China Construction (South Pacific) Development Co Pte Ltd v Shao Hai [2004] SGHC 59

Case Number : DA 12/2003

Decision Date : 23 March 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Beng Swee (Tan Beng Swee) for appellant; N Srinivasan (Hoh Law Corporation) for respondent

Parties : China Construction (South Pacific) Development Co Pte Ltd — Shao Hai

Civil Procedure – Pleadings – Whether court may make finding on material facts not pleaded – Order 18 rr 7 and 15(1) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Tort – Negligence – Breach of duty – Standard of care – Whether there was breach of employer's duty to provide safe and secure workplace for employees

23 March
2004
Judgment reserved.

Judith Prakash J:

Background

1 In December 2000, China Construction (South Pacific) Development Co Pte Ltd ("China Construction"), was carrying out construction works at the premises of the Nanyang Technological University ("the site"). On 26 December, one of the carpenters employed by China Construction, one Shao Hai, became involved in a fight with another worker, one Cao Yong Hui. Cao hit Shao with a piece of metal and fractured the latter's hands.

2 In May 2001, Shao started this action in the District Court. The original defendants were Cao, three other co-workers and China Construction. Judgment in default of appearance was obtained against three of the defendants including Cao, but China Construction contested liability and the action went for trial. In July 2002, the district judge delivered judgment and held China Construction to be 50% liable for Shao's injuries. The district judge found Shao himself to be 50% liable for his own injuries as he had provoked Cao and had thus been the co-author of his own misfortunes. China Construction has appealed.

The action below

3 In Shao's statement of claim, two causes of action were pleaded against China Construction. The first was that it was vicariously liable for the wrongful acts of Cao and the other three co-defendants when they assaulted Shao. The second was that it was negligent at common law because it had failed to provide a safe and secure system of work at the site, proper supervision and/or safe fellow employees.

4 The facts that emerged at the trial were as follows. The construction project undertaken by China Construction involved the alteration of various buildings on the site in order to expand the teaching facilities available at the Nanyang Technological University. The work had to be done at different locations on the site. Shao, a Chinese national and a construction carpenter with some 15 years' experience, had come to Singapore in April 2000 to work for China Construction. His duties as a

construction carpenter included all carpentry work and the erection and stripping of formwork. At the material time, he was working at block N1.1.

5 On the morning of 26 December 2000, the foreman in charge of the carpenters on site had instructed Shao and a fellow carpenter to assemble a metal frame for the construction of the flooring between the third and fourth storeys of block N1.1. Once the frame was in place, the metal workers would install reinforced steel rebars and thereafter concrete would be poured into the frame. The work was done at a height of about 6m above ground level and both the carpenters and the metal workers had to work on a platform at this level. The carpenters had to assemble the frame using metal moulds or formwork and the metal workers had to bring the steel rebars up to the platform so that they could be inserted inside the assembled formwork.

6 Just before the lunch break Shao and his co-worker managed to collect all the formwork of the various sizes that were needed to fit the construction area. At about three o'clock in the afternoon, Shao discovered that one small piece of formwork was missing. He searched for it and found it on the platform being used as a support for some heavy steel rebars. He asked the metal workers present to give it back to him. When his request was not acceded to, he walked over to retrieve the missing formwork himself. When he pulled it away from the rebars, they fell off the platform onto the ground 6m below. The steel workers were upset as they had spent the whole morning carrying the bars by hand up to the platform. A heated argument and scuffle then broke out between Shao and Cao who was the team leader of the steel workers. Shao assaulted Cao by punching his face and kicking his leg. Under this sudden and grave provocation, Cao retaliated by hitting Shao with a piece of formwork. Shao's hands were fractured when he tried to protect himself against being so hit. Subsequently, Cao was charged with the offence of causing grievous hurt to Shao under grave and sudden provocation under s 335 of the Penal Code (Cap 224, 1985 Rev Ed). He pleaded guilty and was sentenced to ten weeks' imprisonment. Thereafter, he was deported to China.

