DCPI517/2003

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES NO. 517 OF 2003

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

AHMED MASOOD Plaintiff

and

CHUNG KAU ENGINEERING COMPANY LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Before: Her Honour District Judge Marlene Ng in Court

Dates of Hearing: 15th, 16th and 24th September and 11th October, 2004

Date of Handing Down Judgment: 28th January, 2005

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

JUDGMENT

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

###### Introduction

1. The Plaintiff (“P”) claims damages against the Defendant (“D”), his employer, for personal injuries suffered on 27th November 2000 (“Date”) as a result of a slip and fall at a construction site at Shek Kip Mei (“Site”) whilst carrying 5 metal grout pipes (“Pipes”) (“Accident”). His claim is based on breach of the employer’s duty of care, breach of duty of care as an occupier under the Occupiers’ Liability Ordinance Cap.314 (“OLO”) as well as breach of statutory duties.
2. D does not dispute that :
   * 1. P commenced employment with D as a construction site general labourer on 1st November 1999;
     2. each Pipe was about 6-7 metres in length and weighed about 20 lbs;
     3. P was working at Site on Date;
     4. D paid P average monthly wages of HK$9,620.00 (HK$370.00 x 26 working days).
3. D’s defence is as follows :
   * 1. Accident did not occur;
     2. even if P’s back injury was caused by an accident at Site, P failed to prove how the accident occurred;
     3. even if Accident did occur, D was not negligent or in breach of the employer’s duty of care, the common duty of care under OLO or other statutory duties;
     4. if the court finds otherwise, D’s negligence/breach of duties did not cause P’s injuries and/or damages;
     5. P was contributorily negligent.
4. P himself gave evidence. D called Liu Chi Wing (“Liu”, its project manager), Tsui Chun Ho (“Tsui”, its assistant foreman) and Yeung Chi Keung Kelvin (“Yeung”, its assistant project manager) to give evidence.

*P’s case on liability issue*

1. D assigned P to work at Site in/about September 2000. At about 3:00 pm on Date, “Che Chai” (“Che Chai”) assigned P and “Ah Chi” (“Ah Chi”) to transport 100 Pipes from one location to another within Site. Che Chai told P to quickly finish the task and then empty a large drum of mud. Che Chai had previously used foul language against workers who did not finish work quickly and had threatened to complain to the boss. P therefore carried 5 Pipes each time on his own and dared not work in pair with Ah Chi. He feared he might be verbally abused and/or dismissed (which would put him at a disadvantage as he did not understand Chinese) if he did not transport Pipes quickly.
2. Pursuant to Che Chai’s instructions, P and Ah Chi had transported 40-50 Pipes prior to Accident and P carried 30-40 of those Pipes. P was carrying 5 Pipes on his shoulder along a wet and muddy path (“Path”) when he slipped and fell. He was in pain and sat down to rest, but his condition did not improve after an hour. P reported his injury to Che Chai, but Che Chai and the other workers made fun of him. P went on his own to Tuen Mun Hospital (“TMH”) for medical treatment.

*D’s case on liability issue*

1. Tsui, nicknamed “牙擦仔” (“cheeky guy”), and P started working at Site from mid-October 2000. Tsui’s team was responsible for clearing piling holes at Site for remedial grouting by forcing water into the holes under high pressure and pumping out soil/mud and water through a hose into a tank (“Tank”). When Tank was full, the water would be released from a hole at its side into an open surface channel that led outside Site. The mud in Tank would be emptied either by using a crane to tip Tank over and dump the soil/mud into a hole dug in the ground or by clearing Tank manually with spade(s). The surface channel would be filled up after remedial grouting of the piling hole. There would be some mud/water but not all over Site or around the piling holes.
2. On Date a piling hole (“Hole”) was cleared in the morning and Tank was put away to one side about 8-10 metres away. 8 Pipes were required for grouting Hole on the following day. At about 2:30 pm, Tsui assigned P and 2 other workers to manually move 8-10 Pipes for about 20 metres from the storage area near Site entrance (“Entrance Area”) to a location about 1-2 metres from Hole. The task was not urgent and there was not much work that day. Manpower was not tight, so the 3 workers could have a rest after finishing the task.
3. Tsui/Liu had previously observed workers transport Pipes and Tsui himself had also carried Pipes. The workers (including P) carried 1-2 Pipes at a time as was appropriate for their physical capability without compromising their own safety or that of passer-bys.
4. At about 4:00 pm on Date, P told Tsui he had sprained his waist whilst transporting Pipes. P declined Tsui’s offer to call an ambulance or have another worker accompany him to the hospital. P walked normally and appeared able to go to the hospital on his own, so Tsui let him do so. Tsui reported to Liu the same evening. Liu completed Form 2 dated 22nd January 2001 on the basis of Tsui’s report. There was no other investigation of Accident.

*Findings of fact on liability issue*

1. P gave evidence in a straightforward and candid manner and I find his evidence honest and reliable. I am not persuaded by D’s version of events.
2. There is no doubt that P injured his back, which is clearly supported by the medical evidence. I find the suggestion that P was injured by some unknown cause apart from Accident and unrelated to his work fanciful. It is common ground that P reported his back injury to Che Chai/Tsui before he left Site on Date. He went directly to TMH for medical treatment and complained of Accident to TMH. Dr Wong Kwok Shing Patrick (“Dr Wong”), P’s medical expert, opines that P’s injury is consistent with the mechanism of the injury described. Further, without any protest, D submitted Form 2 which refers to Accident causing P’s back injury in the course of work and later paid employees’ compensation to P as assessed by the Labour Department pursuant to Forms 5 and 7.
3. Based on the analysis below, I make the following findings of fact :
   * 1. On Date, Che Chai (who must be Tsui) instructed P and Ah Chi to transport 100 Pipes from one location to another within Site. P was told to hurry and to clear a large drum of mud after such task.
     2. As P was under pressure to complete the task quickly, he carried 5 Pipes on his own over the shoulder for each trip.
     3. P had past experience of Che Chai/other difficult foremen verbally abusing the workers and complaining to the boss if the assigned task was not finished quickly. He was afraid of being verbally abused or dismissed if he did not work quickly.
     4. Path was wet and muddy.
     5. P slipped and fell on his buttocks/back whilst carrying 5 Pipes over his shoulder. He injured his back.

