DCPI 896/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 896 OF 2009

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BETWEEN

ALI RAFAQAT Plaintiff

and

WISE SECURITY LIMITED 1st Defendant

EVER SUNNY ENGINEERING 2nd Defendant

LIMITED

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Coram: Her Honour Judge Anthea Pang in Court

Dates of hearing: 18, 19, 22 February 2010

Date of judgment: 16 March 2010

**J U D G M E N T**

***Introduction***

1. This is a claim for damages for personal injuries in respect of an assault on the Plaintiff. The assault happened on 11 April 2006 while the Plaintiff was carrying out his work as a night-shift security guard on a construction site. The Plaintiff now sues Wise Security Ltd., his employer (the 1st Defendant), and Ever Sunny Engineering Ltd., the occupier of the site (the 2nd Defendant), for damages.

1. On the Plaintiff’s pleadings, his claim is about HK$1.6M. The sum exceeds the jurisdictional limit of this Court. I therefore raised this with Mr. Sakhrani, the Plaintiff’s counsel, at the beginning of the trial. Mr. Sakhrani confirms that in the event the Court found in favour of the Plaintiff, the Plaintiff would waive any amount that is over and above the jurisdictional limit of this Court.
2. Other than the Plaintiff’s claim, there is, in this action, a Contribution/Indemnity Notice filed by the 1st Defendant against the 2nd Defendant. However, when addressing the Court in her closing submissions, Ms. Pinto, counsel for both Defendants, submits that the cases for the two Defendants actually stand or fall together. In the circumstances, Ms. Pinto asks for the Notice to be withdrawn.

***The Assault***

1. The Plaintiff started working for the 1st Defendant as a security guard at the end of October 2005. There was an occasion between 15 February and 31 March 2006 when the Plaintiff did not report for work. The 1st Defendant’s case is that the Plaintiff failed to report for duty without giving any reason and he did not ask for permission to go on leave. The absence of the Plaintiff was documented in the 1st Defendant’s records. The Plaintiff’s version, however, is that he was told by the 1st Defendant that there was no work for him to do during that period but there would be work later and they would call him.
2. In any event, the Plaintiff reported for duty on 6 April 2006. The 1st Defendant continued employing him and sent him to a newly constructed wing (‘the Building’) of the Haven of Hope Hospital in Tseung Kwan O to perform night-watchman duty. The 1st Defendant’s records show that the Plaintiff worked there from 7:00 pm to 7:00 am each day thereafter until the date of the assault. There is no dispute that the Plaintiff was the only guard posted by the 1st Defendant to patrol the Building although there was another guard who was employed by the 2nd Defendant. This other guard, according to the Plaintiff, was housed inside a container office opposite the Building.
3. At about 1:00 am on 11 April 2006, while the Plaintiff was patrolling the Building and was about to enter a room on the 2nd floor in order to get the security key to insert into the clock which he carried for checking purpose, he was hit with a metal pipe (the police report referred to this as a water pipe) on his right wrist by one of two males who emerged from the room. The Plaintiff said that after the assault, he shouted immediately and he then saw the two men run away. The security guard employed by the 2nd Defendant was alerted by the Plaintiff’s shout and a report was made to the police. According to the Plaintiff, the police found a metal pipe on the floor when they attended the Building for investigation. Other than this, no property was reported to have been taken from the Building and no equipment or tool fit for taking away bulky objects was found left behind by the two intruders. These two men were never located.
4. On the evidence, it was not known for what purpose the two males entered the Building. Presumably, they entered in order to steal. They, however, did not appear to have made any noise which would have alerted the Plaintiff before he entered the room. At the time of the assault, these two males were not caught in the course of stealing nor were they restrained from leaving. According to the Plaintiff, they were simply hiding in the room. In other words, the attack took place at the very moment when the Plaintiff entered and even before the Plaintiff noticed the presence of the intruders.

***The Building***

1. The Building which the Plaintiff was required to patrol was a 5-storey building. It was a new block of a hospital. At the material time, the Building was still under construction and, therefore, the windows and doors had not all been fitted.

