DCPI 1585/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1585 OF 2011

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BETWEEN

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| --- | --- |
| POON CHING MAN | Plaintiff |
| and |  |
| LAM HOI PUN | Defendant |

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Before: Deputy District Judge Winnie Tsui in Court

Dates of Hearing: 24-26, 29-30 September 2014 and 3, 6, 8 and 10 October 2014

Date of Judgment: 11 November 2014

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J U D G M E N T

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*INTRODUCTION*

1. This is a personal injuries action arising out of an accident which took place on 17 March 2009 in a car park of an industrial building in Fo Tan.
2. The accident happened when the plaintiff was unloading a container filled with goods (“the Goods”) from a medium goods vehicle (“the Vehicle”) by using a hand pallet truck. When he was pulling out the hand pallet truck loaded with the Goods from the compartment of the Vehicle on to its tailboard, he fell down from the tailboard on to the ground.
3. He sustained injuries to his right knee. At the trial, he also complained about occasional pain in his left knee and back pain.

*THE PARTIES*

1. At the time of the accident, the plaintiff was 35 years old and was married with 2 children.
2. It is the plaintiff’s case that he was at that time employed by the defendant to work as a driver-cum-transportation worker.
3. On the other hand, it is the defendant’s case that at the time of the accident the plaintiff was not his employee. Instead, the plaintiff, the defendant and two other individuals, namely Mr Sham Sheung Lun (“Mr Sham”) and Mr Cheng Yi Yuen, were partners and ran a transportation business together. Under the partnership arrangement, the defendant would share 40% of the profits and each of the three other partners would share 20%.

*THE ACCIDENT*

1. The accident happened on 17 March 2009 at about 6.30 pm. The plaintiff had earlier picked up the Goods from a warehouse using the Vehicle. He returned to the car park of the Fo Tan office and was assisted by Mr Sham in unloading the Goods from the Vehicle.
2. The plaintiff’s evidence was that Mr Sham was standing on the ground at the back of the Vehicle and on its nearside operating the tailboard by a pneumatic button. Mr Sham lowered the tailboard to the compartment level. The plaintiff then pulled out the hand pallet truck loaded with the Goods from the compartment in a straight line motion. At that time, he was standing in front of the Goods facing the compartment.
3. It is not disputed that the Goods were heavy and sizable. The container measured 129 cm by 115 cm by 217 cm in size and the Goods weighed about 480 kg.
4. When a big part of the hand pallet truck had left the compartment, the plaintiff tried to align it properly and squarely on the tailboard by pulling it out in a slow zigzag motion.
5. Just as the whole of the hand pallet truck had left the compartment floor and completely entered the tailboard, the plaintiff stepped to the right side of the hand pallet truck (ie, the Vehicle’s offside) and continued to align the Goods in the same slow zigzag motion, with his left foot being placed in front of the hand pallet truck. It was at that moment that the tailboard suddenly tilted downwards. The tilting caused the hand pallet truck together with the Goods to skid towards the outer edge of the tailboard. The plaintiff’s left foot got trapped by the truck at the edge. He lost balance and fell to the ground. His right leg hit the ground first and then bounced upwards since his left foot was still trapped by the truck and his hands were holding on to the handle bar of the truck.
6. Mr Sham immediately lowered the tailboard to the ground level and only then was the plaintiff’s left foot released.
7. It was further the plaintiff’s evidence that in the normal course of things, if the tailboard had not unexpectedly tilted, once he had aligned the truck properly and squarely within the tailboard, he would have taken the usual precautionary step of lowering the hand pallet truck to touch the ground and turning the handle bar at a right angle to the Goods. This would have the effect of avoiding the truck from slipping or skidding. This was referred to in evidence as “落唧”, which I shall simply refer to in this judgment as “lowering the truck”. But when the accident happened, there was just no time for him to lower the truck because of the sudden and unexpected tilting of the tailboard.
8. After the accident, the plaintiff was accompanied by Mr Lam Ching Pun, the defendant’s brother, to seek medical treatment at the A&E department of Prince of Wales Hospital. He was admitted to the orthopaedic ward on the same day. I shall return to his injuries and medical treatment in more detail below.
9. On the other hand, the defendant’s case is, first, that there was no tilting of the tailboard as alleged by the plaintiff, and, secondly, the accident might have occurred because the plaintiff was not moving the Goods in a proper way and the plaintiff might have adopted an improper method known as “飛唧”, which I shall simply refer to as “the Improper Method” in this judgment.
10. The Improper Method works as follows. For convenience, instead of placing the hand pallet truck properly within the tailboard and lowering the truck before lowering the tailboard, sometimes, a transportation worker would move the hand pallet truck towards the outer edge of a tailboard with its wheel slightly overshooting the edge and would leave it there while the tailboard is being lowered to the ground floor. That way, when lowered, the worker can then straightaway slide off the hand pallet truck to the floor. This saves the time of lowering the truck. It is not disputed that it is not a safe way to move goods as there is a risk of the hand pallet truck skidding or sliding out of control of the worker.