7 At the trial of this action, evidence as to what had happened on the day in question was given by the investigating officer; Shao himself; one Jin Jie who was a site supervisor; one Guo Man Dong, the site manager and one Zhao Shen Ping who was a worker on the project. The trial judge considered this evidence in the context of whether the two causes of action had been substantiated. In relation to the claim of vicarious liability, the judge cited *Salmond on Torts* (13th Ed, 1961) at 122 to the effect that an employer was not responsible for a wrongful act done by his employee unless it had been done in the course of his employment. It would be deemed to be so done if it was either: (a) a wrongful act authorised by the employer or (b) a wrongful mode of doing an authorised act. The judge found that the illegal acts of assault committed by Cao on Shao during the fight were not acts that China Construction could be said to have expressly or impliedly authorised.

8 The judge further found that Shao could have, as he himself admitted, come down from the platform and walked to the base of the tower crane to get another piece of formwork instead of retrieving the piece on the platform. Shao had acted recklessly and dangerously by displacing the steel rebars from the six-metre high platform. This in itself was not a wrongful mode of doing an authorised act. Shao had been motivated "by nothing more than sheer perversity rather than any misguided attempt to finish his assigned task". Further, "all the plaintiff's and defendant's acts against each other that afternoon were retaliatory destructive acts against each other". The judge therefore concluded that there was no basis for a claim of vicarious liability in this case. Shao has not appealed against that finding.

9 In relation to the second basis of claim, following the decision of the Court of Appeal in *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579, the judge stated that the common law duty that an employer owes his employees in relation to the system of work is to provide:

(a). a competent staff of men;

(b). adequate material; and

(c). a proper system of, and effective, supervision.

10 In relation to this head of claim, the trial judge held that the events on the material day had taken place in the following sequence:

(a) Shao discovered that a piece of formwork he intended to use was missing, he went to look for the formwork and found it wedged below a pile of steel rebars.

(b) Shao retrieved his formwork, causing the rebars to fall onto the floor below. When the bars hit the ground, there was an extremely loud clattering sound and that was loud enough for China Construction's supervisor, Mr Jin, to hear even though he was in the toilet at that time.

(c) Cao and three co-workers saw this happening and reacted by moving over to Shao's work area.

(d) Either Cao alone or all four workers proceeded to dismantle the formwork and this resulted in more construction materials raining onto the ground below.

(e) Shao attempted to protect his formwork layout. As the metal workers approached Shao, he cowered down and attempted to cover the undemolished formwork and protect it.

(f) Shao was manhandled by the four metal workers who pulled him into an upright position.

(g) Shao resisted and a struggle ensued.

(h) Shao hit Cao on the face and also kicked him.

(i) Cao's three co-workers either restrained Shao or attempted to separate the two or (as Shao himself testified) did not involve themselves in the fight.

(j) Cao retrieved a piece of formwork and attacked Shao with it.

(k) Shao used both hands to block the descending formwork piece wielded by Cao and sustained the bilateral fractures of his hands.

11 The judge considered that China Construction must have been aware that Cao had a propensity for violence because the site manager Guo had referred to both Cao and Shao as having been frequently warned not to engage in illegal fights. Guo had also assessed Shao as a known troublemaker who had gone through several supervisors before the incident. The judge also found that in so far as the system of work was concerned "there was a considerable degree of chaos on 26 December 2000, when the tower crane had broken down" ([2004] SGDC 181 at [84]). According to him, the fatigue of the metal workers caused by having to lug the heavy steel rebars up the scaffolding, combined with the restricted space in which the carpentry and metal workers had to work together and the time pressures on them to complete their tasks had contributed to "a volatile mix when [Shao] engaged in his perverse and ill-considered act of pulling his form work away from the pile of iron bars resting on it" (at [84] and [85]). The judge's conclusions (at [91]) may be summarised as follows:

(a) Shao's injury was ultimately caused by a blow from Cao wielding the piece of formwork and this blow occurred at the last stage of the altercation between Cao and Shao.

