DCPI 2047/2011

## DCEC 1267/2010

(Heard Together)

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2047 OF 2011

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BETWEEN

JIANG ZHONG (姜忠) Plaintiff

And

UP CHEER LIMITED 1st Defendant

YEUNG CHUN LEUNG formerly trading as

DREAM HOME WORKSHOP 2nd Defendant

CHENG KWOK WEI trading as

HON HING ENGINEERING COMPANY 3rd Defendant

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD

(僱員補償援助基金管理局) 4th Defendant

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**IN THE DISTRICT COURT OF THE**

HONG KONG SPECIAL ADMINISTRATIVE REGION

EMPLOYEES’ COMPENSATION CASE NO 1267 OF 2010

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IN THE MATTER OF AN APPLICATION BETWEEN:

JIANG ZHONG (姜忠) Applicant

### and

YEUNG CHUN LEUNG (楊振良)

formerly trading as

DREAM HOME WORKSHOP 1st Respondent

KWOK MAN LUNG (郭文龍) 2nd Respondent

(Discontinued)

UP CHEER LIMITED

(皆昇有限公司) 3rd Respondent

CHENG KWOK WEI trading as

HON HING ENGINEERING COMPANY 4th Respondent

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD

(僱員補償援助基金管理局) 5th Respondent

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Before: Deputy District Judge Elaine Liu in Court

Date of Hearing: 24, 27-29 April 2015, 18 May 2015

Date of Judgment: 5 February 2016

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JUDGMENT

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*INTRODUCTION*

1. Jiang Zhong (“Jiang”) is a Mainland national. In 2008, he visited Hong Kong on a two-way permit. It was a condition of his stay that he was not permitted to undertake any employment in Hong Kong. Despite the prohibition, he was employed as a construction worker and had worked in a house at the Giverny, Lot no. 1184 in DD 217, Sai Kung, New Territories, Hong Kong (“the House”) on the demolition of a swimming pool at the backyard of the House (“Swimming Pool”). The House was owned by Up Cheer Limited (“Up Cheer”).
2. On 24 October 2008, while Jiang was working in the House, he was injured in an accident (“the Accident”).
3. Jiang commenced a personal injuries action (“PI Action”) against Up Cheer, Yeung Chun Leung who was then trading as Dream Home Workshop (“Yeung”) and Cheng Kwok Wei trading as Hon Hing Engineering Company (“Cheng”) for negligence, breach of common law duty of care and breach of statutory duties.
4. Jiang also took out an employees’ compensation application (“EC Action”) against Up Cheer, Yeung, Cheng and Kwok Man Lung (“Kwok”). The claim against Kwok was discontinued. At the end of the trial, Jiang confirmed through counsel that he did not press his case against Up Cheer in the EC Action.
5. The employment undertaken by Jiang was a breach of his condition of stay and was therefore illegal. There was no insurance coverage on the injuries sustained during his employment. The Employees Compensation Assistance Fund Board (“Fund Board”) applied and was granted leave to join in both the PI Action and the EC Action as intervener.
6. The PI Action and the EC Action were heard together.
7. Cheng, who was sued in both actions, did not appear despite service and subsequent substituted service of the proceedings by way of newspaper advertisements.
8. In the EC Action, this court shall decide whether or not discretion shall be exercised in favour of Jiang under section 2 of the Employees’ Compensation Ordinance, Cap. 282 (“ECO”). There was also a heated dispute among the parties on the identity of Jiang’s employer, which is an issue relevant to both the EC Action and the PI Action. The liability of Up Cheer under the Occupiers’ Liability Ordinance, Cap. 314 is also contested.