*THE PLAINTIFF’S CAUSES OF ACTION*

1. The plaintiff relies on the following causes of action:
   1. negligence;
   2. breach of statutory duty under the Occupational Safety and Health Ordinance, Cap 509; and/or
   3. breach of common duty of care under the Occupiers Liability Ordinance, Cap 314, on the common ground that the defendant was the owner of the Vehicle.
2. In gist, the plaintiff says that the tailboard tilted because it was not functioning properly due to lack of maintenance. I should record that in addition to this complaint, the Statement of Claim also contains an extensive list of further grounds of negligence, including, for instance, failure to provide suitable equipment and failure to provide sufficient instructions to the plaintiff as to how to perform his duty etc.
3. However, in her closing submissions, Ms Vivian Chih, counsel for the plaintiff, confirmed that it is the plaintiff’s position that if, at the time of the accident, the tailboard was functioning properly according to its specifications, ie, it was not faulty, it would have sufficient capacity to support the Goods. Further it is common ground that if the plaintiff in fact unloaded the Goods in the way which he now describes, it would be a safe method. Accordingly, I consider that the issue of liability does not turn on such grounds of negligence as relating to safe system of work, proper instructions or the like as pleaded. Hence it would not be necessary for me to deal with the evidence which both parties adduced at trial in this regard.

*ISSUES ON LIABILITY*

1. Having set out the parties’ respective cases, I identify below the issues which need to be determined in respect of liability:
   1. At the time of the accident, was the plaintiff an employee of the defendant or his partner?
   2. Did the accident happen in the way as alleged by the plaintiff? In particular, did the tailboard tilt as alleged?
   3. If the court accepts the plaintiff’s version of the accident, was the defendant negligent in causing the accident?
2. Ms Chih submitted that if the court finds that the relationship was one of employment and the accident happened as the plaintiff now describes, then the defendant owed a duty of care to the plaintiff and he failed in discharging that duty and should be held liable.

*EMPLOYEE OR PARTNER?*

1. The plaintiff’s case is that he became an employee of the defendant in about February 2008.
2. It is common ground that the plaintiff and the defendant had known each other since primary school and had been very good friends. Prior to working with the defendant, the plaintiff had had over 10 years’ working experience in the field of transportation. He had once run his own transportation business but it did not work out. Having found out about this, the defendant invited the plaintiff to work with him. There was no employment contract signed. No employees’ insurance was taken out and no MPF was put in place. The plaintiff explained that since they were good friends, he did not mind so long as he was paid his salary at the market rate which was $12,000 a month.
3. In his job, the plaintiff would transport goods to various locations in Hong Kong. His job would involve driving the Vehicle and sometimes another vehicle owned by the defendant to pick up the goods and manually loading and unloading the goods at designated locations.
4. The defendant’s brother, Mr Lam Ching Pun, was involved in a logistics business which was operated by a company called PLT Logistics (HK) Limited (“PLT”). The defendant would get orders from PLT for transporting goods. PLT’s office was located at the industrial building in question. The defendant made use of that office to run his transportation business.
5. The plaintiff gave evidence that during the earlier months of the employment, he received discretionary bonuses ranging from $1,000 to $3,000 a month when he had worked late at night helping to unpack goods. He would pay for petrol, toll fees, tunnel fees and warehouse registration fees as and when they arose but would get reimbursement from the defendant on a monthly basis.
6. Copies of cheques drawn by the defendant and paid to the plaintiff from April 2008 to May 2009 were produced as evidence at trial. The amounts of the cheques varied from month to month and ranged from $13,336 to $24,389 and the cheques were usually dated at the beginning of a month (not counting the cheque drawn in May 2009 which was issued after the accident). In examination-in-chief, the plaintiff confirmed that these monthly payments each comprised the basic salary of $12,000, the discretionary bonus (if applicable) and reimbursement of expenses for the preceding month.
7. His evidence was further that he did not have to contribute any capital into the defendant’s business and that he did not share any profits or loss. He was never shown any business or financial accounts or reports of the business. All the tools and equipment, eg, the Vehicle and the hand pallet truck, were owned and provided by the defendant.
8. He did not have any right to control or decide on the timing, procedure or manner of work. He did not have the right to hire any worker to assist him in his job. He needed to take instructions from the defendant and the staff of PLT. When he attended the office in the morning, he would get orders for the day. While he was working outside, he would also receive orders from the office by phone. He said that he had no right to reject orders and he had never done so.
9. Mr Sham, who gave evidence for the plaintiff, said that at the time of the accident, he was also an employee of the defendant. He had known the defendant from his previous job working as a shipping clerk at a trading company, who was a customer of the defendant’s. After he left the trading company, the defendant asked him whether he would be interested in working as a driver and transportation worker. Since he did not have a job at that time, he started to work for the defendant and that was in July 2007. He was paid a salary of $7,000 for the first month and from the second month onwards, his salary was increased to $9,000. During his employment, he also received discretionary bonus for some of the months and the most he got for a month was $11,000 (inclusive of salary and bonus).
10. Similar to the plaintiff, there was no written employment contract in place. No employees’ insurance was taken out and no MPF was arranged. Mr Sham said that he did not mind at that time as the important thing to him was that he would at least receive the basic salary of $9,000. He generally echoed the plaintiff’s evidence as set out in paragraphs 28 and 29 above.
11. On the other hand, as I mentioned above, the defendant’s case is that at the time of the accident, the four of them, namely, the defendant, the plaintiff, Mr Sham and Mr Cheng Yi Yuen, were partners in the business. As far as the plaintiff and Mr Sham were concerned, each month after paying them their fixed salary, the defendant would also pay them their share of the profits of that month, namely, 20% each. And that accounted for the varying amounts paid to the plaintiff each month, as shown by the cheques.
12. When asked in cross-examination whether the plaintiff and Mr Sham had ever had to bear any loss, the defendant replied that they never had to because the business had never lost money while the plaintiff and Mr Sham were partners.
13. The defendant was not able to produce any accounts relating to the partnership. He said that he usually threw his records away after two or three months if all the payments had been settled.
14. In examination-in-chief, the defendant confirmed that at that time PLT was their major customer, accounting for about 80% of their orders, with the rest of the orders coming from other sources.

