#### DCPI2537/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2537 OF 2007

BETWEEN

HUSSAIN TANWEER Plaintiff

and

FOCUS ROLLER SHUTTER LIMITED Defendant

(IN LIQUIDATION)

##### Before: Her Honour Judge H C Wong in Court

Date of Hearing: 23 February 2009

Date of Delivery of Assessment of Damages: 23 February 2009

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## A S S E S S M E N T O F D A M A G E S

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1. The plaintiff claimed against the defendant, its former employer, common law compensation for injuries suffered at two accidents in the course of his employment, they took place on 10 December 2004 and 29 January 2005.
2. The defendant is in liquidation, having been wound up on 27 March 2006. The liquidators had by letters informed the court of their position and that little assets had been recovered from the company. They were excused from attending court at the assessment of damages. The hearing today is, therefore, conducted in the defendant’s absence.
3. Interlocutory judgment against the defendant was entered on 9 August 2008.

The plaintiff’s case

1. The plaintiff claimed he was injured in his right eye at an accident in the course of work in the course of employment on 10 December 2004 when he was working at the IFC Mall in Central. He claimed that the welding slag broke and a piece of metal fragment injured his right eye after he finished the welding. He claimed he was not given a pair of goggles for protection for work in spite of requests made to his employer, the defendant.
2. The second incident of injury took place on 29 January 2005, some 49 days later while he was assigned to work at the defendant’s office at Unit A, Upper Ground Floor, Stage 4 of Yau Tong Industrial Building, 18-20 Sze Shan Street, Yau Tong. He was carrying out metal bar fitting work when one of the bars he was carrying became too heavy for him to continue and he injured his back. As the bar dropped from his hands, it hit his left knee, thus injuring the knee.
3. After the first accident, the defendant was admitted into Kwong Wah Hospital for treatment. He was diagnosed for corneal abrasion with no foreign body found. He was treated and referred to Caritas Medical Centre Eye Clinic for urgent management on the same day. He continued to be treated at the Caritas Medical Centre Eye Clinic on 11 July 2005. He defaulted the following-up clinic on 19 July 2005.
4. After the second accident, he attended the Ruttonjee Hospital where the Accident and Emergency Department doctors found contusion but no wound over his left knee. They also found para-spinal spasm at his lumbar region and the range of movement of the back to have diminished. X-rays of the left knee and lumbosacral spine were taken but found to be normal. He was discharged with analgesics on the same day and given one day’s sick leave. On his return to the Accident and Emergency Department on 5 and 13 February, he was given further sick leave at the Ruttonjee Hospital.
5. Because of the continued back pain, he went to the Caritas Medical Centre for treatments in February 2005. From 9 March 2005, he received 14 to 15 sessions of physiotherapy treatments and he continued to be followed up at the Caritas Medical Centre Orthopaedics Department. He was given sick leave from 29 January 2005 to 13 May 2005 and then from 10 June 2005 to 5 September 2005.

Medical experts’ opinions

1. On 18 July 2005, the plaintiff was examined by Dr John Chua, ophthalmologist in private practice. Dr Chua confirmed the plaintiff had a right eye corneal abrasion. In his medical report of 27 October 2005, Dr Chua reported that he found poor visual recovery and poor vision at the time of his examination to be inconsistent with the injury sustained. He said, on page 59 of the bundle, which is page 4 of his medical report, that “Mr Hussain Tanweer had failed all psycho-physical tests, these tests that required cooperation from the patients claiming poor vision, but all the objective tests were normal, indicating vision within a normal range.”
2. He said further,

“It is highly likely that Mr Hussain Tanweer has functional visual loss in his right eye such as hysteria, conversion disorders or malingering. As hysteria and conversion disorders usually result in poor vision in both eyes, it is highly likely that he is malingering.” (p. 59 of bundle)

1. Dr Chua did not think the plaintiff had any degeneration arising from the injury. Neither did he consider the plaintiff suffered from any disability from the injury and, in his opinion, the plaintiff could resume his pre‑accident job as a welder.
2. He further said there should not be any effect on the patient’s daily living activities and his returning to work. From an ophthalmologic point of view, the vision with both eyes for a construction site worker should be within normal limits.
3. In Dr Chua’s opinion at page 60, which is page 5 of his medical report, he said,

“Functional visual loss such as hysteria, conversion disorders or malingering can result from major trauma. It could be suggested for a specialist in psychiatry to assess the psychological impact and sufferings involved.”

1. The estimated medical costs for a psychiatric consultation in the private sector would range from HK$600 to $2,000. He felt that the plaintiff suffered from no permanent loss of earning capacity or any permanent impairment of visual function.
2. As to the injuries suffered from the second accident, the plaintiff consulted a private orthopaedic specialist, Dr James Kong, on 15 July 2005. At page 70 of the bundle, paragraph 4 of Dr Kong’s medical report, his findings are as follows.

