###### DCPI 1696/2008

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1696 OF 2008

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##### BETWEEN

## AMAR NAZIA also known as AMIR NAZIR Plaintiff

### and

#### WONG CHUI YI formerly trading as

SINO CONSTRUCTION ENGINEERING

COMPANY 1st Defendant

#### MAK SHUE KUEN formerly trading as

SINO CONSTRUCTION ENGINEERING

COMPANY 2nd Defendant

#### LAU SAI KEI formerly trading as

SINO CONSTRUCTION ENGINEERING

COMPANY 3rd Defendant

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Coram: Master S. Lo in Court

Date of hearing: 8 December 2009

Date of handing down Assessment of Damages: 14 December 2009

ASSESSMENT OF DAMAGES

*Introduction*

1. The Plaintiff is a Pakistani national. He came to Hong Kong as a visitor in 2000 and had overstayed. On 20 August 2005, the Plaintiff through introduction of friends went to 252 – 274 Jaffe Road (the “Site”) to work as a casual labourer doing demolition work. The Plaintiff was instructed to demolish cabinets, wooden frames and glass using hammer and his hands. In the course of breaking a large piece of glass a whole piece of glass fell towards him and cut his right forearm.
2. The 1st, 2nd and 3rd Defendants were former partners of Sino Construction Engineering Company (“Sino”) which sub-contracted the works at the Site from Hennex Industries Limited (“Hennex”) by signing a contract with Hennex’s project manager namely, Kwan Tai Surveyor (HK) Ltd.
3. Sino denied liability in the Employees’ Compensation proceedings (DCEC 566/2006) (“the EC proceedings”).
4. Judgment in the EC proceedings was entered against Sino on 27 April 2009 for HK$76,654 with interest.

*The common law proceedings*

1. The common law proceedings was commenced by the Plaintiff on 4 August 2008 against the 3 Defendants jointly and severally for the trial result of the EC proceedings.
2. All the 3 Defendants failed to file the Acknowledgment of Service and Interlocutory judgment was entered on 12 August 2009 against them leaving damages to be assessed.

*The injuries and treatments*

1. At about 11:00 a.m. on 20 August 2005, the accident occurred. As a result, the Plaintiff cut his right forearm. He was afterwards sent to Ruttonjee Hospitals (“Hospital”) by a taxi, where he underwent an operation for exploration and repair. He was hospitalized from 20 to 23 August 2005.
2. The Plaintiff was referred to Occupational Therapy for follow-up of cut flexor tendon program. A wrist cock-down splint was provided to him and kept for 3 weeks as treatment. The diagnosis was complete cut of right flexor carpi radialis (“FCR”) and partial cut flexor digitorum superficialist (“FDS”).
3. The Plaintiff attended around 7 sessions of occupational therapy and 4 sessions of physiotherapy at the Hospital but there was not much improvement. He was arranged to go for rehabilitation at the Occupational Therapy Department twice per week. However, due to his financial difficulties, the Plaintiff requested to go once a week. The last appointment with the O&T Department of RTSKH was on 6 October 2005. He failed to attend the next appointment on 10 November 2005.
4. The Plaintiff was given sick leave up to 9 November 2005 and an appointment was given to him on 10 November 2005. He defaulted the appointment as he was unable to pay on “Non-eligible person” basis. He also failed to attend the 2nd and 3rd anti-tetanus immunization.
5. The Plaintiff’s solicitors had instructed Dr. Johnson Lam, specialist in orthopaedics and traumatology to examine the Plaintiff on 8 November 2006. According to the Medical Report dated 1 December 2006, there was laceration measured 8.5 cm in length, and had healed with some scar hypertrophy. There was some thickening and firmness beneath the scar consistent with scarring/fibrotic changes. There was no significant scar adhesion but there was scar tenderness.
6. According to Dr. Johnson Lam, the recorded handgrip of the left hand was 46 kgf but the right hand was only 6 kgf. Based on the evidence reviewed and the findings of that medical examination, the diagnosis was right forearm laceration with complete cut FCR and partial cut FDS.
7. The treatment received, according to Dr. Lam, was appropriate for the diagnosis and the Plaintiff had reached maximal medical improvement at the time of the examination. Considering the muscle/tendon injury and scarring in the Plaintiff’s dominant right forearm, some residual pain and weakness was expected. With heavy exertion, mild increase in pain in the forearm over the scarred area was expected. When performing very heavy lifting and carrying activities, the Plaintiff might have some difficulty due to pain.
8. Dr. Lam assessed the Plaintiff should carry 3% whole person impairment relating to residual pain and sick leave about 6 months was considered by him appropriate.