1. 8-9 or 100 Pipes It is unlikely that Tsui assigned 3 workers to transport 8-10 Pipes. P’s unchallenged evidence is that he took 2-3 minutes for each trip, so transporting 8-9 Pipes will take less than 10 minutes for 3 workers taking 2 trips with each carrying (even on D’s case) 1-2 Pipes per trip. This is contrary to Tsui’s “understanding” that the exercise took 30 minutes. He was therefore constrained to say there was little work on Date and the workers carried out the task in a leisurely manner, which evidence I reject.
2. Grouting a piling hole requires 8-9 Pipes and at the time of Accident, grouting was yet to be done for 20 piling holes. More than 100 Pipes were still required at Site. I do not accept Tsui’s evidence that a batch of only 50 Pipes was ordered on Date. I agree with Mr Wright, counsel for P, grouting work would be facilitated by moving Pipes from Entrance Area (where they were unloaded) into Site within easier reach of the grouting locations. This is supported by Tsui’s evidence that building materials delivered to Site might be moved for temporary stockpiling on a platform near piling hole. This seems more plausible than the suggested practice of moving a limited number of Pipes to one grouting location, removing and returning unused Pipes to Entrance Area and re-transporting them in due course to a new grouting location. The presence of the temporary storage area also shows that transporting more than 8-10 Pipes within Site will not necessarily cause obstruction.
3. Work after injury The assertion in Tsui’s/Liu’s witness statements that P worked for another hour after he finished transporting Pipes does not sit well with Tsui’s evidence that (a) after he gave instructions he did not see P again until 4:00 pm, (b) he had no idea whether P did any work after moving Pipes and (c) there was no more work to be done. I find Tsui’s/Liu’s evidence self-serving and unreliable.
4. Path Given that Hole was cleared by high pressure water jet in the morning before Accident, it is unlikely the area surrounding Hole would be pristine and dry. In a construction site, water, mud and debris are obviously regular features, particularly when foundation works are carried out.
5. Large drum of mud Hole was cleared that morning by pumping water/mud into Tank. Tsui said there was no other work after the transportation of Pipes, so there is no reason why instructions would not be given to P to empty Tank after he finished transporting Pipes. Although this is not mentioned in P’s witness statement, P’s evidence was given before Tsui/Liu described the clearing/grouting process and is spontaneous and convincing. I am not with Mr Chang, counsel for D, when he suggested that Tsui would not have just instructed P alone to clear a large drum of mud. There is no evidence of the size of Tank or whether more than one worker can clear Tank at the same time.
6. Resting after injury P suffered a back sprain. It is not implausible that he wanted to rest and see if his condition would improve instead of, as Mr Chang suggested, rushing to find the safety officer (whom P did not know) or a first aid station. I find on balance that Ah Chi came over to enquire after P sat down to rest and P told him about Accident. P thought (and I find it likely) the other workers saw him resting, and so were probably aware that P was resting after injury. Mr Chang questioned why Che Chai who was said to be demanding did not berate P. However, even on D’s case Tsui (who must be Che Chai) attended to other work and did not come over before 4:00 pm.
7. Reporting to Che Chai Although Mr Chang doubted why P had to report to Che Chai, P obviously had to request permission to leave Site for medical treatment before the end of the workday. I do not accept that Tsui offered to call an ambulance or have a co-worker accompany him to hospital. It was suggested that Tsui would not have laughed at P but I strongly suspect oral miscommunication had a hand in P’s belief he was being made fun of. Tsui only speaks Cantonese which P understands very little. P was not even able to adequately tell Che Chai he was in pain or ask Che Chai which hospital to go to. Apart from work instructions (which can be understood in the context of daily work), Tsui seldom chatted with P due to language limitations.
8. TMH P only knew TMH so he went there instead of hospitals closer to Site. Mr Chang suggested P lied when he said TMH was closer to his home. Form 2 which gives P’s home address in Kwun Tong is dated about 2 months after Accident. Liu did not give evidence as to his source of such information and P was not cross-examined on his home address at the time of Accident. There is no sufficient basis to say P’s evidence in this respect is suspect.
9. I conclude on balance that Accident did occur in the manner described by P.

*Liability*

*(1) Safe system of work : the law*

1. Employers owe their employees a non-delegable duty of care to devise a safe system of work and to see that system is operated (**McDermid v Nash Dredging & Reclamation Co Ltd** [1987] 1 AC 906). Such duty is to exercise reasonable care in all the circumstances. Lord Oaksey said in **Winter v Cardiff Rural District Council** [1950] 1 All ER 819, 822-823 that :

“…… There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise. It is not easy to define these spheres but where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workman on the spot.”

1. The employee’s individual circumstances are relevant. An experienced employee may not require the same instructions, warnings or advice about risks on familiar and obvious matters as an inexperienced employee.

*(2) Safe system of work : the analysis*

1. It is not disputed that D did not (a) expressly instruct its workers (including P) on the number of Pipes to be carried each time or the manner of carrying Pipes, (b) warn its workers (including P) not to carry more than 1-2 Pipes at a time or (c) carry out any risk assessment for transporting Pipes prior to Accident.
2. D’s contention is that transporting Pipes is a simple, common and frequent chore at construction sites that can be left safely to the workers to carry out without specific instructions. Mr Chang referred to Lord Oaksey’s comment in **Winter**’s case (supra at p.823) that transport of goods would be impossible to carry on efficiently if the method of securing every load had to be decided by the employer. However, each case must turn on its own facts. The employer in **Winter**’s case (supra) provided proper equipment and its superintendent justifiably believed that the foreman was competent and capable of arranging for the transport of a machine by lorry. Here, as seen below, D did not have such belief and even if it did, it was unjustified.
3. I am not convinced P was at the time of Accident “vastly experienced” in the transport of Pipes. It is not suggested his previous job as a driver in Pakistan involved manual handling operations. P only worked intermittently as security guard, gardener and labourer on a casual basis after he came to Hong Kong. He only became a permanent construction site general labourer when he joined D in November 1999. But even if P were an experienced worker in transporting Pipes, given the nature of the task and the associated risks which D knew (see below), D should still have given appropriate instructions for the task. I refer to the comment by the late Ching PJ in **Rainfield Design & Associates Ltd v Siu Chi Moon** [2000] 2 HKC 419, 424 : “In my view …… it is often more important to give experienced workmen instructions of this sort because their familiarity with their work may tend to leave them contemptuous of safety precautions”.
4. Number of Pipes carried I find on balance that previously P and other workers to Tsui’s/D’s knowledge have carried 5 Pipes at a time but Tsui/Liu did not stop them from doing so. I reject Tsui’s/Liu’s claim that the workers (including P) invariably carried not more than 2 Pipes.
5. Although each Pipe was 6-7 metres long and 5 Pipes weighed about 100 lbs, it is not implausible P was able to and did carry 5 Pipes at a time. P believed he weighed 70 kgs at trial. As at trial, he is a tall strapping man and I accept that he was very fit and strong prior to Accident. The medical evidence does not refer to any degenerative changes despite his age. Mr Chang submitted it would take longer to pick up and transport 5 Pipes, but there is no evidence carrying 5 Pipes each time would be more time-consuming. P said he only took 2-3 minutes for each trip.
6. P fairly distinguished between the requirements by good and by difficult foreman in respect of the number of Pipes to be carried for each trip. A good foreman would allow workers to carry 2-3 Pipes each time. But P classified Che Chai within the category of difficult and demanding supervisors, so P had to hurry up by carrying 5 Pipes at a time. His evidence is firm and unshaken. On the other hand, Tsui’s evidence varied first from having observed workers carrying a maximum of 2 Pipes each trip to a maximum of 3 Pipes and finally settling again for 2 Pipes. Tsui said he would stop a worker from carrying more than 2 Pipes but upon clarification confirmed he never did so as he has never seen any worker carrying more than 2 Pipes. I prefer P’s evidence and find that Tsui/D knew P and other workers have moved 5 Pipes at a time before Accident.
7. Mr Chang alternatively submitted that P disregarded his own safety by carrying 5 Pipes per trip just because he thought Tsui would pressurise him to finish the task quickly. He referred to **Cheung Suk Wai v Attorney General** [1996] 4 HKC 288 but its facts are quite different. The plaintiff there sprained her back when swinging bags of refuse over the side of a container at the refuse centre. The court held it was a simple operation with no evidence that the bags of refuse were outside the plaintiff’s load safety limit. She was provided with an unlimited supply of garbage bags and could have regulated her own pace/manner of work, freely deciding on the weight of the bag and how to carry out work to suit her physical ability.
8. Here, P did what he was told and lifted 5 instead of 1-2 Pipes because he was under pressure to complete the transportation of Pipes quickly. He and other workers had carried 5 Pipes in the past. Furthermore, I find the weight posed by 5 Pipes excessive and the number/length of Pipes adds to difficulty in balancing. Even Tsui/Liu confirmed that (a) moving more than 2 Pipes posed risk of injury to the worker carrying them and to others and (b) if more than 2 Pipes were picked up in cross-position, they might hit other people during transportation.
9. I find Che Chai’s/Tsui’s overriding concern was to get the necessary work done as quickly as possible, so a degree of pressure was put on P at the expense of caution. P had previously suffered verbal abuse from foremen not satisfied with the progress being made and who complained to the boss. P was expected to do what was necessary to maintain progress. I refer to the observations by Fuad VP in **Sun Wan Co v Ng Kam** [1988] KC 358 (referred to in **Wong Tai Wai David v Hong Kong Cable Television Limited formerly known as Wharf Cable** Limited HCPI541/2001, Deputy High Court Judge Fung (unreported, 13th August 2002), a case cited by Mr Chang) which are applicable to the present case :