“Radiological examination, X-ray report of lumbosacral spine dated 15 July 2005. No fractures seen. There is no evidence of disc space narrowing. Vertebral alignment is normal. There is no evidence of osteophytosis of the vertebral bodies. No degenerative facet joint changes are present. No focal bony lesion is seen.

4.2. X-ray reports of the left knee dated 15 July 2005. No evidence of fracture is seen. Alignment is normal. No focal bony lesion is seen. No normal soft tissue swelling or calcification is noted. Joint spaces are within normal.”

1. He found in paragraph 5 of his report that the diagnosis from a summary of the history and physical examination investigations of (a) back contusion with residual pain and stiffness; (b) left knee sprain, to be consistent with the mechanism of the injury on 29 January 2005 and the accident was the contributing cause of his persistent symptoms.
2. His comment in paragraph 3.5 to 3.4 is as follows.

“For both of his conditions, he received conservative treatments of rest, analgesics followed by physiotherapy. I agree that the said treatments were standard and appropriate.

5.4 If there is no further improvement, then he has likely reached the state of maximal medical improvement and he is suitable for assessment of permanent disability. His symptoms of knee and back pain and stiffness are likely to persist. Permanent disability is expected. The symptoms may be aggravated by exertion and require treatment on a need-to basis.”

1. He assessed the impairment to the lumbar spine to be a 3% impairment of the whole person and the left knee impairment to be a 1% impairment of the whole person. The impairment of a whole person added up to 4% and the same 4% resulted from the loss of earning capacity, in his opinion.
2. In paragraph 5.7, Dr Kong said:

“He can resume his pre-injury occupation as a welder on the condition that intermittent rest of 10 minutes is given for every two hours of work. He is also advised to avoid poor posturing and standing for long periods.”

1. His further comments are:

“Orthopaedically, future operations are not required. Psychiatric assessment is not necessary for him.”

1. He further considered the sick leave given from 29 January 2005 to 8 July 2005 to be reasonable.

Quantum

PSLA

1. The plaintiff asked for $5,000 on the first accident to compensate the plaintiff for his pain suffering and loss of amenities. I find the sum of $5,000 for what the plaintiff suffered at the time of the accident and for the subsequent nine days, the temporary discomfort and loss of amenities, to be reasonable, and I will allow the award of $5,000.
2. As to the second incident, the plaintiff asked for $200,000 for his persistent low back pain and temporary left knee pain and discomfort. Mr Cheung, counsel for the plaintiff, referred to three cases, the first case being *Ali Shoukat v Hang Seng Bank Limited* HCPI3/2003 (date of judgment 23 June 2004) where Master Wong awarded $250,000 under PSLA to the plaintiff where there is a loss of lordosis in the lumbosacral region which was found to be the cause of the plaintiff’s pain and muscle spasm. Both the plaintiff and the defendant’s medical experts agreed the plaintiff to have suffered from 5% impairment of the whole person due to the injury due to the accident.
3. The second case referred to me is *Lung Kwong Ying v So Sai Lo & Others* HCPI206/2001, a judgment of Seagrott J on 9 August 2005. The PSLA awarded was $250,000 for the contusion to the 52 year-old plaintiff who suffered from lumbar spine injury leading to decreased range of movement and muscle spasm. X-ray showed deformity at S4 level. This was unconfirmed. The MRI scan showed degenerative changes at L4/5 area.
4. In the third case of *Yuen Yiu Kwong v Chau Kwok Chuen & Others* HCPI1356/1999 (date of judgment 20 December 2002), Mr Recorder E. Chan awarded the sum of $200,000 to the plaintiff under PSLA.
5. I have found two more recent authorities where the victim suffered similar injuries as the plaintiff in the present case. The first case is *Mahmood Tariq v Kinway Engineering Limited* HCPI149/2006, a judgment of Deputy Judge Gill on 17 May 2007, where he awarded the sum of $200,000 to the plaintiff, a plasterer, whose X-ray showed a loss of normal lumbar lordosis and mild degenerative spondylosis with reduced L5/S1 disc space but no back or right knee bone or joint lesion attributable to trauma was found. The defendant’s medical expert assessed a 3% impairment due to low back pain with no loss of impairment from the knee injury. The plaintiff’s expert, on the other hand, assessed the injury to the back had resulted in a 5% impairment of the whole person and the knee injury resulted in impairment of the whole person at 1%. The plaintiff had similar injuries to the plaintiff in the present case, this case was reported in the [2007] HKLRD 407.
6. In the second case of *Ashok G. C. v Kam Kee Construction Works Limited & Another* HCPI691/2004 [2006] HKLRD 370, Master Hui assessed on 29 March 2006 that the plaintiff in that case should be awarded the sum of $180,000 under PSLA. The plaintiff of that case suffered from bilateral spondylosis at the L5 vertebra. It was found that this was likely to be pre‑existing and the medical assessment was he suffered from 5% to 7% impairment of the whole person. In the present case, no lordosis of lumbar vertebrae was found. Furthermore, the medical assessment board’s assessment of the plaintiff’s loss of earning capacity was 0.5%. There was no appeal of the assessment board’s assessment, neither was there a request for review.
7. Compared to Dr Kong’s assessment, after the second accident, the 3% to the back due to the back injury, and 1% to the knee, is completely inconsistent. I have observed the plaintiff’s demeanour in court, and I have taken into account the history of his post-accident activities together with the medical reports after the first and second accident. I am convinced the plaintiff is a malingerer.
8. He has informed the court that he had returned in January 2006 to Pakistan after he tried to find a job between September and December 2005. There was no evidence that he had been seeking gainful employment during those three years in Pakistan in spite of his doctor reporting he was fit to return to his old job as a welder.
9. His persistent claim of blurry right eye is without any clinical support. Yet, up to this day, he claimed his right eye suffered from blurred vision. His own medical expert, Dr Chua, considered his complaint must be due to malingering because if it was caused by hysteria, it would be to both eyes rather than just one eye.
10. After taking into account that he is a malingerer after the first accident, I have doubts in his claim that he was suffering from low back pain and still suffering from it four years after the second accident, or that he was suffering from discomfort or loss of movement in his knee to the extent that he has to use a crutch to walk four years after the second accident, or that, as he claimed, he was unable to resume his old job as a welder.
11. My assessment of his PSLA, after taking into account all the above issues, is $100,000. I have taken into account his pain and suffering and discomfort at the time of the injuries and subsequent follow-up clinics and physiotherapy treatments.