1. The Plaintiff told the Court that the Building was not fenced off and at night, there was no lighting on the outside of the Building. There does not appear to be much dispute concerning these claims of the Plaintiff as he was not cross-examined on these aspects and the Defendants did not assert, or adduce evidence to say, that the condition was otherwise.
2. One further feature about the Building which the Plaintiff mentioned in his evidence was that there was a “*jungle*” behind the Building. Again, there is not much dispute concerning the dense vegetation at the back of the Building which the Plaintiff described as a “*jungle*”. From the photographs submitted by the Plaintiff, one can see that there were a lot of closely-packed tall trees lining the side of the road opposite the back of the Building. The Plaintiff’s case is that this “*jungle*” increased the danger of people sneaking into the Building.

***The Negligence Pleaded***

1. The Particulars of Negligence pleaded are :
   * 1. failing to take all reasonable precautions for the safety of the Plaintiff while he was engaged upon his work by ensuring the area the Plaintiff had to patrol was safe;
     2. failing to ensure that no unauthorized person or persons could enter the site;
     3. failing to ensure that the site was properly secured and/or a fence was placed around the site and/or the open gaps on the windows or doorways were blocked off;
     4. failing to ensure that the room on the 2nd floor where the Plaintiff was required to enter during his patrol was kept locked so no unauthorized person could enter or hide there;
     5. failing to provide the Plaintiff with a torch to patrol the site;
     6. failing to ensure that the area where the Plaintiff was required to patrol was not dark and had sufficient lighting;
     7. failing to supervise properly or at all the work of its servants and/or agents and/or the Plaintiff at the site to ensure that the area where the Plaintiff had to patrol or gain access was safe;
     8. failing to ensure that there was sufficient manpower so that at least 2 security guards could patrol the site at any time; and
     9. failing to take all due care in all the circumstances.
2. These particulars are repeated in respect of the Plaintiff’s claims made under the Occupiers’ Liability Ordinance, Cap. 314, and in respect of his claims made with regard to the alleged breach by the 1st Defendant of the implied terms of the contract of employment and/or the alleged breach of the 1st Defendant’s duty of care owed to the Plaintiff as the Plaintiff’s employer.

1. In essence, the Plaintiff’s complaint is that both Defendants did not take steps to ensure that the Building was safe for the Plaintiff to work therein and that, in particular, the 1st Defendant did not carry out any risk assessment before sending the Plaintiff to work in the Building. Mr. Sakhrani submits that the situation was this : the 1st Defendant was asked by the 2nd Defendant to provide one security guard; pursuant to the request, the 1st Defendant provided one security guard and sent the Plaintiff to work in the Building. That was it and nothing more was done.
2. In respect of the 2nd Defendant, the Plaintiff says that the condition of the Building was itself an invitation to people to enter : no fencing or cordoning-off; no lighting on the exterior; the “*jungle*” at the back of the Building; the limited lighting on the staircases of the Building which was covered by scaffolding; the absence of windows and doors; and the presence of electrical equipment or construction material on the site.

***The Evidence***

1. The way in which the Plaintiff sustained his injury was set out above and there was not much cross-examination on this aspect. Also, the condition of the Building was described above and there is apparently no dispute that the Building was not fenced or cordoned off and there was no lighting on the exterior.
2. The Plaintiff complained of the poor lighting inside the Building. He said that although there was one light bulb on each staircase, not all of them were switched on. According to the Plaintiff, the other source of light was from the single large light bulb near the lift which was about 7-8 metres away from the staircases. He said the Building was dark and the light was only sufficient for him to move around. The allegation that not all the light bulbs were switched on was, however, not mentioned in his statement. Ms. Pinto submits that the Plaintiff was exaggerating the matter. The Plaintiff also said that he was not given any torch by the 1st Defendant. He therefore had to use his own torch for patrolling the Building. He said he had one with him at the material time.
3. Further, it was the Plaintiff’s evidence that there were many openings and gaps in the Building as not all the windows and doors had been fitted. He said that the room from which the two males emerged was not locked. As to the Standing Order of the 1st Defendant setting out the general duties of security personnel (‘the Order’), the Plaintiff denied that the Order was posted in the Building and denied having seen it.