“The plaintiff was not performing his task in a dangerous way to save himself trouble. He was doing it in that way to get on with his employer's business; in a way, as the judge found, that was condoned and tacitly encouraged by his employer. There were safe system available but they were not ones which, in practice, were used. Indeed, as I have mentioned, the chief foreman himself had employed the same method on the evidence accepted by the judge. In these circumstances, I do not think that an employer can be heard to say that his employee was being negligent in carrying out the work in that manner. It seems to me that the approach of Denning LJ in the Court of Appeal hearing of the General Cleaning Contractors case which I have just read is applicable.”

The words of Denning LJ to which he referred were as follows:

“…… it was suggested that the accident might have been avoided if the man had put in a chock to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it, and, if they had taken proper safeguards, the accident would not have happened.”

1. D did nothing to ensure P did not lift an excessive load or to devise/implement a safe system that limits the number of Pipes to be carried. There is ample opportunity for Che Chai/Tsui to give appropriate directions as he was on site and aware of Pipes’ dimensions and likely weight, the difficulty in balance and the risk of injury. To say nothing and to issue no instructions or warning are a dereliction of the duty of care D owed to its employee P.
2. Manner of carrying Pipes and teamwork Tsui/Liu have previously seen P carry Pipes either over his shoulder (for greater strength if Pipes were carried over a longer distance) or horizontally across his arms (if the distance was short).They left the manner of carrying Pipes to the workers and did not warn against the practice of carrying Pipes over the shoulder. At the time of Accident, Pipes had to be transported over 20 metres. In my view, D expected P to carry Pipes over the shoulder.
3. Mr Chang submitted it was P who chose to disregard his own safety by failing to carry Pipes with another worker as a team. There is no evidence that Tsui/Liu have previously seen workers work in pairs (which is consistent with P’s claim that he was at times pressurised to go about his assigned tasks on his own) or that D has ever devised or implemented teamwork in transporting Pipes. I find Tsui/D accepted/ condoned the practice of workers carrying Pipes on their own.
4. I do not think there is merit in the argument that carrying Pipes is a task that can sensibly be left to the worker to ask for help if required. Here Tsui/D knew the task is “obviously dangerous for one employee to do alone” (**Munkman on Employer’s Liability** 12th ed (1995) p.114). D should have given instructions for teamwork where working alone is inherently unsafe.
5. Frequency of the task Given the known hazards of transporting 5 Pipes at a time by a single worker, D should have given appropriate instructions, especially when it is a frequent/regular task that will increase the workers’ exposure to injury.
6. P’s knowledge and safety training P obtained a safety card after attending a one-day CITA training course. He admitted to cheating during the written examination. As regards the 4 safety training sessions (“Training Sessions”) by the main contractor at Site between 6th October and 6th November 2000, P and his co-workers signed the Chinese attendance records in order to get their staff permits. However, P said he did not actually attend Training Sessions (one of which was on manual handling) and was not given any Chinese pamphlet on manual handling procedures (with diagrams).
7. D’s case is that its workers were compulsorily required to attend Training Sessions. The main contractor organised a safety training session for D’s workers at Site after which they were given temporary staff cards. Tsui, P and D’s other workers attended (and signed the attendance records of) all Training Sessions. They were conducted in Cantonese without interpretation but with the aid of photographs and illustrations. After P had been trained on safety precautions and had shown his safety card to the main contractor, he was given a staff permit to work at Site. Some written Chinese materials with diagrams were shown to the workers during Training Sessions and posted by the main contractor at the notice board.
8. Mr Chang submitted that P was akin to the “extremely experienced technician” in **Flowerday v Visionhire Limited** (unreported, English Court of Appeal, 16th October 1987) such that by reason of his possession of the safety card and his attendance of Training Session on manual handling operations, P had the requisite knowledge for safe transportation of Pipes and no specific instructions were required.
9. I do not think the situation is analogous. The technician in **Flowerday**’s case (supra) was employed for 6 years and experienced in servicing, installing and removing television sets. He had undergone a course of training and had a City and Guilds qualification. The employer’s policy was for experienced technicians to single handedly lift/handle up to and including 22-inch television sets and to leave them to seek help from the manager for any out of ordinary and difficult job even with a 22-inch set. The policy required assistance to be given for handling 26-inch television sets. The technician was injured when lifting a set. It is clear that P was less experienced than the technician and D had no established policy at all in relation to the transportation of Pipes.
10. I am not persuaded on the evidence that the CITA course is of assistance to the task in question. No doubt it imparted basic safety knowledge. But there is no evidence the “Guidance Notes on Manual Handling Operations” issued by the Labour Department formed part of the course. Even if it did, the September 2000 edition disclosed in the present proceedings is irrelevant since P obtained his safety card before he joined D in November 1999. There is no evidence that P was told how to carry or manuvoeure a load of 5 6-7 metre Pipes or made aware of the inherent dangers. P’s cheating during the CITA examination does not detract from D’s duty to provide a safe system when the task and the practice adopted are inherently unsafe.
11. As regards safety training, it is obvious that D simply delegated safety training to the main contractor. It is telling that Liu as project manager insisted it was not for him to give safety tips or tell workers how to carry things whilst emphasising that safety training was the main contractor’s responsibility. In my view, if D chooses to delegate its obligation to give proper instructions/training, it should see that it operated to meet the particular circumstances of its employee.
12. I accept on balance P’s evidence that he did not attend Training Sessions or receive the Chinese pamphlets on safety practices. P had little reason to attend Training Sessions as he did not understand the Cantonese teaching medium. Although it was suggested that Training Sessions were a prerequisite for issuing workers’ staff permits for access to Site, Tsui admitted to working at Site for some time before Training Sessions and after 1st Training Session the workers were issued temporary staff permits. I find the issuance of staff permits in November 2000 more of a formality as the workers already had access to and were working at Site for some time.
13. In my view, D knew of P’s limited understanding of Cantonese. Even if P attended Training Sessions, D must have known P would not have benefited without interpretation. I have discussed P’s language difficulties. Further, seen below, Yeung said he spoke to P in English and in Cantonese but it still resulted in oral miscommunication. The employer’s duty is owed to the particular employee and must take into account his particular circumstances. Even further, if P attended Training Session on manual handling and assuming the Chinese pamphlet on this topic is a guide to the contents of the session, the diagrams only illustrate the postures for an individual to lift/carry a box and is not directly pertinent to the proper method and/or inherent dangers of carrying 6-7 metre Pipes. D’s so-called safety training is insufficient to establish a proper safety regime for the health and safety of P as a non-Cantonese speaking employee in carrying Pipes.
14. In the circumstances, I find there was no safe system of work.