(b) Jin was elsewhere at that time and only reacted to the sound of poles falling onto the ground. He was the only supervisor in the immediate vicinity and had been tasked to supervise building works that were far apart. The level of supervision was woefully inadequate.

(c) On the facts, the interval between the time when China Construction would have received a warning that something was amiss at the worksite and the time when the injury was inflicted was sufficiently long for it to have intervened and prevented the injury. Jin's failure to intervene and take steps to suppress the fight was a failure to maintain proper supervision.

(d) The negligence of China Construction was not premised on the mere fact that there was a fight between Cao and Shao, but rather that the injury was a preventable one that could have been avoided if China Construction had taken adequate measures to control the possibility of fights or to ensure that any fight that started was quickly suppressed before the combatants seriously injured each other. The injury was not the result of an un-preventable affray or a sudden fight.

The appeal

The law

12 The basis of China Construction's liability to Shao was that it had been found negligent in the performance of its duty to ensure that, as its employee, he was provided with a safe and secure system of work and proper supervision. Neither counsel was able to cite another case in which it had been found that an employee's injuries arising from a fight with a co-worker had in fact been due to a breach of the employer's duty to provide a safe system of work and proper supervision. As noted in para 10-38 of *Charlesworth & Percy on Negligence* (10th Ed, 2001) "[i]f an employer has reason to anticipate his employee's misconduct, which is likely to be dangerous to fellow employees, the employer is under a duty to those other workmen to take reasonable steps to avoid harm arising from it". In the first instance a reprimand would be sufficient but repeated misconduct might put a duty on the employer to dismiss the errant worker. It is also stated in that paragraph that an employer could be held liable for employing a workman who was known to be vicious and dangerous if a fellow worker is injured in an attack. The cases cited in the text to support the foregoing statements of law did not, for the most part, deal with injuries arising from fights. It is instructive, however, to examine some of these authorities in more detail.

13 In *Smith v Crossley Brothers, Ltd* (1951) 95 SJ 655, the plaintiff was an apprentice employed in the apprentice training school of the defendant company. While he was working at a vice, another apprentice approached him from behind and placed a compressed air pipe near his rectum and signalled to a third apprentice to turn on the compressed air. In the result, the plaintiff sustained rupture of the colon. He sued the defendants for damages for negligence but they contended that the injuries were caused by unauthorised acts of the two apprentices in question. The trial judge held that the defendants had not exercised adequate supervision over the apprentices and that lack of supervision was the cause of the plaintiff's injuries and constituted negligence. The defendants' appeal against his finding was successful. The English Court of Appeal held, with regard to the alleged lack of supervision, that the compressed air pipe had been in the same position for ten years and no accident had happened before. The defendants had no reason whatsoever to anticipate that the two apprentices in question would use it in that way. The duty of an employer towards his employees was to take reasonable care for their safety and the evidence did not show any negligence by the

defendants. The injury to the plaintiff resulted from what was wilful misbehaviour by the other two boys and the wicked act which the defendants had no reason to foresee.

14 In *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348, the plaintiff suffered a fractured wrist when he was tripped by a fellow employee who was indulging in horseplay. This employee had made a nuisance of himself to his fellow employees for nearly four years by persistently engaging in skylarking activities. The defendant employers knew this. Their foreman had reprimanded the employee many times but without effect. The plaintiff successfully claimed against the defendants for damages on the ground that they had failed to maintain such discipline among their employees as would protect him from dangerous horseplay. *Smith v Crossley Brothers Ltd* was distinguished on the basis that in that case the injury was due to something that had never happened before whereas in *Hudson* the evidence was that the employee concerned had been in the habit of tripping up co-employees over and over again. Streatfeild J held that if a fellow workman was not merely incompetent, but by his habitual conduct likely to prove a source of danger to his fellow employee, a duty lay fairly and squarely on the employers to remove that source of danger.