*Findings of fact*

1. In my view, it is inherently improbable that the defendant would be willing to share profits with the plaintiff and Mr Sham. It was the defendant who put up all the capital investments, including vehicles, equipment and tool and the associated repair and maintenance costs. More importantly, it was no doubt by reason of the defendant’s relationship with PLT that it received substantial amount of orders from PLT. It certainly begs the question of why the defendant would be so ready to share these valuable business assets with the plaintiff and Mr Sham.
2. Furthermore, in the case of Mr Sham, given that before he joined, he was just a business acquaintance of the defendant and had no experience in transportation (admitted by the defendant), it is quite inconceivable why the defendant would be willing to share profits with him, when he could just pay him a modest monthly salary to hire his service.
3. I therefore accept the evidence of the plaintiff and Mr Sham on this issue, as set out in paragraphs 23 to 31 above and reject the defendant’s. Accordingly I find as a fact that the monthly payments received by the plaintiff during the period from April 2008 to April 2009 comprised a fixed salary of $12,000, discretionary bonus (only applicable during those months when he did overtime work) and reimbursement of out-of-pocket expenses and that there was no sharing of profits as alleged by the defendant.
4. Based on my factual findings above and applying the principle laid down by the Court of Final Appeal in *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951 at 961A-F, it is clear in my view that at the time of the accident, the plaintiff was an employee of the defendant. Notwithstanding the absence of any MPF arrangement and insurance cover, all the other indicia, including the degree of control, the prospect of profit or risk of loss and the provision of equipment, all point overwhelmingly to the relationship of employment and I so hold.

*HOW DID THE ACCIDENT HAPPEN?*

1. I have set out the plaintiff’s evidence on how the accident unfolded in paragraphs 7 to 13 above. There were 2 eye witnesses present at the scene, namely, Mr Sham and a Mr Ha Yuk Wah (“Mr Ha”). At trial, they gave evidence for the plaintiff and the defendant respectively.