*(3) Safe place of work*

1. Mr Wright submitted that the uneven, wet and muddy Path was unsafe for manual carrying of objects, yet D did nothing to instruct/supervise P to ensure that he did not carry a load on such unsatisfactory surface. The standard of a smooth ballroom floor or of safety in a nursery cannot be applied to a construction site. Water, mud and building debris are usual features and those who work in construction sites must be aware of these obvious and usual dangers. I am not satisfied the wet and muddy ground makes Site or Path unsafe.

*(4) Occupiers’ liability*

1. Mr Wright accepted that this issue related to the issue of Path being muddy and slippery. There is no breach of the common duty of care under OLO.

*(5) Breach of statutory duty*

1. P also framed its case under section 38A(1) of Construction Sites (Safety) Regulations Cap.59I (“CSSR”), sections 6(1) and (2) of the Occupational Safety and Health Ordinance Cap.509 (“OSHO”) and regulations 23(1), 24(1) and 27(1) of the Occupational Safety and Health Regulations Cap.509A (“OHSR”).
2. Mr Chang submitted that the above provisions did not confer any private right remedy as P failed to demonstrate a legislative intention that there should be civil cause of action for damages (**Kaisilk Development Limited v Urban Renewal Authority** [2004] 1 HKC 62). **Rainfield**’s case (supra) is pertinent. In that case the only basis for the defendant’s liability was a breach of the now repealed regulation 38A of CSSR. The Court of Final Appeal said that the policy of CSSR was to promote safety at construction sites by imposing duties designed to protect construction workers from physical harm and that the statutory duties on the defendant as contractor were absolute and non-delegable. It was held that a breach of the regulation was causative of loss and on that basis, civil liability followed. Likewise in my view, the legislative intention for civil remedy in respect of OSHO and OSHR is amply shown by provisions targeted for the safety of employees at the workplace.
3. Mr Chang suggested that the above provisions in CSSR, OSHO and OSHR were not dissimilar to section 6A(1) of the Factories and Industrial Undertakings Ordinance Cap.59 (“FIUO”). Since this section did not confer a private right remedy (as expressly provided in section 19(a) of FIUO), by parity of reasoning, the above provisions in CSSR, OSHO and OSHR should not ground any civil cause of action. Mr Chang said the statutory penalties for breach of the above provisions suggested that their breach lied in criminal sanctions only. The fallacy in such argument is that the bar to civil remedy under section 6A of FIUO is expressly achieved by section 19(a). Given that CSSR, OHSO and OSHR have the requisite legislative intention to support civil remedy, the absence of express exclusion provisions shows they give rise to private law remedy.
4. Mr Chang argued alternatively that in light of the wide definition of “manual handling operation”, the legislature could not have intended to require mandatory “preliminary assessment” under regulation 23 of OSHR for every kind of manual handling. I accept that for a task to be caught by such regulation, there must be a real risk with a foreseeable possibility of injury in the relevant context of the particular operation in the particular place of employment and the particular employee involved. However, an employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety, and there should be an element of realism (**Koonjul v Thameslink Healthcare Services** [2000] PIQR 123).
5. I have found that the past practice and the practice adopted at the time of Accident of transporting 5 Pipes each time is inherently risky. It is self-evident that the risk of slipping and falling will be less with 2 workers carrying Pipes or if less Pipes are carried at a time. It is therefore necessary to weigh the risk of P injuring himself if he carries 5 Pipes by himself against the sacrifice to D of providing teamwork or delay caused by less Pipes being moved per trip. That involves time and inconvenience but the sacrifice is slight as compared to the risk. It is the employer’s duty to ensure compliance with the statutory regulations. But D has not carried out any risk assessment under the above statutory provisions or given any directive, training or warning as to the task and manner of doing it. I find that D was in breach of statutory duty under CSSR, OHSO and OHSR.

*(6) Contributory negligence*

1. The burden of establishing contributory negligence rests on D. Mr Chang submitted that P should be two-thirds contributorily negligent. He argued that the danger of carrying 5 Pipes should be obvious and the fact that P was pressurised did not remove his liability for choosing to adopt an unsafe method or neglecting his own safety.
2. A worker owes a duty of care to himself to avoid taking risks that might injure him. But here P was only carrying out the assigned task and he was under pressure from Che Chai to do the job quickly. Mr Wright distinguished the finding of 30% contributory negligence by the plaintiff carpenter in **So Chung Kwong v Ho Kuen & anor** [2000] 3 HKLRD 241 as the plaintiff carpenter chose to lift a particularly heavy board whilst under no pressure to do so.
3. I have carefully balanced the causative blameworthiness in this matter but find no contributory negligence on P’s part. P may not have adopted the most cautious and prudent approach but one does not bring in aid wisdom after the event. He carried 5 Pipes in the past and had seen other workers do so. He received pressure at the hand of D’s foremen and he was under pressure from Che Chai on Date. As Fuad VP said in **Sun Wan Co**’s case (supra), P did not perform his task in a dangerous way for his own purpose but to get on D’s business which he no doubt felt he was expected to do in order to finish the assigned task quickly.