*Pain, suffering and loss of amenities*

1. The Plaintiff was born on 4 March 1976 in Pakistan. At the time of the accident, he was 29 years old and now he is 33 years old. He received education up to secondary level in Pakistan. He can read and write simple English. He cannot speak or write Chinese. He got married in Hong Kong on 24 October 2008 with a Filipino who is working as a domestic helper.
2. The Plaintiff is right hand dominant. He alleged that he enjoyed good health before the accident. Apart from the residual pain and disabilities that he suffered as mentioned above, he complained that he could not play cricket any more. He encountered a lot of difficulties in his daily life.
3. He further complained the following:-
   1. He cannot lift heavy objects such as 40 – 50 kilograms of materials by now.
   2. He cannot make a full fist.
   3. He has stiffness in his fingers.
   4. When he tries to straighten his right elbow, he experienced pain along the whole right upper limb.
   5. He gets pain on his forearm during the change of cold weather.
4. Ms. Wong for the Plaintiff submitted the following cases for my consideration:
   1. *Ngai Lung Hing v. Gowin Engineering Co. Limited & Anor.* (HCPI 211 of 2005);
   2. *Lau Chi Man v. Kowloon Canton Railway Corporation* (DCPI 501/2005);
   3. *Yiu Pau Yau v. Co-Ray Design & Construction Limited* (DCPI 864/2006);
   4. *Wong Kam Po v. Yim Sui Hong* (DCPI 1628 of 2008);
   5. *Yiu Wing Shing v. Lau Kam Hung formerly trading as Tak Shing Metal Engineering & Anor* (DCPI 2550/2007);
5. After studying the above 5 cases carefully, I consider that the Plaintiff’s case is close to Wong Kam Po’s case but not as serious as that case. A sum of HK$180,000 under this head is considered to be appropriate and awarded.

*Pre-trial and future loss of earnings*

The first 6 months sick leave

1. The Plaintiff was unable to attend further treatment and obtain further sick leave as the Hospitals asked him to pay on “non-eligible person” rate. Dr. Lam opined that 6 months was reasonable. The Plaintiff claims compensation based on the remuneration he received whilst employed by Sino. That was HK$350 a day.
2. His Honour Judge Chow in the EC proceedings found that it was reasonable to adopt 26 days as the number of days worked per month in August 2005 for the purpose of computing the monthly earnings of the Plaintiff. I see no reason as to why the findings in the judgment of the EC proceedings shall not be accepted and adopted. I consider that the reasonable sick leave as opined by Dr. Lam is 6 months. So I award HK$54,600 (i.e. $350 x 26 days x 6).

After sick leave up to change of law (ie. from 20.2.2006 – 13.11.2009)

1. The Plaintiff was an Asylum Seeker and is a torture claimant. By virtue of the judgment of Wright J in *Ibqal Shahid* & *Others* in HCAL 150/2008 and *Waseem Abbas & Others* in HCAL 8/2009, it was said in paragraph 79 thereof as follows:

“It follows that, contrary to the magistrate’s finding, in my judgment, the recognizance under s36 of the (Immigration) Ordinance constitutes an authority from the Director for the applicants to remain in Hong Kong, thus providing them with a defence to a charge under s38(1)(b) of the Ordinance if it were in effect as at the date of the commission of the alleged offence.”

23. All the applicants in the above 2 mentioned cases were charged with the offence of remaining in Hong Kong without the authority of the Director after landed unlawfully in Hong Kong contrary to section 38(1)(b) of the Immigration Ordinance from the date that they were found working in Hong Kong. The decisions of the magistrate were however quashed by the learned judge. Since the said judgment was pronounced on 2 March 2009, the Immigration and the Police stopped the charge of 38(1)(b) against those torture claimants until the change of law on 14 November 2009. The new section 38AA of the Immigration Ordinance, Chapter 115 was enacted on 14 November 2009 which states that:-

“(1) A person-

* 1. who, having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director under section 13; or
  2. in respect of whom a removal order or a deportation order is in force.

must not take any employment, whether paid or unpaid, or establish or join in any business.

* + 1. A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.”

24. I am of the view that the Plaintiff would be able to work lawfully in Hong Kong before the change of law on 14 November 2009.

1. Deputy High Court Judge Wright (as he then was) in *Tsang Siu Hong v. Kong Hoi For trading as Wing Hing Auto Engineering Service & Anor* (HCPI 173/2001) said in page 16:-

“In my judgment this plaintiff’s situation is addressed by compensation being calculated in accordance with what he would have earned in his lawful Mainland employment during the equivalent period for that, in truth, is his real loss.