*Eye witnesses’ accounts*

1. Mr Sham gave a very detailed account of what he saw and, perhaps more importantly, what he did not see when the accident took place.
2. In examination-in-chief, he confirmed that he was standing on the nearside of the Vehicle and just beside the tailboard where it adjoined the compartment. He was there to lower the tailboard to the compartment level. In accordance with the usual practice, after the tailboard was lowered, he adjusted the angle of the tailboard so that its outer edge tilted slightly upwards. The purpose was to prevent the goods on the tailboard from sliding out of the tailboard.
3. He also confirmed that after the plaintiff started to pull out the Goods from the compartment, his view was blocked by the Goods and he could not see the plaintiff from where he stood. He observed that the Goods were first pulled out in a straight line motion and later in a zigzag motion. He was paying attention to whether the hand pallet truck had completely been moved to the tailboard as only after that could he start to lower the tailboard to the ground level.
4. Mr Sham said that after the whole of the hand pallet truck had entered on the tailboard, the hand pallet truck did not stop at the place where it should have. Instead, the truck started to skid towards the outer edge of the tailboard at a high speed. He was curious as to why the Goods did not stop at the right place and he took a few steps forward and saw that the plaintiff was falling from the tailboard, with one of his feet trapped under the hand pallet truck. His other foot then struck the ground floor but then bounced up. All that time, the plaintiff was holding on to the handle bar of the hand pallet truck. Mr Sham believed that there was only a one second’s interval from the time the Goods skidded to the time the plaintiff fell.
5. It is immediately noteworthy that in his detailed account of the accident, he did not mention that he saw any tilting or movement of the tailboard. Later on, he was asked whether after the accident, the plaintiff told him why he got hurt. Mr Sham said that the plaintiff mentioned to him that the tailboard “tilted once” but he could not remember whether this conversation took place at the car park or when the plaintiff was discharged from the hospital.
6. During cross-examination, he was asked about the plaintiff’s reference to the tailboard “tilting once”. Mr Sham said he could not explain what exactly the plaintiff meant. He was then specifically asked whether he did at any time see the tailboard tilt. His answer was that he had not seen anything “strange” with the tailboard. Then, later on, he was asked to look at the paragraph in his witness statement in which he described how the plaintiff fell. There he said that it was his *guess* that since the Goods were too heavy, the tailboard *tilted* and the Goods and the hand pallet truck together skidded. Not surprisingly, he was pressed by Ms Candy Tang, the defendant’s counsel, to clarify the apparent inconsistency between his written statement and oral evidence on this point. In the end, he replied that he had not seen that the tailboard had tilted at any time during the accident. He agreed also that there was no basis for him to make the guess as he did in his witness statement.
7. The other eye witness was Mr Ha. At the time of the accident, he was a caretaker working at the car park. He was on duty that day. According to his witness statement, he saw that the plaintiff was standing near the outer edge of the tailboard, and then all of a sudden, the plaintiff jumped down from the tailboard. He could see that the tailboard was level with the compartment floor and he noticed that the tailboard did not move at all during that interval of time. The hand pallet truck with the Goods loaded on it was on the tailboard but overshot the outer edge with the wheel hanging in the air.
8. In cross-examination, Mr Ha confirmed that when the accident happened, he was standing at a distance of about 10 metres from the Vehicle and the plaintiff was standing on the tailboard (before he fell) with his back facing him.

*After the accident*

1. The next piece of evidence which I consider to be relevant relates to what the plaintiff said to Mr Sham, Mr Lam Ching Pun and the defendant in relation to the accident.
2. When asked in cross-examination whether he told Mr Lam Ching Pun who accompanied him to the hospital how the accident happened, the plaintiff’s response was he was in great pain – he did not directly answer that question. Counsel for the defendant then asked the plaintiff whether he had told the defendant about the tilting of the tailboard. His answer was that, according to his recollection, he had not. He was further asked to confirm that he in fact did not mention the tilting at all until he first notified the Labour Department of the accident in October 2010, ie, one and a half years after the accident. The plaintiff said he could not remember because of the lapse of time.
3. He also confirmed that after he resumed work, he recalled that he did use the Vehicle and the tailboard in his job but he could not recall whether he transported heavy goods using the Vehicle.
4. He was then asked about whether the Vehicle was checked or repaired after the accident. I set out below the questions and answers, which are my translation of the evidence taken in Chinese:

Q: Did you ask the defendant whether he had checked and repaired the tailboard?

A: I believe that the defendant should have already asked Mr Sham. I did not ask him myself. Because I believe that he knew – he should have known.

Q: What about repair?

A: The Vehicle was not mine. It was his.

Q: Weren’t you worried about accident?

A: I believe that after my accident, someone would have fixed it.

Q: Did you try to find out?

A: When I returned to work, it was already three months after the accident. They must have used the Vehicle during that time.

Q: Was the tailboard repaired or not?

A: I really don’t know.