15 In a third case, *Coddington v International Harvester Company of Great Britain Ltd* (1969) 6 KIR 146, the *Smith* case was applied and the *Hudson* case was distinguished. There, the defendants employed M as a workman in their foundry for 16 years. M was a known practical joker though his conduct had not caused any danger to his fellow workmen. The plaintiff was injured when M flicked a lighted tin of thinners with his foot to tease another workman, X. X was scorched and, in the agony of the moment, kicked the tin violently so that it upset and enveloped the plaintiff in a sheet of flame causing him severe injuries. The plaintiff sued his employers on the ground of vicarious liability and for failing to provide adequate supervision and control. Ormrod J, in dismissing the plaintiff's case against the defendants, said at 151:

> There was nothing in his previous conduct to suggest that he might endanger any other man's safety in the foundry although he obviously might annoy some and amuse others. I do not think anyone would suggest that the defendants could possibly have foreseen any accident remotely resembling the one that happened …

and at 152–153:

> This case seems to me to fall on the *Smith v Crossley Brothers* … side of the line rather than on the *Hudson v Ridge Manufacturing Co Ltd* … side of it. In *Hudson*'s case … the employers knew that their employee was given to tripping people up and other kinds of horseplay, and were held liable for an accident to a fellow employee caused in just such horseplay by knocking the man down and breaking his wrist. In the present case there is no suggestion of any previous conduct by [M] which had caused danger or any reasonable apprehension of danger.
>
> In these circumstances I am unable to hold the defendants liable for this accident.

16 In each of the above cases, an employee tried to make his employer responsible for injuries caused by the playful actions of another employee. The cases had differing outcomes and the vital distinction between the one in which the plaintiff was successful and the two in which he failed lay in the knowledge of the employers as to the actions of the misbehaving employee and the likely outcome of such actions. The employers in *Hudson* were held liable because they failed in their duty to provide a safe working environment for their employees because they continued to employ a co-worker whom they knew to be someone whose habitual behaviour could injure the other workers. In the other two cases, no such injuries to the workers concerned could have been anticipated from the prior conduct of the co-workers concerned.

17 There were only two cases that involved a fight between employees. The first of these, *Walden v Court Line, Ltd* (1965) 109 SJ 151, was cited by *Charlesworth & Percy*. There, the plaintiff, a ship's cook employed by the defendants on board their vessel, was the victim of a violent and vicious attack upon him by H, another member of the crew. H was not on duty at that time. The plaintiff alleged that the defendants knew or ought to have known that H was a dangerous man and likely to attack crew members for no good reason and yet had kept him in their employment. The attack on the plaintiff took place in July. In January of the same year, when the vessel was captained by Capt B, H had assaulted two other crew members. By July, the ship was under the command of Capt C. The plaintiff's claim was dismissed. The judge stated that the plaintiff could only succeed if he could show that the defendants, by their servant the master of the ship, were negligent. The plaintiff's real case was that the entries in the log relating to the January attack made it manifest that H was a danger to his shipmates. It was conceded that no blame attached to Capt C and on the evidence the judge could not say that it was incompetent and negligent of Capt B not to make up his mind that H should be got rid of.

18 The report of the case is very brief. It is difficult to discern the reasons for the judge's decision as it certainly seems to have been arguable that Capt B would have known after the second attack in January that H was a violent man who was liable to harm his shipmates and thus that it was negligent of him not to have dismissed H. The case, however, is authority for the proposition that it may be negligent of an employer not to dismiss a worker whom he knows to be a danger to co-workers.

19 The second case which involved a fight between employees was a local case, *Nani v Public Utilities Board* [1980–1981] SLR 406. There, a widow claimed compensation under s 3 of the Workmen's Compensation Act 1975 (Act 25 of 1975) on the basis that her husband had died in the course of his employment. The deceased, one Veloo, had been assigned to work in a team with one Rozario. While they were doing the work, an argument arose. This escalated and Veloo slapped Rozario and Rozario retaliated by pushing him. Veloo then fell backwards onto the floor and fractured his skull and died. The commissioner of workmen's compensation held that the incident resulting in the death of Veloo did not occur in the course of his employment nor did it arise out of his employment. The widow's claim was accordingly dismissed. She appealed to the High Court. Kulasekaram J allowed the appeal. He considered the facts and held that there was nothing personal in the argument between Veloo and Rozario. What had given rise to the dispute was the concern of both employees to carry out their work properly and therefore the dispute was in the course of the employment. He added (at 408, [12]):

> Moreover when workers with the low level of education as the deceased and Rozario are asked to work as a team by their employer, with very little direct on the spot supervision as here, disputes such as these over the manner in which the work is to be carried out can by no means be said to be unexpected. Such incidents are incidental to and here manifestly arose out of their employment in working as a team. The deceased sustained these personal injuries in an accident in the course and arising out of his employment within the meaning of s 3 of the Act.