*Quantum*

*(1) Pain, suffering and loss of amenities*

1. Post-Accident circumstances P was 57 years at the time of Accident. He enjoyed prior good health. After Accident, he was diagnosed to have mild back sprain. He was treated conservatively and received physiotherapy treatment until April 2001. His back symptom improved. P had sick leave from 27th November 2000 to 23rd February 2001 and from 27th February to 1st May 2001.
2. P returned to work for half day in February 2001 and I accept Liu’s evidence that it was 26th February 2001. He was assigned light duty, ie putting hooks on the crane which required bending down and straightening up actions. P felt pain in his lower back and pain/numbness in his right leg. He had to sit down and then attend TMH the same or following day. He was given further physiotherapy exercises.
3. When P’s sick leave expired in May 2001, P said he felt better but was not fully recovered. The pain increased when he returned to work, so he took or applied self-purchased painkillers/ointment. D arranged for P to do light duty work but P still felt pain/discomfort. On the other hand, Tsui (who worked with P for 2 months from June to August 2001) and Liu (who visited the construction site where Tsui and P worked) said they observed P did pre-accident work after his sick leave and his physical condition was good/normal. Such work required occasional lifting/moving of objects, including heavy objects such as cement and Pipes. Tsui said there was no light duty work in the trade.
4. P ceased working in December 2001 and went to Pakistan (see below). He returned to Hong Kong on 10th May 2002. P said the pain in his back/leg was always there and appeared incurable. He did not seek formal medical treatment but continued to take/apply painkillers and ointment.
5. P worked as a daytime security guard at a construction site for AMEC-Hong Kong Construction CC-202 Joint Venture (“AMEC”) between June 2002 and 15th December 2003 (“1st Job”). He took painkillers and persisted in the job because he had to earn his living. P worked as a night-shift security guard with Honway Security Limited (“Honway”) at another construction site for 3 months from 13th January 2004 (“2nd Job”). P was unemployed since.
6. At the time of trial, P still had low back pain (especially when bending down and standing up) that would be aggravated with work. He used to have intermittent pain/stiffness in his right leg but 6-8 months before trial such pain/stiffness became constant when he was standing or walking. Sometimes the pain/stiffness in his back and right leg was mild and sometimes it was worse. P described them as good and bad days. P also had unpredictable attacks of numbness in his right leg which lasted about half an hour and which would subside slowly. Such attacks happened about every 3-4 days. P sometimes felt painful/uncomfortable whilst sitting and had to shift his sitting posture every now and then.
7. Expert medical evidence The expert medical opinions of Dr Wong and Dr Au Ting Wah (“Dr Au”), D’s medical expert, are quite similar. Dr Wong and Dr Au examined P in September 2003 and March 2004 respectively.
8. P complained to both experts of low back pain. He told Dr Wong the low back pain was constant but it was sometimes mild and sometimes a bit worse and it increased in cold weather. He told Dr Au the pain was especially bad after walking for longer than 20 minutes.
9. P told Dr Wong he had stiffness in his right leg and attacks of pain over the entire right leg about every 2-4 days lasting for 30 minutes. Dr Au also recorded P told him of weakness and numbness of the right leg and he could not lift more than 10 kgs.
10. Dr Wong found P could walk normally, stand on single leg and squat down, but had low back pain when he walked on heels and tiptoes. Dr Au found P had no difficulty in rising from a chair and could walk very slowly (especially when asked to walk on toes) without a limp. P could not walk on heels.
11. Both experts found no abnormality with P’s back but local tenderness over the lumbar sacral or mid-sacral area. Dr Wong noted mild muscle spasm but Dr Au did not. Dr Wong noted P had pain on full flexion and extension. Dr Au noted P could touch his ankles on forward flexion. Straight leg raising test by Dr Wong showed 70º on the right side and 80º on the left side, but Dr Au recorded straight leg raising was 60º on both sides.
12. Dr Wong and Dr Au diagnosed P to have sustained back contusion or sprained back with no significant findings or neurological impairment. Dr Wong opined that overall prognosis was expected to remain satisfactory and no treatment was available to assist further recovery. P did not require on-going treatment. Dr Wong and Dr Au respectively estimated P to have 3% and 2% impairment of the whole person for the residual pain from the back injury. They also considered the sick leave period granted to P was adequate for the type of injury he sustained.
13. Analysis P plainly suffers from residual pain and stiffness to his back and right leg and from attacks of numbness to his right leg. His condition will be aggravated by work that requires back movement (eg bending down and straightening up) or by keeping the same posture (eg sitting) for a prolonged period. P said and I accept that he had to shift and adjust his sitting posture when he gave evidence as he was in pain or felt discomfort. Whilst P accepts his back condition fluctuates with good and bad days, I find it is not intolerable pain but nevertheless a permanent condition which P has to live with by adjusting his posture and/or by seeking temporary relief with painkillers and ointment. Dr Wong said there is no treatment available for further recovery and no further treatment is required. I accept that further medical treatment will not be therapeutic.
14. The medical records/reports show quite clearly P suffered soft tissue injury to his back. I reject any suggestion that P has fully recovered by May 2001 or has exaggerated his back condition. TMH’s medical report only said P’s back symptom improved (not extinguished) after physiotherapy. Both Dr Au and Dr Wong opined that P has residual back pain amounting to permanent impairment and they did not in any way suggest that P’s complaints are not genuine. Pain from soft tissue injury is a subjective symptom and the lack of objective evidence does not necessarily make the pain less genuine. I reject Tsui’s/Liu’s evidence that P was fully capable of handling pre-Accident work after May 2001 including moving cement and/or Pipes or that P did such work in full capacity for 6 months. It is contrary to the medical experts’ recommendation for light duty work or suggestion of reduced efficiency.
15. P did not perform “significantly worse” during Dr Au’s examination. With unpredictable good and bad days, it cannot be assumed that P’s condition was static. I accept P’s evidence that he told the medical experts what he felt on the respective days he was examined. When he was examined by Dr Au, P’s physical condition was less good than when he was examined by Dr Wong. But Dr Au, who had sight of Dr Wong’s report, did not remark on the difference in the findings. Any such difference is immaterial given the closely similar opinion and conclusions of both medical experts.
16. Mr Chang focused his criticisms on P’s half day’s work on 26th February 2001. He criticised P for being “AWOL” from 24th to 26th February 2001. In fact, P returned to work on 26th February 2001 but could not cope with the work. P recollected he sought treatment on that day or the following day, which is consistent with his being granted sick leave on 27th February 2001. His attendances at Pok Oi Hospital very shortly thereafter as a result of increased low back pain and right sciatica are consistent with aggravation of his back pain upon return to work. It is not surprising given that his assigned task of putting hooks on the crane required bending down/straightening up back movements. P received physiotherapy treatment until April 2001 and his sick leave continued until 1st May 2001. The whole picture shows that P was not physically capable of returning to work in February 2001 because of back/leg pain and he consequently received further treatment and physiotherapy.
17. P’s inability to cope with the work on 26th February 2001 due to subjective pain/discomfort does not conflict with Dr Wong’s opinion there is no *objective* evidence that P was absolutely unfit to return to his pre-accident work (although at reduced efficiency). Further, no useful comparison can be made of P’s condition on 26th February 2001 prior to completion of his full physiotherapy course and expiry of his sick leave against his condition whilst at 1st Job a year later and when he was examined by Dr Wong 2½ years.
18. Mr Chang’s suggestion that bending down action to put hooks on the crane on 26th February 2001 would not have triggered pain results from a misreading of P’s witness statement. Although P mentioned backward bending triggered pain, he was describing it as one of his complaints in December 2001. It was not described as the sole trigger of back pain and P stated he had lower back pain even at rest. Further, although it is D’s case that P exaggerated his pain when he was capable of handling the assigned tasks in February 2001, Mr Chang on the other hand complained of P’s failure to tell the medical experts of P’s attempt to return to work as “this half-day work may have aggravated [P’s] “injury” at the back and/or lower limbs”. D should not be permitted to blow hot and cold. Anyway I find the half-day’s work immaterial to the medical experts’ opinion on P’s prognosis and physical impairment.
19. In my view, P’s injury does not seem severe but he has permanent residual symptoms which will cause him pain and discomfort. This falls short of the serious category in **Lee Ting Lam**’s case. Mr Wright submitted that HK$150,000.00 was reasonable under this head of claim (**Ng Shing Kwai v Chan Yu Chuen & anor** [2002] 3 HKLRD J14 and **Lai Kam Wah v Wing & Kwong Co Ltd** [2003] HKLRD L11 and L19). Referring to **Ma Chi Fu v Law Tit Wing & anor** HCA3551/1981 Master Betts (unreported, 11th April 1986) and **Kwong Kam Cheung v Lee Cheong Dyeing Works Limited** HCA2300 of 1983 Master Crawshaw (unreported, 22nd January 1985) and adjusting the awards to the present level, Mr Chang suggested HK$100,000.00. I find that the appropriate award should be HK$130,000.00.