*Findings*

1. I do not believe the plaintiff’s version of the accident. In my view, two matters are of critical importance: first, Mr Sham’s evidence that he himself did not see any tilting of the tailboard; second, the plaintiff’s failure to mention the tilting to the defendant afterwards.
2. If the tailboard had tilted as alleged by the plaintiff, Mr Sham should have seen it clearly for the following reasons:
   1. He was standing right next to the tailboard.
   2. He was paying attention to the movement of the Goods as once they left the compartment floor completely, he should then lower the tailboard.
   3. If the tailboard had tilted in such a way as to cause the Goods and the hand pallet truck to skid forward at a great speed, the tilting should have been obviously noticeable, even though Mr Sham was standing nearer to the compartment than the outer edge of the tailboard.
   4. It should also be borne in mind that any tilting should not have escaped his notice, since he had specifically adjusted the angle of the tailboard to make it tilt slightly upwards at the outset.
   5. Yet Mr Sham’s evidence was that he did not see any tilting.
   6. Further, if the tailboard had tilted, the Goods would have tilted at the same time. But all Mr Sham noticed was that the Goods started to skid towards the outer edge of the tailboard at a high speed and he did not mention any tilting of the Goods either.
3. In my view, the fact that Mr Sham did not see any tilting at all goes to contradict the plaintiff’s case in this respect since Mr Sham had an undoubtedly clear view of the Goods and the tailboard and he was paying attention to them at that time. He did not see the alleged tilting when he should have had it really happened. It is strong evidence that the tailboard had not tilted as alleged.
4. Next, I consider that the fact that the plaintiff did not inform the defendant of the tilting as highly relevant.
5. In my view, it seems that the plaintiff was not keen at all to even raise the issue of the safety of the tailboard with the defendant. If the accident had indeed happened as the plaintiff now describes, his attitude would seem inconsistent with inherent probabilities in the circumstances:
   1. In the normal course of things, the tailboard would not tilt when goods were placed on it. The tilting which the plaintiff alleged happened would be highly unusual.
   2. It would point strongly to there being something wrong with the tailboard which made it unsafe for anyone to use. The plaintiff himself was hurt while using it.
   3. It would be in every interest of the plaintiff to see to it that the tailboard was checked and if appropriate repaired since the defendant, with whom he was then still on good terms, would use it or would ask other people to use it. In fact, the plaintiff himself continued to use it after he resumed work. This is not to say that he had a duty to ensure that the tailboard was safe for use. But it seems inherently improbable that he took no interest at all in checking that it was good for use. One would have expected that at least for his own sake, especially after what happened to him, he would have been concerned with its safety.
   4. According to his own evidence, the plaintiff seemed to have told only Mr Sham about the tilting of the tailboard, and no one else. Mr Sham was arguably more junior than him in the defendant’s business. It seems odd that the plaintiff did not take this issue up with the defendant directly.
6. For the above reasons, I do not consider that the plaintiff’s version of event as regards the accident is credible. And I further find that the tailboard did not tilt as alleged by the plaintiff.

*Other evidence*

1. Before leaving this topic, I should deal with three more matters for the sake of completeness:
   1. Mr Ha’s evidence;
   2. the defendant’s suggestion that the plaintiff might have used the Improper Method in moving the Goods; and
   3. questions from both counsel on the movement of the Goods and the hand pallet truck.
2. I shall first deal with Mr Ha’s evidence. I do not consider that any weight should or can be given to his recollection of the event for two reasons.
3. First, I note that Mr Ha’s account of the events was far from consistent. For instance, early on in his evidence, he said twice that when the plaintiff fell, he *immediately* “sat” on the floor. Later on, he told the court that when he fell, his leg touched the ground first and then he sat down. Mr Ha also displayed a tendency to say what he thought should have happened rather than what he actually saw happen. To that extent, his evidence cannot be safely relied upon.
4. Secondly, and more importantly, Mr Ha was quite far away from the Vehicle when the accident happened. I think it is simply unrealistic to expect him to be able to observe whether the tailboard did tilt or not during that short interval of time from where he stood. I do not think that the defendant can rely on Mr Ha’s evidence to make good the point that there was no tilting of the tailboard just before the plaintiff fell.
5. Next, I turn to the allegation regarding the Improper Method. During the plaintiff’s cross-examination, the defendant’s counsel put to him that he was trying to use the Improper Method to move the Goods. The suggestion was that he somehow lost control and that was the reason the Goods skidded towards him and caused him to fall. The plaintiff denied that he had done so. Mr Sham also said that given the way the Goods were moving, he did not believe that to be the case either. In my view, there is no adequate evidence based on which I can make the finding that the plaintiff adopted the Improper Method.
6. Lastly, I should point out that a considerable amount of time was spent by both counsel at trial on asking the witnesses questions relating to the movement of the Goods and the hand pallet truck. The questions related to, for instance, the positions of the handle bar or the wheel of the hand pallet truck, the angle at which the handle bar was placed against the Goods, where exactly the plaintiff stood and placed his left foot (the one which was trapped) at different points of time. These questions went into minute detail and were apparently asked with a view to demonstrating that what the plaintiff said had happened was or was not physically possible or probable, depending on which counsel was asking the question.
7. It should be borne in mind that the accident happened very quickly. Both the plaintiff and Mr Sham said that it was only a matter of one second between the time when the plaintiff finished pulling the Goods in a zigzag motion and the time when the plaintiff fell down. I think it is just not feasible to have that one second of event be effectively re-played in slow motion (in words and diagrams) so that the court could then examine critically whether it is more likely than not that a certain position or movement did happen or not. It would be sufficient for me to say that there is nothing in the evidence to suggest that either the plaintiff’s version or the defendant’s version (namely the Improper Method) is physically impossible in theory. It is simply that in my judgment neither has been able to prove his version to the required standard.