In that case, the question before the judge was whether, for the purposes of the Workmen's Compensation Act, the deceased had died from an accident that had occurred in the course of his employment. That was the sole question before the judge. He did not consider and did not have to consider whether there was any fault on the part of the employers. For the purposes of compensation under the Act, what was important was not whether the employer was negligent or not but whether the injury was sustained in the course of employment. The purpose of the Act is to provide compensation for workers who are injured in circumstances in which the common law would afford them no remedy. The observation of the judge, that disputes over the way work is to be done are not

unexpected and arise in the course of employment, has to be read in that context.

20 Before I go on to discuss the judge's findings in this case, I note the following established principles with regard to the role of an appellate court:

(a) an appellate court should be slow to overturn the trial judge's findings of fact which depend on the credibility and veracity of witnesses;

(b) however, an appellate court would still need to test the quality of the evidence against inherent probabilities or against uncontroverted facts, including the conduct of the parties at the relevant time; in this respect, the appellate court is in as good a position as the court of first instance; and

(c) where the credibility of the witnesses is not in issue and the only concern of the appellate court is to determine whether the trial judge has drawn proper inferences from the facts, the appellate court is in as good a position as the trial judge to evaluate the evidence.

See *Lim Hwee Meng v Citadel Investment Pte Ltd* [1998] 3 SLR 601 at [26] to [27].

Analysis

21 The judge stressed that China Construction ought to have anticipated the incident because it had frequently warned Cao and Shao not to engage in illegal fights and also knew that Shao was a troublemaker. This finding was, however, against the weight of the evidence. Whilst Mr Guo had stated that both these workers had been frequently warned not to engage in illegal fights, this statement was made in the context of his evidence that weekly meetings had been held at which all workers were reminded to observe safety procedures and the laws of Singapore including the prohibition against engaging in illegal activity such as fighting at the site. It was not Mr Guo's evidence nor was it put to him by Shao's counsel that either Shao or Cao had previously engaged in any fight or shown any inclination towards fighting with anyone. On the contrary, the evidence was that there was no fight on site at all between any of the workers before the incident of 26 December 2000. Until the incident, therefore, China Construction's efforts to ensure that the workers conducted themselves properly while on the site had been successful.

22 Further, while prior to the incident Shao was known as a difficult worker who appeared to have some interpersonal relationship problems with his supervisors, these problems did not involve any physical interaction. Shao had simply complained frequently about his supervisors. No evidence was led of any propensity to violence on the part of Shao, much less on the part of Cao.

23 In determining whether China Construction had failed to provide a safe system of work and proper supervision, the correct question to ask, as submitted by Mr Tan, counsel for China Construction, was whether Cao had a propensity to violence which China Construction knew about or ought to have known about in order to have anticipated that more supervision was required of any site where Cao was working. It was not Shao's pleaded case, nor was any evidence adduced by him, that Cao was a difficult worker or was a man who was prone to violence when under stress or otherwise. Mr Guo's evidence was that neither Cao nor any of the other three metal workers sued by Shao had had any previous record of fighting or assaulting other workers or even of any sort of disciplinary problem at all. This evidence was not challenged.

24 Finally, before the incident, there was no known animosity between Shao and Cao which would have alerted China Construction that it should not put these two workers together or, if that

could not be helped, that it should provide constant supervision during the course of their works so as to ensure that they did not fight with each other. Shao's own evidence was that he had not known Cao at all before the incident. Shao had been on the site only seven days prior to the incident and he said it was not possible for him to have known Cao. He also agreed that the affray was a sudden and spontaneous incident. In any event, it was not part of Shao's case that there was any previous fight at the site or any previous incident which would have required China Construction to step up the level of supervision in anticipation of potential trouble.