*BACKGROUND FACTS*

1. Wendy Chan is the sole shareholder and director of Up Cheer, the owner of the House. She lived in the House together with her family.
2. Yeung is the brother-in-law of Wendy Chan. He was the owner of Dream Home Workshop carrying on the business of indoor decoration and construction work.
3. Kwok, who was also called “Fei Lung”, was Yeung’s employee and worked as the foreman in the site of the Swimming Pool. According to Yeung, he subcontracted to Kwok the debris clearing works on the demolition of the Swimming Pool.
4. Cheng was the owner of Hon Hing Engineering Company carrying on the business of electrical and decoration engineering work. Cheng has not appeared in these proceedings.
5. After Wendy Chan bought the House, she wanted to demolish the Swimming Pool and engaged contractors to do the works. Wendy Chan said in court that the demolition works were undertaken by two independent contractors, Yeung who undertook the coring and concrete waste disposal works; and Cheng who undertook the bursting work. There was a conflict of evidence on the engagement of Cheng, which I will deal with below.
6. Jiang first worked in the House on 18 September 2008. On that date, he went to a working site inside an industrial building with one of his friends, Ah Ming. They met a man called Ah Chiu who asked them to wait in the site for the arrangement of works. About an hour later, a man called Ah Loi came to pick up Ah Ming and Jiang. The two of them were arranged to get in a car driven by Ah Loi. On the way, Ah Loi asked Jiang and Ah Ming to move to another car driven by Yeung. Yeung drove them to the House, followed by Ah Loi’s car. When Jiang and Ah Ming arrived at the House, they started to work there.
7. Jiang worked in the other unrelated sites between 19 and 22 September 2008. On 23 September 2008, Jiang was asked to work in the House again. Since then, he worked almost every day in the House until the date of the Accident, save for a few days when he worked in the other sites or was on holiday.
8. Jiang said in court that he saw Yeung, Kwok and a Mr Chan (“Mr Chan”) almost every day when he worked in the House. Kwok was the site foreman. Kwok, Yeung and Mr Chan had given working instructions to Jiang and other workers at the Swimming Pool. The workers were not divided into different groups. At the end of every working day, Kwok informed Jiang if he was required to work at the House on the following day.
9. Jiang did not know and has not heard of any person known as Cheng Kwok Wei or a contractor known as Hon Hing Engineering Company when he was working in the House.
10. He had been instructed to do different tasks in the House including coring holes, bursting stones and walls, cleaning mud and debris and handling waste materials of heavy weight. To carry out his work, he had to use heavy equipment such as electric drill and hammering tools.
11. Jiang and other workers were provided with lunch and afternoon tea in the House. Mr Chan helped workers to obtain the mouth protective mask, working eye glasses and working gloves. The drilling, coring and other machines used at the Swimming Pool by Jiang were provided by Kwok, Yeung and Mr Chan. Jiang was not provided with safety shoes.
12. Jiang received wages twice. The first time from Ah Chiu in the sum of HK$1,000. The second time from Ah Loi in the sum of HK$2,000.
13. The Accident happened in the afternoon of 24 October 2008. Jiang was assigned to carry out the coring holes procedure on a concrete wall of the Swimming Pool. While he was using a coring machine to core holes, a concrete slab of the other side of the wall suddenly collapsed. The detached concrete slab fell on Jiang’s right foot and crushed his foot. At the time of the Accident, Yeung and Wendy Chan were not in the House.
14. Immediately after the Accident, Jiang was sent to the hospital. There was no dispute that Jiang sustained injury while he was working in the House. The dispute was who should be responsible for it.

*WITNESSES*

1. Jiang testified in court for his own case. Wendy Chan and Yeung testified for Up Cheer and Yeung respectively.

*THE ILLEGAL EMPLOYMENT*

1. The illegal employment of Jiang raised a primary issue in the EC Action as to whether Jiang is entitled to compensation under the Employees’ Compensation Ordinance, Cap 282 (“ECO”).
2. Section 2(2) of the ECO provides that:-

“If, in any proceedings for the recovery of compensation under this Ordinance, it appears to the Court that the contract of service … under which the injured person was working, at the time when the accident causing injury happened, was illegal, the Court may, if having regard to all the circumstances of the case it thinks proper so to do, deal with the matter as if the injured person had at the time aforesaid been a person working under a valid contract of service …”

1. Section 2(2) of the ECO confers a discretion on the court to treat a person employed under an illegal contract as if he was employed under a valid contract of service.
2. In exercising the discretion, the court shall examine all the relevant circumstances. As held by the Court of Appeal in *Yu Nongxian v Ng Ka Wing* [2007] 4 HKC 551, followed by *Chen Xiu Mei v Li Siu Wo* [2007] 5 HKC 516, there is strong public policy reason to exercise the discretion in favour of the injured person in such situation. It is not conducive to stop illegal employment if the employers are allowed to escape from liability for compensation to illegal employees for injuries sustained during employment.
3. The employment of Jiang was illegal because it was a breach of Jiang’s condition of stay in Hong Kong. But for the fact that Jiang was not lawfully employable due to his visitor status, there was no special feature in the employment between Jiang and his employer. The works that Jiang was employed to do were lawful. The employer of Jiang ought to have known that Jiang, who could not produce his Hong Kong identity card, is not a Hong Kong resident. The mere fact that Cheng, who was said to be an employer of Jiang, was not traceable should not be a reason for exercising the discretion against Jiang.
4. I am satisfied that the discretion under section 2(2) of the ECO should be exercised in favour of Jiang. The claims in the EC Action would be dealt with as if Jiang had at the time of the Accident been a person working under a valid contract of service.