*(2) “Resignation” issue*

1. P returned to Pakistan on 12th December 2001. Did he resign to visit his sick wife in Pakistan or did he cease work due to pain/discomfort and to have medical treatment in Pakistan? This goes to loss of earnings and loss of earning capacity.

*(a) P’s case*

1. P said in his witness statement “he resigned in December 2001 because of the following reasons :- 1) felt lower back pain even at rest, 2) pain radiates down the right leg and associates with numbness over both thigh and calf, 3) difficulty in lifting up objects of more than 5 kg and 4) stiffness of back, any backward bending would trigger pain”. He said in evidence his wife was not ill and he did not resign.
2. P first approached his foreman in broken English to ask for “holiday” to go to Pakistan and for help to talk to the boss. About 7-10 days before he left for Pakistan, he applied to D’s manager for 2-3 months’ leave to return to Pakistan (where he had family and no language problem) for medical treatment for his pain. He told D’s manager in broken English that his wife was “sick about me” and asked for “holiday” to go to Pakistan. He also asked for help about money. What P wanted to say was his wife was upset about his condition.
3. P asked and was told that there were no benefits payable to him after having worked for D for 3½ years. As P had made reservations to go to Pakistan, he requested payment in advance of payday of wages for days worked. He signed a typed document which he did not understand. He thought it was perhaps an acknowledgment of wages. P was then paid his salary (probably by cheque) and was promised a job upon his return from Pakistan.
4. In fact it was a letter by P addressed to D dated 3rd December 2001 (“Letter”) stating P “will resign from [his] present position with effect today due to personal reasons, and will leave [D] on 12 December 2001”. When P subsequently found out what it said, he felt cheated, especially when he was then on work injury sick leave. P saw little point in complaining to D or to the police/Labour Department as Letter suggested his job with D was over.
5. P borrowed money from friends in Hong Kong and left for Pakistan. He consulted doctors in Pakistan at 400-1,000 rupees per consultation, but confirmed he would not claim against D for his medical fees in Pakistan. P returned to Hong Kong on 10th May 2002.

*(b) D’s case*

1. On/about 3rd December 2001, D’s office secretary Ms Tang (“Tang”) reported to Liu P wanted to (a) resign and stop work on 12th December 2001, (b) receive his wages up to 12th December 2001 and (c) return to Pakistan to visit his wife who was sick. Liu through Tang told D he could not stop work and be paid on the same day as time was required to work out the amount due to him and issue the cheque.
2. On 10th December 2001, P submitted his work injury sick leave certificate for 9th to 13th December 2001. Liu through Tang required P to submit a resignation letter to obviate any potential allegation that D unreasonably dismissed P. When Tang reported that P did not have any resignation letter, Liu asked her to approach Yeung to follow up on this matter.
3. Tang told Yeung P wanted to resign but he suffered work injury within the 7 days’ resignation notice period (“Notice Period”). When Yeung saw P, P said in broken English he did not wish to work anymore. He used the words “唔做” in Cantonese and “my wife in Pakistan sick” in English. Yeung understood P meant he wanted to visit his wife in Pakistan who was unwell. On Yeung’s further query, P confirmed he was resigning for his own personal reason. Yeung spoke to P in English and repeated keywords in Cantonese. Yeung was sure that P understood what he said.
4. As P’s work injury overlapped Notice Period, P was asked to submit a resignation letter (Yeung used the English words “formal resignation letter” and Cantonese words “辭職信”) to avoid any criticism of unreasonable dismissal. Since P had no resignation letter, Yeung at P’s request prepared Letter in P’s presence and asked whether P agreed to simply state in Letter he resigned for personal reason. P said “okay” in English.
5. Yeung said because of the problem with Notice Period, he asked Liu how to date Letter. Liu (without consulting P) told Yeung to backdate Letter to 3rd December 2001 because Liu came to know of P’s resignation on that day (“Liu’s Reason”). However, Yeung said under cross-examination it was he who first thought of backdating Letter and he further pointed out that such backdating was for P’s and not D’s benefit (because he drafted Letter as P’s friend). Had Letter been dated 10th December 2001 and P was to leave D’s employ on 12th December 2001, 5 days’ wages would have to be deducted in lieu of the full Notice Period (“Yeung’s Reason”). Yeung denied there was any other reason to backdate Letter. D had no intention to use the opportunity to be rid of P due to his disabilities. Yeung was then unaware of Accident and he did not observe any disability on P’s part.
6. Yeung explained Letter to P in English and Cantonese. He told P Letter was backdated to 3rd December 2001 but did not explain to P the benefit of such backdating. Yeung asked P whether he understood the explanation and whether any amendment was required. He invited P to sign Letter if there was no problem. P said there was none and signed Letter. Yeung reported to Liu who instructed that P should return in two days to get the cheque. Yeung so informed P and gave him a copy of Letter.
7. Liu instructed Tang that P should be paid four days’ sick leave pay for his work injury up to 13th December 2001 although P ceased working on 12th December 2001. P collected the cheque on 12th December 2001.