25 The next important part of the judge's finding was that there was chaos in China Construction's system of work on 26 December because the tower crane had broken down. There was, he thought, a volatile mix arising from the facts that the metal workers had to work in close proximity with the carpenters, the two groups of workers would be working at a height and would be extremely likely to get into each others' way, the metal workers were fatigued after carrying the steel rebars up to the platform and they had to improvise with the formwork as a support in order to keep the rebars on the platform.

26 These findings by the judge were not based on any pleadings of Shao or any evidence raised by him in his affidavit of evidence-in-chief. It was not his case therefore that the circumstances in which he and Cao had to work that day had given rise to a situation in which fights could be expected or that these circumstances were out of the ordinary. As the well-known case of *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793 reiterated, a court is not allowed to make a finding or give a decision on material facts which have not been pleaded. A party is required by O 18 rr 7 and 15(1) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) to set out in his pleadings all material facts on which he relies for his claim so as to inform the opponent in advance of the case to be met so that the latter would have adequate opportunity to prepare and present his own case. Here, the particulars of negligence given by Shao in his statement of claim were very general. It was asserted that China Construction had failed to take precautions for Shao's safety while he was carrying out his work; that it had failed to provide a safe system of work and that it had failed to provide proper supervision for the workers at the site. Subsequently, when further and better particulars were asked for, Shao had pleaded that the system of work was unsafe because China Construction had:

(a) given deadlines to its workers which put them under pressure;

(b) failed to provide sufficient formwork and/or to make formwork easily accessible; and

(c) failed to train its workers to follow proper procedures and not take formwork away from another worker.

It was not asserted even at this stage that the system was unsafe because once the crane broke down, the metal workers would have to carry steel rods manually and this would fatigue them and cause them to be vulnerable to provocation. Nor was it alleged that it was wrong to require metal workers and carpenters to work on the same small platform. Perhaps that omission was because, as Shao admitted during cross-examination, all along during the works the metal workers and the carpenters had worked side by side.

27 As Shao did not raise the material facts contributing to the "volatile mix" in his pleadings, his allegations in relation to the same which were raised only in cross-examination should have been rejected by the judge.

28 The third basis of the judge's finding that China Construction had been negligent in its duty of supervision was that there had been "a sufficiently long interval" for it to intervene and prevent any

injury. Mr Tan submitted that this conclusion was speculative and not supported by evidence. This was because none of the witnesses had been asked for, or had given, any evidence as to how long the scuffle had actually lasted. Mr Jin's evidence was that he had rushed out of the toilet immediately after he heard the sound of the falling rods and that the toilet was close enough to the site of the fight for him to see the fighting as soon as he emerged from it. He saw Shao and Cao fisting and kicking each other and four other workers attempting to separate the two. He also saw Cao pick up the metal piece and hit Shao with it. He had shouted at them to stop behaving badly and to come down to the ground. This evidence emerged during cross-examination. It was not, however, put to Mr Jin that there was sufficient time for him to have stopped the fight before the assault took place.

29 With respect, the judge's conclusion that there was a long enough interval during which Mr Jin could have intervened was probably caused by the way he separated what had occurred during the fight into 11 distinctive acts as set out in [10] above. The judge noted that the sound of the metal bars clattering 6m down to the ground was event no 2 in the sequence and stated that since that alerted Mr Jin, he would have had sufficient time to do something between then and event no 11 which was when the metal formwork was brought down on Shao's hands. This was pure speculation. As submitted by Mr Tan, the judge's separation of the sequence of events into 11 distinct events was artificial and minute and could have given rise to an impression in his mind that the fight had taken quite a bit of time when there was no real evidence to that effect. It was submitted that the judge had fallen into the trap of being wise after the event. There is much force in this submission.