1. At trial, the Plaintiff said that there were hospital machinery and rolls of wiring placed in cartons stored in the Building and that the other security guard had told him a few times that those were very expensive. The Plaintiff said that the wires were in big quantities and were kept on each floor. This evidence of the Plaintiff was subject to much cross-examination. Ms. Pinto points out that the presence of hospital machinery and the information from the other guard concerning the value of the wiring and machinery were never mentioned in the Plaintiff’s statement.
2. I should say at this juncture that I do not consider the alleged presence of valuable machinery and equipment in the Building to be of material relevance as there was no evidence that such information had been made known to others or leaked out, thereby increasing the chances of the Building being attacked by burglars/robbers. In any event, I am not convinced that valuable hospital machinery was stored in the Building at that time. It was highly unlikely that such machinery would have been delivered to the Building when construction work was still in progress; when there was still scaffolding covering the Building; when lighting was limited to that provided by the light bulbs; and when not all the windows and doors had been fitted.
3. Mr. Lee Hung Tao (‘Mr. Lee’), the managing director of the 1st Defendant, also testified at trial. Mr. Lee said that he has had 20 years’ experience in the field of security work. At any one time, the 1st Defendant provides security services to about 100 locations in Hong Kong. It is estimated that about 30-40% of these are construction sites. Mr. Lee said that prior to the assault on the Plaintiff, the security guards employed by his company have never encountered such an assault before. He regards such an assault to be rather unusual.
4. Insofar as the Building is concerned, Mr. Lee told the Court that Mr. Ng Ho Cheung, his employee, had gone over to the Building to conduct an inspection and to arrange for the setting-up of the security checkpoints. Mr. Lee, however, agreed that no general risk assessment concerning the Building was made as they had not been asked by the 2nd Defendant to do so. Mr. Lee further said that the Plaintiff should have been provided with a torch for his use as it was a standard practice. He also maintained that the Order should have been shown to the Plaintiff and posted in the Building. Mr. Lee admitted that there was no written report or written record as to what Mr. Ng did. In the circumstances, his testimony was based on his recollection of events which happened almost 4 years ago. Mr. Lee, however, maintained that if there was anything special about the Building, Mr. Ng would have told him about it but he could not remember Mr. Ng doing so.

***The Employer’s Duty of Care***

1. Mr. Sakhrani relies on the case of *Charlton v The Forrest Printing Ink Co. Ltd.* [1978] IRLR 559 to submit it is trite that an employer has a duty to take reasonable care to see that an employee is not subjected to any unnecessary risks of injury, including the risk of injury by criminals. On the facts of that case and based on the findings made by the trial judge, the Court of Appeal later allowed the appeal of the appellant company and held that no damages were payable. (see *Charlton v The Forrest Printing Ink Co. Ltd.* [1980] IRLR 331)
2. Ms. Pinto accepts that the 1st Defendant, as the Plaintiff’s employer, did owe a duty of care to the Plaintiff to take reasonable care for his safety at work. Primarily, the contention is as to whether there was “*a real risk of strangers gaining entry to the site and attacking security guards*”. Ms. Pinto submits that, in this particular case, the risk was low and therefore, there was no breach of any duty on the part of the 1st Defendant.

1. Mr. Sakhrani, on the other hand, submits that the question in the present case is this : “*was there* *a real risk of intruders entering the building at night?*” Mr. Sakhrani argues that if there was such a risk, then there was a risk that the intruders, in the course of escape, would inflict personal injuries on security personnel, and indeed anyone, inside the premises. Although there was no evidence before me, statistical or otherwise, concerning how frequent or common personal injuries which happened on construction sites were inflicted in this manner, Mr. Sakhrani asks the Court to adopt a common sense approach when examining the case. He submits that given the Building’s condition, it clearly invited unlawful entry by intruders. Once intruders entered, then criminal actions by these intruders were likely to take place. He argues, therefore, that there was a duty on the part of the Defendants to reduce this risk of harm, no matter how that harm might eventually manifest itself.

***The Risk of Injury***

1. In the course of submissions, Ms. Pinto refers to a number of Hong Kong cases which examined the risk of injury caused by a third party in the employment context : *Wong Wai Ming v Hospital Authority* [2001] 3 HKLRD 209; *Cheng Loon Yin v Secretary for Justice & Anor.*, HCPI 118/2003, unrep. (16 November 2004); and *Chan Ah Kwong v Yan Cheuk Lun & Ors.*, HCPI 287/2005, unrep. (10 August 2009).

1. Needless to say, the factual matrix in each case is different. Other than the general principles, these cases cannot be of much assistance when considering whether, in this particular case and with the set of facts before me, there was a real risk of injury and if there was such a risk, the degree of the risk.