(c) Assessment of the evidence

1. I do not agree, as Mr Wright contended, Liu/Yeung deliberately concocted a story against P, but there obviously has been oral miscommunication in that P applied for leave and advance payment of wages to go to Pakistan whilst D’s staff thought P intended to visit his sick wife in Pakistan. There are also certain aspects of Liu’s/Yeung’s evidence which I consider unreliable.
2. I have already referred to P’s limited knowledge of English and Cantonese. Even on D’s case, the discussion between Yeung and P is certainly not simple. I find that confusion arose from P’s imperfect use of the word “sick”. P mentioned “my wife sick about me”. Yeung recollected P said “my wife in Pakistan sick”. I find P meant his wife was worried about him and not she was ill, but the way he said it no doubt gave rise to misunderstanding. Another illustration of P’s imperfect English can be seen from his use of the word “holiday”. On P’s evidence, he plainly intended to apply for leave to go to Pakistan and not on a vacation. However, he must have used the same word and confused Dr Au because Dr Au noted in his report P went to Pakistan for a holiday.
3. Although the word “resigned” was used in P’s witness statement, P said he has explained the circumstances to the interpreter. He did not know what the interpreter told his solicitors and what was written in his witness statement. Even in his witness statement, P said he ceased to work *because* of his lower back pain and the pain/numbness in his right leg. P did not say it was for a personal reason unrelated to his injury. I accept that when P subsequently discovered Letter was a resignation letter, due to oral miscommunication he thought he was tricked by D and felt it was pointless to complain. It is also not surprising that D misunderstood Letter signed by him might have something to do with his salary. Although his monthly salary was regularly paid by bank autopay, P on this occasion requested payment of his wages in advance of payday. As a matter of fact, P was eventually paid by cheque and not by autopay.
4. On the other hand, I am not persuaded by Yeung’s suggestion that his memory so improved over the short period from the time he made his witness statement to his cross-examination that he was able to give evidence on detailed particulars of the events of 10th December 2001.
5. It is telling to note Yeung’s remark that Tang told him P previously tried to borrow money from D to go to Pakistan, which request Liu refused. An employee is unlikely to be intent on resigning when he concurrently applies to his employer for an advance. It tallies with P’s evidence that he wished to receive advance payment of wages.
6. Tang on Liu’s instructions sought Yeung’s help on 10th December 2001 because of the sensitivity resulting from the overlap between the sick leave for P’s work injury and Notice Period. Yeung acknowledged such sensitivity when he asked P to submit a resignation letter. His subsequent denial of the relevance of such sensitivity to the preparation of Letter is inexplicable. Yeung also did not give any plausible reason for renouncing Liu’s Reason and insisting on Yeung’s Reason as the sole reason for backdating Letter to 3rd December 2001. Yeung’s Reason does not sit well with Yeung’s acknowledgment of the aforesaid sensitivity or with the fact that he did not explain Yeung’s Reason to P for backdating Letter. Liu and Yeung also contradicted each other as to who made the decision to backdate Letter. I am not convinced their evidence is reliable.
7. I find that the underlying reason for P’s decision to stop work is his pain/discomfort which has been aggravated with work over the past 6 months. P has not fully recovered by May 2001 but returned to work because he had to earn his living. He carried on by taking painkillers and applying ointment. As P said, light duty construction site work (eg putting hooks on crane, cleaning, picking up and putting away things) is more tedious than security guard work. It obviously requires more movement of the back than, say, P’s work at 1st or 2nd Jobs (eg sharing the task of checking staff permits and copying down particulars with his colleague or controlling ingress/egress at the construction site but not required to do security rounds).
8. I also bear in mind P’s conduct after Accident. P resumed work shortly after expiry of his sick leave and took up 1st Job quite soon after his return from Pakistan. When 1st Job ended, he moved to 2nd Job. This is not behaviour of a worker who is unwilling to work. In my view P would not have lightly made a decision to stop work unless he felt pain/discomfort in his work, particularly as D then paid him his normal salary for doing light duty work.
9. I find P intended to return to Pakistan for rest and relief from the aggravation of his back condition by work and he did not intend to resign. Irrespective of whether he resigned or not, I find it was not unreasonable for P to cease performing light duty at D’s construction site in December 2001 due to pain/discomfort (see **Yuen Siu v Lau Choi Har & anor** HCPI374/2002, Master S Cheung (unreported, 3rd June 2003) for an illustration where the court upheld the plaintiff’s decision to voluntarily resign to take up a new job at lower pay because he was physically unable to continue with the former job). This is consistent with Dr Wong’s view (examination in 2003) that P was more suitable for light to moderate work (eg security guard) and does not conflict with Dr Au’s recommendation in 2004 that P can return to light duty construction work or, say, security guard work.
10. I accept P might have attended the doctor in Pakistan and got some medication for relief but I do not think he went to Pakistan for seeking therapeutic treatment of his back/leg condition. There is minimal evidence of the medical treatment P received in Pakistan. I also find that P extended his stay in Pakistan from the original planned leave of 2-3 months to 5 months because of his belief that his contract with D was finished and he must have been influenced by the immigration restriction on the maximum period allowable for him to be overseas. I am also not persuaded that P was completely incapable of any work during his period. I find that he was physically able to take up security guard work or other moderate work that did not tax his back condition. Indeed, P in his Revised Statement of Damages pleaded that he will give credit for notional earnings of a security guard for the relevant period.

*(3) Pre-trial loss of earnings*

1. I am not convinced that but for P’s departure for Pakistan D would have continued to employ P indefinitely on light duties. Tsui/Liu denied P was ever put on light duty and Tsui said there was no light duty work in the trade. As seen below, P was unsuccessful in securing such job.
2. P returned to Hong Kong on 10th May 2002. Yeung recollected P approached D for a job but D had no position for him. Between June 2003 and 15th December 2002, D was employed as daytime security guard at 1st Job. It was light work (ie checking workers’ staff cards and copying down their particulars) which he shared with a fellow employee. With this arrangement and the help from two friends also working at AMEC, P could have some rest in his job. AMEC confirmed by letter dated 1st August 2002 that P’s monthly salary was HK$6,000.00 with overtime pay.
3. For 3 months from 13th January 2004 until completion of the construction when P’s services were no longer required, P worked as construction site security guard at 2nd Job. Work was light as P worked the night shift and he did not have to do security rounds. Honway’s letter of 12th March 2004 confirmed his monthly salary was HK$6,000.00. P said he was paid HK$250.00/day and received HK$3,800.00 for January 2004 (incomplete month).
4. P has been unemployed since. He tried but could not find a job. P believed he could do light duty work at construction sites although the work of a security guard was less tedious. He felt he could never return to his pre-Accident work. In the 6 months before trial P approached some construction sites for light duty work to no avail. At the time of trial, P was living off loans from friends.
5. Both Dr Wong and Dr Au opined that 5 months’ sick leave was adequate. Although Dr Wong said there was no *objective* evidence that P was absolutely unfit to return to pre-Accident work with reduced efficiency, he accepted that P has residual back pain and further opined “[the] overall prognosis is expected to remain satisfactory despite he was unable to return to his pre-accident job”. Indeed, both medical experts agree that P was better suited to light work and Dr Au also advised less heavy lifting than before (which obviously is to avoid aggravation of P’s back pain).
6. In my view, it is inappropriate for P to return to his pre-Accident work which required heavy lifting, frequent bending and physically arduous activities which he had difficulty in doing. I agree he would be able to handle light duty work. P also confirmed in the Revised Statement of Damages that he will give credit for notional earnings.
7. I assess the claim for pre-trial loss of earnings at HK$123,105.75 as follows :
   * 1. full loss from 27th November 2000 to 1st May 2001 (ie 5.164 months) x HK$9,620.00 = HK$49,677.70;
     2. partial loss from 13th December 2001 to 7th June 2002 (ie 5.82 months) x (HK$9,620.00 – HK$7,095.00 (“Figure A”)) = HK$14,695.50;
     3. partial loss from 8th June 2002 to 15th December 2003 (ie 18.23 months) x (HK$9,620.00 – HK$8,190.00 (“Figure B”)) = HK$26,068.90;
     4. full loss from 16th December 2003 to 12th January 2004 (ie 0.92 month) x HK$9,620.00 = HK$8,850.40;
     5. partial loss from 13th January 2004 to 12th April 2004 (ie 3 months) x (HK$9,620.00 – HK$6,000.00 (“Figure C”)) = HK$10,860.00;
     6. partial loss from 13th April 2004 to 16th September 2004 (ie 5.13 months) x (HK$9,620.00 – HK$7,095.00) = HK$12,953.25.
8. In respect of Figure B, P pleaded in the Revised Statement of Damages his average earnings at 1st Job were HK$8,190.00/month and not HK$7,535.50/month as set out in Mr Wright’s written opening submissions. Although it is not clarified in Mr Wright’s submissions, presumably the latter figure is based on P’s earnings in the sum of HK$73,245.00 from 8th June 2002 to 31st March 2003 as shown in AMEC’s employer’s return. Yet this period did not reflect the whole period of P’s employment by AMEC. P’s bank passbook only showed his salary and final payment from November 2002 to December 2003 (which again only reflected part of his employment period by AMEC) which averaged to a sum in excess of HK$8,000.00 per month. There is no sufficient reason for P to depart from its pleaded position.
9. In respect of Figure C, although P’s Revised Statement of Damages pleaded that P’s earnings at Honway was HK$5,200.00/month (HK$200.00 x 26 days), it is contradicted by Honway’s letter dated 12th March 2004 confirming P’s monthly salary of HK$6,000.00, which I accept.
10. Figure A is the notional monthly earnings of a security guard. I bear in mind that P’s 1st Job was a permanent position but 2nd Job was a short-term one pending completion of works at the construction site. P could have looked for either type of security guard job and a fair approach is to take an average, ie (HK$8,190.00 + HK$6,000.00) ÷ 2 = HK$7,095.00/month.