It is no answer to say that in adopting such a method of calculation the defendants will “benefit” as a result of the application of the lower rate. The fundamental purpose of compensation is to put a claimant in the position he would have been in had the incident giving rise to the claim not occurred. The plaintiff had no legitimate expectation of continued remuneration at the elevated, Hong Kong level but, on the evidence, he was in regular employment on the Mainland which has been disrupted as a consequence of the injuries he sustained at the hands of the defendants.”

1. Ms. Wong for the Plaintiff submitted that there was still a big demand of cheap labour in the local market. I accepted her submission. According to the Statistical Table of the Average Monthly Salaries of Selected Occupations submitted by the Plaintiff, I adopt the average income of a lavatory cleaner in Hong Kong which is around HK$5,000 and award the loss of earning for about 45 months up to 13.11.2009 for the sum of $184,500 [i.e. ($9,100 - $5,000) x 45].

Loss of earnings after 14.11.2009

1. Ms. Wong submitted a letter dated 13 March 2009 from the Immigration Department to show that the Plaintiff’s torture claim interview was presently suspended due to the judgment in HCAL 51/2007, she estimated that the interview will be resumed in January 2010 and it may take another 3 years to finalize the assessment.
2. I consider that the estimated date of the Plaintiff’s torture claim interview has no relevant in the assessment of his loss of future earnings unless the Plaintiff can prove that his torture claim is very likely to be accepted by the Government of the HKSAR. Eventually, Ms. Wong for the Plaintiff rightly conceded that this assessment of damages had to be proceeded on the basis that the Plaintiff’s torture claim will be rejected and he has to return to Pakistan.
3. The Plaintiff was 29 at the time of the accident and is 33 years old at the date of the assessment. A multiplier of 14 is claimed. In view of the Plaintiff’s work nature, I consider that a multiplier of 12 is appropriate.
4. Before coming to Hong Kong, the plaintiff was working as a construction site worker in Pakistan earning about $2000 per month. According to the Plaintiff’s oral evidence in the Court, he said that it was very difficult to find a job of cleaner or watchman in Pakistan and that it would be much easy to find a job of office assistant or cashier in Pakistan, the average income of which is around $500 to $600. I accept his evidence and take the median figure of $550. Hence, I award the future loss of earning after 14 November 2009 in the sum of $208,800(i.e. ($2000 - $550) x 12 x 12).

Loss of earnings capacity

1. I consider that the Plaintiff is fully compensated for his loss of future earnings as awarded above, I am of the view that none is appropriate under this head. The judgment of Keith, JA, in *Yu Kok Wing v. Lee Tim* Loi [2001] 2 HKLRD 306 @ 313B said as follows:

“If there was such a risk, the plaintiff was entitled to an award for loss of future earning capacity to the extent that that loss had not been reflected in the award for loss of future earnings.”

Other special damages

1. The Plaintiff claimed HK$15,400 being his medical expenses and $486 travelling expenses. The Hon. Judge Chow only awarded $830 medical expenses in the EC proceedings despite the fact that the Hospitals charged him HK$15,400 and there was a sum of HK$14,480 remained outstanding. Ms. Wong submitted that the Plaintiff had made a promise to pay them back if he could obtain the same from the Defendants. I therefore award under this head a sum of $15,886.

The Employees’ Compensation Award

1. No payment has been made by the Defendants notwithstanding that the Plaintiff was awarded HK$76,654 in the EC proceedings. The Director of Legal Aid is now trying to enforce the payment against ECAFB. Credit shall be given to deduct the EC awarded.
2. Summary

(1) PSLA $180,000

(2) Loss of pre-trial earnings

(6 months’ sick leave) $54,600

(20.2.06–13.11.09) $184,500

* 1. Loss of future earnings from 14.11.09 $208,800
  2. Loss of Earning capacity nil
  3. Special damages $15,886

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$643,786

Less: Employees’ Compensation Award $76,654

Balance: $567,132

1. Hence, judgment be entered against the 1st, 2nd and 3rd Defendants jointly and severally for the sum of $ 567,132.
2. I award 2% per annum on the above general damages from the date of the Writ i.e. on 4 August 2008 and interest at half judgment rate on the above special damages from the date of the accident i.e. 20 August 2005, up to the date of judgment, and thereafter at the judgment rate until satisfaction.
3. Costs of this assessment of damages be paid by the 1st, 2nd and 3rd Defendants jointly and severally to be taxed if not agreed and the Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Simon Lo)

Master of District Court

Ms. Cecilla Wong of M/s. Yip & Liu assigned by the Director of Legal Aid for the Plaintiff.

1st, 2nd and 3rd Defendants in person were absent.