###### Loss of earnings

1. I accept that the plaintiff had been granted sick leave for the first accident of nine days. I would allow it in full and the damages comes from $13,500 monthly salary divided by 30 multiplied by 9, $4050, plus MPF 5% of $202. A total sum of $4,252.

The second accident

1. I would allow the sick leave period that Dr Kong considered to be reasonable rather than the 193 days allowed by the medical assessment board because of Dr Kong’s comment that the plaintiff was fit to resume his work on the day of his examination in his report, in fact, when his last sick leave certificate expired before the examination on 15 July 2005, which was 8 July 2005. The sick leave period is, therefore, from 29 January 2005 to 13 May 2005 and from 10 June 2005 to 8 July 2005, a total of 134 days. 134 days multiplied by $13,500 divided by 30 is $60,300 plus 5% MPF of $3,015. In total, $63,315.
2. I am not persuaded that the plaintiff was not fit to resume work as a welder after the sick leave period expired on 8 July 2005. Given the support of the medical opinion of Dr Kong, I would therefore not award any further loss of pre-trial earnings, neither should the plaintiff recover any loss of future earnings because there is no evidence to show he would suffer any loss of income in spite of his claim that he should be able to get a lighter duty job at seven to eight thousand dollars a month. He did not try to look for a job between January 2006 and January 2009. Though he claimed to have tried to find work between 6 September 2005 to 31 December 2005, there is no evidence in support of such an attempt.

Loss of earning capacity

1. As Dr Kong’s report indicated that the plaintiff was advised to take 10 minutes’ rest every two hours at work as a welder when he resumed duty and to take care of his posture and when he lift heavy objects. I am prepared to make an award of loss of earning capacity equivalent to three months of his former salary of $13,500 a month. This should allow him enough time to look for a job. The sum comes to $40,500.

Special damages

1. I will allow the medical expenses and travelling expenses incurred after the first and second accident.

##### Medical expenses:

The first accident, the plaintiff incurred $610; the second accident, $2,180; in total, $2,790.

##### Travelling expenses:

Under the first accident, $180 travelling expenses; and the second accident, $480; in total $660.

Total : $3,450.

Tonic Foods:

1. The plaintiff produced no receipts in support of this claim, neither did he in his evidence said he had taken any tonic food after the accident. The claim, therefore, is not allowed. He did, however, claim that he had gone back to Pakistan and received homeopathic treatments. Though he failed to produce any receipts in respect of those treatments, I accept that he probably did receive homeopathic treatments back home in Pakistan. I would allow the sum of $1,000 to cover this item.
2. The total of special damages ($3,450 + $1,000) comes to $4,450.

Summary

1. PSLA: first accident: $5,000, second accident: $100,000;

Pre-trial loss of earnings, first accident: $4,252; second accident: $63,315;

Loss of earning capacity: $40,500;

Special damages: $4,450.

Total: $217,517

Less: employee’s compensation of $123,940

The sum remaining is $93,577.

1. Interest on special damages from the date of 1st accident to the date of judgment at half-judgment rate and interest on general damages for the PSLA at 2% per annum from the date of writ to the date of judgment, thereafter at judgment rate.
2. Costs to the plaintiff to be taxed, if not agreed.

# (H C Wong)

# District Court Judge

Mr Albert Cheung, instructed by Messrs Huen & Partners, for the Plaintiff

Defendant, in person, absent