*(4) Post-trial loss of earnings*

1. P is now 61 years. The medical reports made no mention of any prior injury or any pre-existing degeneration of P’s spine. P has been a remarkably strong and fit man for his age. P said that but for Accident he would have continued in his previous work for a few more years until his health did not permit. Although he was the oldest worker at Site, he had seen workers who appeared older than him at other construction sites doing work similar to his pre-Accident work. Mr Wright submitted that P could probably have continued with heavy labouring at construction sites until 65 years and he submitted the appropriate multiplier should be 3 (**Muhammed Ismail v Or Wah** [2004] 1 HKLRD A14, **Ho For Sang v Lau Sun Choi & anor** [2003] 1 HKLRD A15 and **Ho Kwai Hong v Cheung Kok** [2003] 1 HKLRD A14). Mr Chang submitted that the appropriate multiplier is 2 (**Chan Kam Sum v Ho Cheung Shing & anor** HCPI929/1999 Cheung J (unreported, 25th July 2000).
2. I am of the view that the appropriate multiplier is 3. Post-trial loss of earnings should therefore be (HK$9,620.00 – HK$7,095.00) x 12 months x 3 = HK$90,900.00.

*(5) Loss of earning capacity*

1. P will be handicapped in competing in the open labour market due to his disability. I reject Mr Chang’s contention that P’s handicap only arose out of his inability to understand Chinese. He is now limited in the kind of work for which he could apply because of his disabilities. I bear in mind that P secured 1st and 2nd Jobs through friends and it is uncertain whether he will be able to secure such jobs if he were to compete in the open labour market. P cannot return to his pre-Accident work and he actually experienced difficulty in looking for security guard or construction light duty work. The risk of being thrown on the labour market is real.
2. Mr Chang then argued that even if the court is minded to make an award under this head, it should not be a lump sum award. He referred to **Tang Shau Tsan v Wealthy Construction Co Ltd** CACV58/2000 (unreported, 5th April 2000) where the plaintiff was capable of returning to lighter work in the same field and the medical experts agreed to a 10% loss of earning capacity. The Court of Appeal adopted the trial judge’s formulation of loss of 2 days’ wages per month (which reflected 10% loss of earning capacity out of 20 working days per month) on a multiplier/multiplicand approach. Mr Chang submitted that any award for P’s loss of earning capacity should be 2% (loss of earning capacity based on Form 7) x 26 working days x 12 x HK$370.00/day x 2 (multiplier) = HK$4,617.60.
3. Mr Wright referred me to the case of **Christopher Gordon Young v Lee Chiu** CACV131/2003 (unreported, 19th May 2004) where the Court of Appeal discussed **Tang Shau Tsan**’s case (supra). Yuen JA in her judgment (which Le Pichon JA concurred) said **Tang Shau Tsan**’s case (supra) was merely an illustration of damages for handicap in the labour market. Although the Court of Appeal in that case held that statements of opinion by medical experts in relation to earning capacity were inadmissible, the trial judge made an estimate of his own.
4. Reyes J held that the judge must be qualitatively satisfied that a person might be forced into the job market and due to his injury would have to exert himself to secure a job similar to the one previously enjoyed. “But once so satisfied, the judge can only award a rough and ready lump sum.” He pointed out the difficulty with **Tang Shau Tsan**’s case (supra) in that the judgments of the Court of Appeal were silent on how the trial judge, who was clearly influenced by the “10% loss of earning capacity” asserted by the experts, justifiably derived the plaintiff would lose 2 out of 20 days’ income, and yet criticised the percentage loss of earning capacity as meaningless, subjective and should be ignored. Reyes J did not think that **Tang Shau Tsan**’s case (supra) went any further than casting serious doubt on the propriety of using a loss of earning capacity percentage.
5. I agree with the above analysis. Mr Wright submitted that P should be awarded HK$50,000.00 under this head. I am prepared to award HK$30,000.00. I bear in mind that P is now aged 61 and has a limited working life ahead of him. The risks of being thrown onto a labour market will be less than that of a young man in the prime of his career.

*(6) Loss of MPF benefits*

1. Loss under this head should be calculated at 5% of lost earnings commencing from 1st December 2000. Both counsel agreed that MPF benefits from 1st December 2000 to 1st May 2001 are HK$2,420.60. MPF benefits on the balance of pre-trial and post-trial lost earnings are [(HK$123,105.75 – HK$49,677.70) + HK$90,900.00] x 5% = HK$8,216.40. The total loss under this head is HK$10,637.00.

*(7) Special damages*

1. P claimed for HK$2,500.00 for medical expenses including purchases of medication and ointment from dispensary stores and travelling expenses to/from hospitals. D admits special damages (ie receipted medical expenses) of HK$910.00. I have found it reasonable for P to purchase/use painkillers and ointment. I cannot see how P’s claimed travelling expenses can be challenged given the documented hospital attendances. I award the sum of HK$2,500.00 under this head.

*(8) Salaries tax*

1. The lost earnings are insufficient to attract tax liability after taking into account the statutory basic allowance.

*(9) Deduction*

1. There is no dispute that the sum of HK$46,235.20 being employees’ compensation should be deducted.

*(10) Conclusion*

1. I summarise the award for P’s loss and damages as follows :

|  |  |
| --- | --- |
| Pain, suffering and loss of amenities | HK$130,000.00 |
| Pre-trial loss of earnings | HK$123,105.75 |
| Post-trial loss of earnings | HK$90,900.00 |
| Loss of earning capacity | HK$30,000.00 |
| Loss of MPF benefits | HK$10,637.00 |
| Special damages | HK$2,500.00 |
| Less employees’ compensation | (HK$46,235.20) |
| Total | HK$340,907.55 |

1. Interest is payable on the award for pain, suffering and loss of amenities at 2% pa and on pre-trial loss of earnings and special damages but less employees’ compensation from the date of Accident to the date of judgment at 4.0345% pa and thereafter at judgment rate until payment.

*Costs*

1. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that D shall pay P’s costs of the action (with all costs reserved, if any) to be taxed if not agreed with certificate for counsel.

(Marlene Ng)

District Judge

Mr John Wright instructed by Messrs Massie & Clement for the Plaintiff.

Mr Jonathan Chang instructed by Messrs K B Chau & Co for the Defendant.