1. As recorded earlier, Mr. Lee’s evidence was that in his 20 years’ experience in the field and with his company providing security services to about 100 locations (30-40% of these are construction sites) at any one time, he has not had any of his security guards attacked in their employments in the circumstances described by the Plaintiff.
2. Mr. Sakhrani asks the Court to examine the case with common sense and not to attach any weight to this evidence of Mr. Lee as it is not known whether those construction sites were in the same or similar condition as that of the Building.
3. Approaching the matter with common sense, I would say common sense tells us that :
   * 1. those who are minded to rob a bank, to snatch property from a person, or to enter occupied premises to steal, are prepared to use violence whereas those who sneak, at night, into a construction site, whether to steal or to idle around, may not be so prepared;
     2. generally speaking, construction sites are not the prime targets for robbers/burglars and are not where acts of violence are expected since cash, jewelleries and valuable commodities are not normally found on the sites;

* + 1. unlike the police or the armed guards, security personnel stationed on construction sites are generally not required to engage themselves in physical confrontation with intruders (this is in fact borne out by the evidence of the Plaintiff and that of Mr. Lee who both said that security guards are told to report to their employers and the police if they find anything unusual on the sites. They are not required to deal with the situation themselves); and
    2. unless intruders are discovered and then are confronted or restrained from leaving the construction sites, in the normal course of events, they would not be expected to resort to acts of violence.

Taking all these together, common sense tells us that physical struggle or confrontation with intruders is not a common feature of the work of security guards stationed on construction sites.

1. Furthermore, I consider Mr. Lee’s evidence concerning the rare occurrence of physical attack on security guards posted on construction sites to be both reliable and relevant. I accept that the conditions of these sites might be different: some might be better protected; some might not be so. However, it remains the evidence of Mr. Lee, which I accept, that in his 20 years’ experience in the field, it is a rare occurrence for security personnel to be attacked on construction sites by intruders.

1. In the circumstances, I find that the risk of intruders resorting to physical violence and attacking security personnel on construction sites is generally low.
2. I now turn to the present case. While I accept that the absence of lighting on the exterior, the absence of fencing, the presence of gaps and openings, and the allegedly poor lighting condition inside the Building might make it easier for intruders to enter, I do not consider that these would then automatically and materially change the degree of risk of injury in this case.
3. Gaining entry to a site is one thing, resorting to acts of violence is quite another. It might be correct to say that if the site was open and unprotected, it would be more likely for there to be intruders but, generally speaking, there would need to be a triggering event or factor before an intruder would resort to violence. The relevant question in this case is not whether there was a real risk of intruders entering an open and poorly lit site, but whether there was a real risk of injury on persons caused by these intruders.
4. It should also be remembered that, in this case, the Building was not a lone building in an isolated area. It was a new block of a hospital. From the photos submitted by the Plaintiff, there were other structures or buildings nearby. According to the Plaintiff, “*the existing hospital was at the back of the Building*”, so it would appear that the Building was within the precincts of the hospital complex.
5. In any event, it is not disputed that there was another guard stationed near the Building. Although the Plaintiff said that this guard was not responsible for patrolling the Building and the guard only stayed inside the container office, it was the Plaintiff’s own evidence that this guard’s office was only next to or near the Building and that, when he shouted after the assault, it was this guard who heard him and called the police for him. Therefore, on any view of the matter, this guard’s presence could not be said to be of no relevance. He in fact provided some form of support to the Plaintiff.

***The Alleged Breach of Duty***

1. Much has been said by Mr. Sakhrani in his submissions that there was no general risk assessment made by the 1st Defendant. He argues that the site inspection conducted by the 1st Defendant for the setting-up of the different checkpoints was not enough. That was for patrolling purposes, not for the protection of the Plaintiff.
2. Given my finding that, for construction sites, the risk of injuries as a result of attacks by intruders is generally small and considering the following, I do not find it unreasonable, in this case, for the 1st Defendant not to have conducted a general risk assessment :
   * 1. that the 1st Defendant’s security guards are neither instructed nor expected to engage in physical combat with intruders;
     2. that nothing like this incident has happened in Mr. Lee’s 20 years’ experience;
     3. that the Building was only a 5-storey structure;
     4. that there was another guard stationed near the Building;
     5. that the Building did not stand in isolation; and
     6. that there did not appear to have anything special which would have called for a general risk assessment.

It cannot be the case that whenever such a risk assessment was absent, then there was a breach of duty on the part of the employer. Much will depend on the facts of the case.