*Decision on liability*

1. The plaintiff’s case rests on the finding of the tilting of the tailboard. In her closing submissions, Ms Chih stated (at paragraph 30):

“Liability of D must rest on the finding of the cause for the accident. It is submitted that so far there was **only one positive proposition for the cause of the accident** being proffered by the parties to the Honourable Court i.e. P’s proposition that the accident was caused entirely by the **sudden tilting of the tailboard**.” (original emphasis)

1. In the circumstances, as I find that there was no tilting of the tailboard, the plaintiff has not established liability against the defendant for the accident.

*The tailboard*

1. In view of the basis of the plaintiff’s claim and my finding as set out above, it is not necessary for me to deal with the issue of whether the tailboard was faulty due to lack of maintenance. But since the issue of maintenance was hotly debated at trial, solely for the sake of completeness, I shall state my conclusion on it.
2. The defendant relies on the fact that the Vehicle passed the government’s annual inspection just the day before the accident to substantiate its allegation that the tailboard was fit to use. Further, the defendant gave evidence that he had kept the tailboard under proper maintenance on a regular basis. On the other hand, the plaintiff says that the tailboard was not individually checked for the purpose of the government inspection, relying on the evidence of Mr Lai Wing Hong, a garage technician, and that the defendant’s evidence on maintenance was a lie since that evidence was directly contrary to his answer given to an earlier interrogatory to the effect that the tailboard had not been maintained since 2004.
3. If the tailboard had tilted in the way as alleged by the plaintiff, I would have drawn the inference from this fact *alone* that there was something defective with the tailboard and the defendant would have been liable for it. (To this extent, I agree with the plaintiff’s submission that the doctrine of *res ipsa loquitur* would have come into play.)
4. I would also point out that I do not give any weight to Mr Lai’s evidence. While he was called to give evidence as a factual witness, his evidence was in substance expert evidence. On the other hand, I would have agreed with the plaintiff’s submission that the defendant’s evidence on maintenance was an afterthought made up when he realised that the issue might become an important one on liability.

*CONTRIBUTORY NEGLIGENCE*

1. Having found against the plaintiff on liability, his claim stands to be dismissed and it is strictly unnecessary to deal with the issue of contributory negligence and the quantum of the claim. However, in case I am wrong on the issue of liability, I briefly set out below my views on contributory negligence and the various heads of damages claimed.
2. If I had accepted the plaintiff’s case, I would not have found that there was any contributory negligence on his part. The defendant’s case is that the plaintiff should have lowered the truck or should not have placed his left foot in front of the truck. I would have considered that there was no time for the plaintiff to lower the truck or step back on the basis that the tailboard tilted suddenly and unexpectedly and it would have been unrealistic to require the plaintiff to be able to do anything within that one second’s interval of time.

*QUANTUM*

1. The amounts of a number of heads of damages claimed by the plaintiff are in dispute. I take the amount claimed under each head from the plaintiff’s opening submissions.