30 The judge also found that Shao would "in all probability not have suffered the injury" if China Construction had had adequate supervision at the worksite and "stopped the fight before that blow was struck". He considered the supervision inadequate because there was only one supervisor in the immediate vicinity who was tasked to supervise building works that were far apart. In fact at the material time, the supervisor Mr Jin was at the right block but he was in the toilet and there was no other supervisor observing the works of the carpenters and the metal workers on the platform in question. The judge's finding that the supervision was inadequate therefore necessarily meant that he considered that adequate supervision required the permanent presence of a supervisor.

31 The evidence of Mr Guo was that in December 2000, China Construction had at least six supervisors at the site. For better control and supervision, the workers were grouped according to their skills *ie* whether they were carpenters or metal workers, and each group was divided into three or four smaller groups with one sub-supervisor or foreman for each group. Mr Jin's evidence was that he was one of three supervisors in charge of the carpenters and that he had 30 workers, including Shao, under his charge. His workers worked at two blocks and it was his routine to inspect both blocks after lunch. First, he went to block LT1 and then after 45 minutes or so, he walked to the block where Shao worked, block N1.1, and inspected it. This was his usual routine and no fights had taken place at either block prior to 26 December 2000. There was no evidence that Mr Jin was an incompetent foreman or that in the construction industry it was necessary, much less customary, to have a supervisor observing each group of workers all the time. There was no evidence either that Shao or Cao were inexperienced workers who needed extra supervision in order to be able to perform their work properly, unlike the situation in *Parno's* case.

32 In *Latimer v A E C Ld* [1953] AC 643, the House of Lords was unanimous that when judging whether there had been a breach of duty on the part of an employer with regard to the safety of his employees, one had to apply the standard of care which an ordinary prudent employer would have taken in all the circumstances. Lord Tucker pointed out at 658 that the common law duty was a duty to take reasonable care for the safety of the employee rather than an absolute duty. He further said:

> [I]t appears to me desirable in these days, when there are in existence so many statutes and

> statutory regulations imposing absolute obligations upon employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations.

Mr Tan submitted that the standard of care that was required of China Construction to Shao was not to anticipate and guard against every conceivable eventuality but rather only to take reasonable precautions for the safety of its workers having regard to the nature of the construction works, the skill level of the workers and the general conditions of the site. I accept that submission.

33 In the present case, there was no reason for China Construction to anticipate a fight between Shao and Cao. Neither of them had been involved in fights before. The carpenters and the metal workers had worked side by side on site without any disciplinary problem previously. The normal level of supervision had been satisfactory previously. The two workers concerned did not know each other and had no history of interpersonal animosity. Shao had not been able to get on with his foremen but his difficulties with them had not involved any physical assaults. The fight occurred because, as the judge found, Shao had acted perversely by retrieving his formwork from below the steel bars instead of going to get a new piece. His action caused a number of steel bars to fall to the ground and thereafter, as the judge found, his and Cao's actions against each other were retaliatory destructive acts within a vicious tit-for-tat cycle. The fight occurred suddenly. It could not have been anticipated. Unfortunately, no supervisor was present to stop things from going too far and Shao was hurt. He himself, however, had, as the judge also found, provoked Cao and been co-author of his own misfortune. The circumstances were unfortunate but it is a truism that unfortunate circumstances can occur without negligence on the part of an employer. The weight of the evidence did not support the finding that Shao's injury resulted from any breach of duty on the part of China Construction.

34 Further, Shao had breached the safety rules by recklessly causing the steel bars to fall off the platform and had breached the "no fighting" rule by hitting Cao on the face and kicking him. The essence of Shao's claim is that China Construction is liable to compensate him because he was able to act badly since the supervisor was not around all the time. Since China Construction did not save him from himself, it has to pay him for the consequences of his own misdeeds. In my view, it would not be correct to allow Shao to recover compensation from China Construction from injuries that arose by reason of his own wrongful behaviour.

Conclusion

35 For the above reasons, I allow the appeal and set aside the judgment below. The appellant shall have its costs here and below. The security deposit shall be released to the appellant's solicitors.