1. In any event, it was not the case here that the 1st Defendant simply sent the Plaintiff to work without attending the site. A site inspection was conducted in order to determine where to set up the checkpoints. The Plaintiff also admitted that he was shown around the Building by an employee of the 1st Defendant when he went to work in the Building on the first day.
2. For the reasons set out in paragraph 37 above, I do not find that the other matters pleaded, even assuming that they were proved, would amount to any breach of duty on the part of the 1st Defendant.
3. In particular, insofar as the openings of the windows and doors are concerned, one normally would not expect these openings to be boarded-up when construction work was still in progress. I can hardly see how it could be said that the 1st Defendant, putting aside the question of whether it had the power to do so, was in breach for not having these openings boarded-up.
4. I make a similar observation in respect of the alleged failure to have the temporary door of the room locked. The Plaintiff was required to go inside the room to get the security key, it would be unreasonable to ask for this room to be locked simply to cater for the remote possibility of people hiding inside the room.
5. The suggestion that there should be another security guard working together with the Plaintiff is also neither here nor there. It might well be that if there were two guards, then they could assist and support each other at work. However, it cannot be the case that when one guard were to be deployed to work alone, there would automatically be a breach of duty on the part of the employer. Again, much depends on the facts of the case. In the present case, there was another guard posted outside or near the Building where the Plaintiff was required to work.
6. In *Wong Wai Ming v Hospital Authority* [2001] 3 HKLRD 209, Keith JA said at 212G-I,

“*8. An employer is under a duty to its workforce to take reasonable care for their safety. Where one employment happens to be more dangerous than another, a greater degree of care must be taken, but where the employer cannot eliminate the risk of danger, it is required to take reasonable precautions to reduce the risk as far as possible : see Charlesworth & Percy on Negligence (9th ed.) para. 10-83. However, an employer is not required to take reasonable precautions to remove every risk which might confront its workforce. …”*

1. All in all, the Plaintiff has failed to show on a balance of probabilities that there was any breach of duty on the part of the 1st Defendant, whether under the employment contract or its common law duty of care.

***The Occupier’s Liability***

1. Insofar as occupier’s liability is concerned, Ms. Pinto relies on *Clerk & Lindsell on Torts* (19th ed.) 2006 paras. 12-03 and 12-04 to submit that the liability under the Occupiers Liability Ordinance, Cap. 314, is limited in application to dangers due to the state of the premises (occupancy duties). Section 1(1) of the Occupiers’ Liability Act 1957, which is identical in terms to section 2(1) of the Occupiers Liability Ordinance, Cap. 314, is examined in para. 12-04. The paragraph reads, “*…it now seems clear that … the specific reference to the “state of the premises” limits the effect of the Act to occupancy duties. …*”
2. Ms. Pinto further points out that the case of *Cunningham & Ors. v Reading Football Club Ltd.,* unrep., QBD (19 March 1991) relied on by Mr. Sakhrani was indeed decided on the basis of the state of the premises, that is, the poor condition of the concrete terraces of the football pitch rather than the throwing of concrete missiles by the football fans. In *Harris v Birkenhead Corporation & Anor.* [1976] 1 WLR 279, another case relied on by Mr. Sakhrani, the main complaint was also about the ruinous condition of the unsecured house, not about any activity carried out in the premises.

1. In respect of this submission of Ms. Pinto, it does not appear that Mr. Sakhrani seeks to argue otherwise for he says in his closing submissions that “*Clearly, the state of the premises rendered D2 in breach.*”
2. On the evidence before me, I am unable to find that there was any breach of duty on the part of the occupier of the Building based on the state of the premises. The injury sustained by the Plaintiff was as a result of the activity of the intruder, that is, the assault. It had nothing to do with the state of the Building. It was not the case that the Plaintiff sustained the injury as a result of any structural defect of the Building or other dangers present in the Building, say, for instance, that because of poor lighting condition, the Plaintiff tripped and fell, thereby sustaining the injury in question.