*Injuries and treatment*

1. According to the report of the treating doctor at Prince of Wales Hospital, physical examination revealed swelling of his right knee, tenderness over lateral femoral condyle and medial joint line and suspected anterior cruciate ligament injury.
2. On 24 March 2009, the plaintiff had a private MRI which showed depressed fracture of right lateral tibial plateau and lateral meniscal tear. Cruciate ligament, collateral ligament and the medial meniscus were normal.
3. The plaintiff was re-admitted to Prince of Wales Hospital on 30 March 2009. On 2 April 2009, he underwent the following surgery: (a) arthroscopic guided partial menisectomy of lateral meniscus; (b) closed reduction; (c) bone substitute insertion; and (d) internal fixation of right lateral tibial plateau fracture.
4. He was hospitalised for 11 days in total.
5. X-ray taken on 22 April 2009 showed satisfactory alignment of the plaintiff’s fracture.
6. He was kept for non-weight bearing walking for 3 weeks and then partial weight bearing walking. The plaintiff claims that he wore a brace for about 6 months.
7. Dr Fu Wai Kee, an orthopaedic specialist appointed jointly by the parties, made a single joint medical report dated 5 December 2011. His diagnosis was that the clinical picture of the plaintiff is compatible with fracture of right lateral tibial plateau and fibula head with lateral meniscal tear and that there is no abnormality with the left knee.
8. I set out below his major findings:
   1. The weakness and pain in his right knee will persist.
   2. He will have on and off pain which will require treatment on a need to basis.
   3. He will have difficulty in stair walking and performing tasks of heavy manual lifting. But he should have no difficulty in driving. He should therefore shift to light duties, eg, working as a driver without weight lifting.
   4. A continuous sick leave period from 17 March to 17 July 2009 would be appropriate.
9. Dr Fu was not called upon to give evidence. Accordingly, his findings as set out in the joint medical report remain unchallenged and I accept those findings. I therefore find that as a result of his injuries, the plaintiff is not able to engage in manual heavy lifting work. However, he is able to continue working as a driver.
10. Based on the diagnosis and the findings of Dr Fu, I reject the defendant’s evidence to the effect that the plaintiff was seen to be able to go about his daily activities normally and lift heavy objects (as alleged in the evidence given by a Mr Cheung Chi Leung, one of the defendant’s witnesses). I accept the plaintiff’s contrary evidence in this regard.

*Post-accident working history*

1. After the accident, the plaintiff took sick leave for about 4 months and returned to work in about August 2009. However, he says that he was unable to cope with the work demand as he could not move heavy goods as a result of his injuries. Although he was assisted by Mr Cheng Ying Shing (who gave evidence for the defendant) in lifting heavy objects, he felt that he could not rely on this assistance indefinitely and thus he quit in about February 2010.
2. It should be noted at this juncture that in about May 2009, ie, shortly after the accident and while the plaintiff was still on sick leave, he was transferred to work as an employee of Pacific Transportation (HK) Limited (“PTL”). He received a sum of $18,000 for May and then a monthly sum of $10,830 from June 2009 onwards. According to the MPF statements, PTL and the plaintiff each made a MPF contribution of $570 each month. Hence it can be worked out that PTL in effect employed the plaintiff at a monthly salary of $11,400. The defendant and Mr Lam Ching Pun were two of the shareholders and directors of PTL.
3. There is a dispute as to what was said between the plaintiff and PTL when he tendered his resignation. The defendant’s case is that the plaintiff said he had found other opportunity and would therefore want to leave. Mr Lam Ching Pun gave evidence to that effect. The defendant’s case is further that if the plaintiff had frankly told him about his concerns, he would have been more than happy to retain him at the same salary and relieve him from manual lifting works.
4. The plaintiff commenced working as a casual driver in June 2010. Since then, the plaintiff says he has been earning about $9,974 per month. This would represent a shortfall of about $2,000 a month when compared with his pre-accident monthly salary of $12,000.
5. In her opening submissions, Ms Chih accepted that a person who works as a casual driver working on referrals from call centres earns about $15,000 to $20,000 a month but that is on the basis that the driver would also engage in moving heavy goods. Due to the disability of the plaintiff, he can only take those orders which do not involve manual lifting and which he estimated account for about 30% of the orders. Hence he is suffering from a loss of $5,250 (ie, $17,500 [this being the half way figure of the range of earning] x 30%).
6. Ms Chih made clear in her submissions that the plaintiff would only claim $2,000 a month as representing his loss of earnings.
7. On the other hand, the defendant’s position is that the plaintiff should have mitigated his loss by staying on with PTL as the defendant would have been prepared to retain him at the then salary of $11,400. Hence the plaintiff should only be allowed to claim $600 a month as the basis for calculating loss of earnings.
8. I reject Mr Lam Ching Pun’s evidence that the plaintiff said he was resigning due to better opportunity elsewhere. In view of my finding that since the accident, the plaintiff has not been able to manually lift heavy goods, I consider that it is reasonable for him to leave PTL and look for a job elsewhere. Therefore I accept that the sum of $2,000 should be adopted in the calculation of loss of earnings.
9. The plaintiff said that because of his disability, he can no longer enjoy his hobby of jogging and Thai boxing. I note, however, that in Dr Fu’s report, it was said that the plaintiff was “not sporty all along”.