***Causation***

1. Even if there were breaches of duty by the Defendants as alleged by the Plaintiff, I do not see how these breaches could have caused or materially contributed to the injury suffered by the Plaintiff. The fencing, the exterior lighting, and the gaps and openings were all related to the access to the Building. The Plaintiff’s argument is that if preventive measures had been taken, then the assailant might not have entered and the assault might not have taken place.
2. I shall first deal with the question of entry. According to the Plaintiff, there were two intruders. It would therefore appear to be unlikely that, at the time, these two persons were simply wandering aimlessly around, but then coming by an open site and seizing the opportunity to enter. If, as it would appear to be the case, these two men already had in mind or had a plan to gain entry into the Building, then given that there were two of them, they would find a way to do so and could assist each other in doing so, for example, by acting as a look-out while the other was sneaking-in, or by pulling and pushing the other in order to gain entry. In the circumstances, whether or not the Building was fenced off and lighted on the exterior would probably not have deterred these “willed intruders”. There is, in addition, the observation which I have made earlier concerning the relatively remote causative link between the access and the eventual assault.
3. I now turn to the question of the assault. The Plaintiff was attacked by one of the intruders not when the Plaintiff tried to stop them from leaving. It was also not the case that they were caught in the course of stealing and were stopped by the Plaintiff. The attack took place immediately upon the Plaintiff entering the room where the two intruders were hiding. The Plaintiff’s evidence was that, “*I believe the men must have been hiding in the small room because as soon as I opened the door to that room I was hit with the metal pipe on my right wrist.*” If the Plaintiff’s assailant was so minded to hit the Plaintiff’s right wrist even before he was noticed and confronted by the Plaintiff; when he was unprovoked; and when the Plaintiff was outnumbered, it is difficult to see how the attack could have been avoided with better lighting. According to the Plaintiff, the intruders were already hiding in the room and the door was closed. Therefore, better lighting would not have allowed the Plaintiff to notice the intruders’ presence earlier and would not have put him on alert, thus avoiding the attack.
4. The torch also does not help. The Plaintiff said he had a torch (although he said it was his own) with him at the time, so the torch did not assist in preventing the assault.
5. Insofar as the suggested deployment of another guard is concerned, it would appear to be mere guesswork to say that the presence of another guard would have prevented the assault.

***Conclusion***

1. Although one feels much sympathy for the Plaintiff, I am not satisfied, on the balance of probabilities, that liability is proved.

***Contributory Negligence***

1. If, however, the Defendants were to be held liable for the assault, then I see nothing in the conduct of the Plaintiff which would have amounted to his own negligence contributing towards the occurrence of the assault.

***Quantum***

1. For the sake of completeness, I would now proceed to consider quantum.

*(1) The Injury*

1. The Plaintiff attended the Accident & Emergency Department of Tseung Kwan O Hospital on the day of the assault. He was given a dynacast and was discharged on the same day. As a result of the assault, the Plaintiff was granted sick leave from 11 April 2006 to 16 April 2008. CT scan of the right wrist was done on 19 May 2006. It showed a widening of the scapho-lunate (“SL”) distance and the diagnosis was SL carpal ligament injury and right thumb metacarpo-phalangeal joint (“MCPJ”) sprain injury. Splintage was applied and physiotherapy was given. The Plaintiff complained of persistent pain and arthroscopic examination was conducted. On 6 December 2006, scarring of the Plaintiff’s right thumb MCPJ with synovitis and tear of the SL ligament were found. An operation for reconstruction of the SL ligament was done on 20 March 2007 and the Plaintiff then continued his physiotherapy treatment. Repeated arthroscopic examination was done on 16 October 2007 which showed scar formation and joint arthritis of MCPJ. The work evaluation showed that the Plaintiff was capable of performing work involving reaching, handling and finger dexterity at all levels but with a below standard rate when compared with industrial standard.

1. According to the joint orthopaedic examination conducted by Dr. Lee Po Chin and Dr. Lau Hoi Kuen on 16 January 2009, the Plaintiff has residual tenderness in his right wrist and thumb with some impaired sensation in the ulnar border of the right thumb except the tip. Movements of the right thumb and right wrist were slightly limited. Both experts agree that some residual pain and stiffness may remain in the right wrist and right thumb but the Plaintiff should be able to perform mild to moderate exertion of his right hand and right thumb. Both experts also agree that it is not advisable for the Plaintiff to return to work that requires strenuous exertion with his right wrist and forceful rotation of his right forearm, but he can change to work as a security guard in a building, which is less demanding on exertion of the hands. Both experts agree that the Plaintiff’s current job as a salesman is also appropriate. While the Plaintiff was assessed by the Employees’ Compensation Assessment Board on 20 August 2008 to have suffered a loss of earning capacity of 3% because of his “*right wrist and thumb injuries resulting in stiffness, pain and numbness*”, Dr. Lee opines that, based on the residual stiffness and pain associated with the right wrist and right thumb, the impairment of the whole person is 12%. Dr. Lau’s assessment of the impairment is 6%.
2. At trial, the Plaintiff said that he still suffers pain at the base of the right thumb and when pressing against an object with the bottom of his right palm. He cannot pick up heavy objects and has to take 2 tablets of painkiller during cold weather. The right hand is his preferred hand and he cannot play cricket now as his right hand is not strong enough. In his present job with the tailor shop, he feels pain if he picks up some heavy cloth or some 3 to 4 suits.

*(2) The Part-time Job*

1. The Plaintiff’s evidence was that about 1 or 2 weeks after he had started working for the 1st Defendant, he got a part-time job as a packer. He was required to open small boxes of mobile phones to see if the goods were in good order, and after checking, he would put them into bigger cartons. The packing work was done in Chung King Mansion or Minden Avenue. The work was arranged by a person called “Moon”. He did not have any further particulars about this man and he had not been to the office of the boss. When there was work to do, his friend would phone him. He worked 4-5 hours per day and 15 days per month. He would get paid HK$200 per day in cash and he spent the money on food and rent. The Plaintiff further said that he did not bank in the money and did not get any receipt in respect of the wages he was paid. He was never asked to file a tax return concerning these wages. The Plaintiff said that he kept this part-time job until the time of the assault as he needed to send money to his parents in Pakistan and to repay a debt.
2. After careful consideration, I reject the Plaintiff’s claim that he kept such a regular part-time job as he alleged. A constant monthly income of HK$3,000 was not a small amount. As is evident from the records, the Plaintiff merely got HK$2,980 as his basic salary and rent allowance from his employment with the 1st Defendant. Only if he worked for 12 hours a day and worked everyday during the whole month could he then earn about HK$6,000. Therefore, if the Plaintiff had had this monthly sum of HK$3,000 from a regular part-time job which only required him to work for a few hours a day and for about half a month, he would have treasured it very much and would have tried to ensure that the job was given to him. To not ask for or obtain any further particulars or contact details about his boss and about the office is unbelievable. It is even more so as the boss, according to the Plaintiff, had provided the regular part-time job to him at the specified places for almost half a year (November 2005 to April 2006).
3. Further, if there had been such an employer who had a constant need to employ packers, it would appear that the business should be relatively stable and established. It is inconceivable and I do not accept that in such circumstances, the packing work of mobile phones, which should be of some value, would simply be done in the open in different places, especially when there were boxes and cartons of the goods as described by the Plaintiff.

*(3) Pain, Suffering and Loss of Amenities (PSLA)*

1. The Plaintiff was 28 years of age at the time of the assault. He is now 32.
2. Mr. Sakhrani submits that an award of HK$300,000 under this head is appropriate. Ms. Pinto, on the other hand, submits that HK$220,000 would be the appropriate amount. My attention is drawn to these cases : *Yip Mau Leung v University of Hong Hong* [2000] 3 HKLRD 198; *Tang Shu Shek v Leung Chi Kit & Anor.*, unrep., HCPI 219/2002 (13 May 2004); *Ngai Lung Hing v Gowin Engineering Co. Ltd. & Anor.*, unrep., HCPI 211/2005 (7 August 2006); *Tang Bo Ling v Chan Po*, unrep., DCPI 79/2007 (20 August 2008); and *Chan Shek v Milkway Image (HK) Ltd.*, unrep., HCPI 295/2006 (6 October 2009).
3. Having considered the cases and the Plaintiff’s condition as well as the other relevant matters, I am of the view that a sum of HK$250,000 should be an appropriate award under this head of claim for PSLA.