*Pain, suffering and loss of amenities (“PSLA”)*

1. The plaintiff claims $350,000 under this head. Against this, the defendant says that an award of 100,000 would be appropriate.
2. Having considered the cases cited by both parties, I consider that the plaintiff’s injuries as I have found them are comparable to the following two cases:
   1. *Yeung Wai Ming v Tsui Ma Sing*, HCPI 561/2007, 4 September 2009 (cited by the plaintiff) – PSLA was awarded at $300,000. The plaintiff there suffered from comminuted fracture of his right patella. Open reduction and internal fixation was performed. After recovery, he complained of persistent pain and could not even drive because of it. His injury is more serious than the plaintiff’s in this case.
   2. *Lin Chi Lam v Ip’s Engineering Company Limited*, HCPI 446/2005, 14 July 2006 (cited by the defendant) – PSLA was awarded at $150,000. The plaintiff there had small crack features over the left medial tibial plateau, osteochondral contusion at left lateral femoral condyle, a sprain injury to the left anterior cruciate ligatment and myxoid degeneration of posterior horn of medial meniscus. There was doubt as to how the injury affected him but he was observed to have walked with a limp and he claimed that he could not lift heavy objects. His injury seems to be less serious than the plaintiff’s in this case.
3. In the present case, I consider that an appropriate award for PSLA would have been $200,000.

*Pre-trial loss of earnings*

1. The plaintiff claims a sum of $165,900 under this head, which comprises 2 items:
   1. Sick leave loss of $50,400 – this is agreed by the defendant.
   2. Post sick leave loss suffered from March 2010 to the date of trial of $115,500 ($2,000 x 55 months x 1.05). The defendant disagrees and submits that the loss should be $34,650 ($600 x 55 months x 1.05).
2. Based on my factual finding above, I would have awarded the plaintiff’s claim in full, ie, $165,900, under this head.

*Future loss of earnings*

1. The plaintiff claims $459,648 for future loss of earning ($2,000 x 12 x 18.24 x 1.05). Similarly, the defendant disagrees on the ground that the sum of $600 should be used instead of $2,000.
2. For the same reason as above, I would have awarded the sum of $459,648.

*Loss of earning capacity*

1. The plaintiff claims $100,000 for loss of earning capacity, on the ground that the plaintiff will suffer a real disadvantage in the labour market as a result of his permanent disability. The defendant says that an appropriate sum would be $48,000 under this head. The respective amounts are based on (approximately) 8 months and 4 months of the pre-accident monthly salary of $12,000.
2. I consider that an award of $60,000 would have been appropriate.

*Future medical expenses*

1. According to Dr Fu’s report, his examination reviewed prominent screws with tenderness and opined that the plaintiff should consider having the screws removed. He further opined that if the surgery is done in the private sector, it would cost $20,000 and a sick leave of 4 weeks would be appropriate.
2. On this basis, the plaintiff claims $30,000 under this head, which comprises the sum of $20,000 for the surgery and the sum of $10,000 for the loss of 1 month’s salary.
3. The defendant does not dispute the sick leave loss but contends that the plaintiff should have the surgery done in a public hospital where the charge would be minimal.
4. I consider that it is reasonable for the plaintiff to obtain private treatment and therefore would have awarded a total sum of $30,000 under this head.

*Interest*

1. There is no dispute that interest should be awarded for the PSLA award at 2% p.a. from the date of writ to judgment and that interest on all pre-trial loss of earnings should be awarded at half the judgment rate from the date of accident to the date of judgment.

*Deduction*

1. The amount of $92,000 being employees’ compensation paid under settlement terms and already received by the plaintiff would have to be deducted from the final award.

*Summary on quantum*

1. The total award, excluding interest, would have been $823,548, as tabulated below:

|  |  |  |
| --- | --- | --- |
|  | PSLA | $200,000 |
|  | Pre-trial loss of earnings | 165,900 |
|  | Future loss of earnings | 459,648 |
|  | Loss of earning capacity | 60,000 |
|  | Future medical expenses | 30,000 |
|  | Less: employees’ compensation | (92,000) |
|  | **Total:** | **$823,548** |

*CONCLUSION*

1. As I have determined the issue of liability against the plaintiff, the action is dismissed.
2. I make an order *nisi* that the plaintiff pay the defendant’s costs of the action, to be taxed if not agreed, with certificate for counsel and that the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

|  |  |  |
| --- | --- | --- |
|  |  | (Winnie Tsui) |
|  |  | Deputy District Judge |

Ms Vivian Chih, instructed by Godwin Chan & Co., assigned by the Legal Aid Department, for the plaintiff

Ms Candy Tang, instructed by Littlewoods, for the defendant