*(4) Loss of Earnings*

*Pre-Trial Loss*

1. As I have rejected the Plaintiff’s claim concerning the alleged part-time job, the said sum of HK$3,000 will therefore not be included in the calculation of his loss of monthly earnings. Based on the documents provided by the 1st Defendant and the Plaintiff, the Plaintiff earned, on average, HK$6,341 per month between November 2005 and March 2006 (HK$6,140 + HK$6,216 + HK$7,200 + HK$2995 + HK$5985 / 4.5 months). The Plaintiff admitted taking a holiday without pay of about 2 months in Pakistan every year, so the Plaintiff’s average monthly earnings at the time of the accident have to be further adjusted : HK$6,341 x 10/12 = HK$5,284.
2. During the sick leave period (11 April 2006 to 30 April 2008), the Plaintiff suffered a total loss of income of HK$5,284 x 24.7 months = HK$130,515.
3. After his sick leave expired on 30 April 2008, the Plaintiff started working in his present employment on 1 May 2008 with a monthly salary of HK$6,175. From January 2009 onwards, his monthly income has gone up to HK$6,650. The Plaintiff said in his statement that if not because of the injury, he would have resumed working as a security guard, earning about HK$7,000 per month. This figure was not challenged but his annual absence of 2 months has not yet been taken into account. After adjustment, the Plaintiff would probably be earning an average monthly income of HK$5,833 (HK$7,000 x 10/12) if he were to resume working as a security guard after his sick leave.
4. As at the date of the hearing, the loss of earnings for the post sick-leave period (1 May 2008 to 18 February 2010) should therefore be : [HK$5,833 – (HK$6,175 x 10/12)] x 8 months + [HK$5,833 – (HK$6,650 x 10/12)] x 13.7 months = HK$5,504 + HK$4,000 = HK$9,504.

*Future Loss of Earnings*

1. The Plaintiff is now aged 32. I agree that a multiplier of 15 is appropriate : (HK$7,000 – HK$6,650) x 10 months x 15 = HK$52,500.

*(5) Loss of Provident Fund*

1. This should be calculated at 5% of the lost earnings :

(HK$130,515 + HK$9,504 + HK$52,500) x 5% = HK$9,626

*(6) Loss of Earning Capacity*

1. On the evidence before me, it would appear that the Plaintiff did not have any difficulty in finding an employment. He started his current job immediately after he has finished his sick leave. At the date of the trial, he has been in the same job for more than 21 months and has been given a pay rise after only 8 months’ service. The Plaintiff took leave in August and September 2009 and went back to Pakistan. When he returned to Hong Kong, he was able to resume working for the same company as a salesman and was given the same salary.

1. Considering all the relevant matters, including but not limited to the Plaintiff’s age and qualifications, the employment he has with his current employer, the range of work he is found by the experts to be able to undertake, the medical condition of his right thumb and right wrist as well as the residual disabilities, I am not persuaded to make an award under this head. On balance, I do not consider that there is any substantial or real risk that the Plaintiff, at some future date during his working life, would lose his employment and would suffer financial loss because of his disadvantage in the labour market.

*(7) Special Damages*

1. This is agreed at HK$5,034.

*(8) Future Medical Expenses*

1. In respect of further medical treatment, the joint orthopaedic report reads, “*We agree that Mr. Ali’s condition is stable. ... However, the scapho-lunate instability may worsen with time and Mr. Ali may have on-and-off right wrist pain and may require surgery in future if he continues to work in jobs of strenuous nature. If pain becomes worse, fusion of the proximal carpal row may be required.*” (emphasis added)

1. The medical opinion is not definite as to the need for further surgery. In particular, it is noted that the surgery may be required if the Plaintiff continues to work in jobs of strenuous nature. On the evidence before me, the Plaintiff has switched to work as a salesman which is not a very strenuous job. As such, the possibility of the Plaintiff requiring further surgery should be low and, therefore, I am not prepared to allow any sum under this head.

*Summary*

1. The damages awarded would have been as follows if liability had been proved :

(1) PSLA HK$ 250,000

(2) Loss of earnings : pre-trial loss HK$ 140,019

(3) Loss of earnings : future loss HK$ 52,500

(4) Loss of MPF HK$ 9,626

(5) Special Damages HK$ 5,034

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Total: HK$ 457,179

1. Interest should be allowed at 2% per annum on general damages from the date of the writ to the date of judgment and at half of the judgment rate on special damages from the date of the assault to the date of judgment.
2. Since employees’ compensation in the sum of HK$220,915.43 has been given to the Plaintiff, this should be deducted from the awards made.

***Order***

1. The claim is dismissed with costs to the 1st and the 2nd Defendants, to be taxed if not agreed, with certificate for counsel. The Plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations. In the absence of an application to vary the order within 14 days from the date of this judgment, the costs order nisi shall become absolute.

(Anthea Pang)

District Judge

Mr. Ashok Sakhrani, instructed by Messrs. Lo, Wong & Tsui, for the Plaintiff

Ms. Josephine Pinto, instructed by Hastings & Co., for the Defendants