*IDENTITY OF JIANG’S EMPLOYER(S)*

1. The forefront issue on liability in both actions is to identify Jiang’s employer(s).
2. There was dispute as to whether Cheng and/or Yeung was Jiang’s employer. Jiang’s primary case was that both Cheng (through a person named Ah Loi) and Yeung were his immediate employers. Alternatively, Jiang contended that Cheng (through Ah Loi) was Jiang’s immediate employer and Yeung was the principal contractor. The Fund Board contended that Yeung was Jiang’s employer. Up Cheer and Yeung denied that Yeung was Jiang’s employer.
3. There was no written employment contract. Jiang was first asked by Ah Loi to work. Later, at the end of each working day, Kwok informed Jiang as to whether he should go back to work in the House on the following day. There was no evidence as to whether Ah Loi enlisted Jiang to work for his own or on behalf of others. Jiang said that he has never seen Ah Loi working in the site.

*Ah Loi*

1. There was no evidence on the full name of Ah Loi. In her witness statement, Wendy Chan said that to her knowledge Ah Loi was the person in charge of or the representative of Hon Hing Engineering Company, she did not know the full name of Ah Loi. She, together with Yeung, have described Ah Loi and Cheng in their respective witness statements as if they are two separate individuals.
2. At court, they changed their evidence and said that Ah Loi and Cheng is the same person.
3. Wendy Chan explained in court that she got the full name of Ah Loi from a one page contract (“the Contract”) on which Cheng has signed his name. If that was true, Wendy Chan ought to have described Ah Loi and Cheng as the same person in her witness statement. The Contract was annexed to her witness statement. This evidenced that Wendy Chan has full knowledge of the Contract when she prepared the witness statement. I do not accept this explanation of Wendy Chan. I am not satisfied that Ah Loi is Cheng, or works for Cheng.

*Was Cheng a contractor engaged by Up Cheer?*

1. In court, Wendy Chan testified that she was introduced to Cheng by one of her previous renovation contractors. She met Cheng once and agreed to engage Cheng to undertake the bursting works. She produced the Contract to support the contractual arrangement with Cheng or Hon Hing Engineering Company. She said that the Contract was drafted by Hon Hing Engineering Company and was brought to her office. It was signed by a staff of Wendy Chan, but she did not remember who that staff was.
2. Jiang and the Fund Board suggested that the Contract was fabricated.
3. The Contract was dated 30 September 2008 and was written on the letterhead of Hon Hing Engineering Company. There were two signatures on it. One of them was signed as Cheng Kwok Wei, apparently on behalf of Hon Hing Engineering Company. The other signature was signed in such a style that one could not discern from it the identity of the person who signed it or on whose behalf the signature was made.
4. The body of the document stated that “現漢興工程 (鄭國偉) 承接溱喬33號屋之花園水池石屎清拆工程, 金額定為港幣十萬元正。金額內包括工人之勞保, 均由漢興工程承擔。” Basically, it means that Hon Hing Engineering Company (Cheng Kwok Wei) undertook the works to demolish the concrete of the Swimming Pool in the House for a fixed sum of HK$100,000 inclusive of the employees’ insurance.
5. According to Wendy Chan, the Contract was the agreement between Cheng and Up Cheer (or Wendy Chan) for the demolition works and it was drafted by Cheng. Cheng and Wendy Chan did not know each other before. It made no commercial sense that the Contract only stated the undertaking of works by Hon Hing Engineering Company, but made no mention at all of who engaged him and who would pay him the fee.
6. The works in the House started at least on 18 September 2008, the date when Jiang first worked there. The Contract was, however, dated 30 September 2008.
7. Under the Contract, Cheng was to undertake the works to demolish the concrete of the Swimming Pool (水池石屎清拆工程). If it was the agreement (as Wendy Chan and Yeung now suggested) that Cheng was only responsible for the bursting works after Yeung completed the coring works, it defies common commercial sense that Cheng did not specify in the Contract that the scope of his work was limited to bursting works.
8. The evidence of Wendy Chan in court on the engagement of Cheng and the making of the Contract contradicted with the statements she made shortly after the Accident when she was interviewed by the Labour Department and the police respectively.
9. In these interviews, Wendy Chan has not referred to any written contract with Hon Hing Engineering Company or Cheng. In the statement signed by Wendy Chan during her interview with the Labour Department on 30 October 2008, Wendy Chan said that in respect of the demolition works, she had only made oral agreements with Yeung and Ah Loi but not with any other person or company. She also confirmed that there was no written agreement with Yeung and Ah Loi. If Wendy Chan (through her staff) has actually signed the Contract with Cheng, there was no reason for her not to say so in the interview with the Labour Department shortly after the Accident.
10. On whether Ah Loi or Cheng was an independent contractor, Yeung’s evidence in court contradicted his previous statements made after the Accident. In court, Yeung said that Ah Loi was another contractor responsible for the bursting works. He had met Ah Loi before the demolition works in order to coordinate the works between them. These were contrary to the statements he made with the police and the Labour Department after the Accident which I highlighted below:-
11. In Yeung’s statement made on the date of the Accident when he was interviewed by the police, Yeung claimed that he was only responsible for drilling holes. There was another contractor Kwok who was responsible for clearing debris. There was no mention of the involvement of Ah Loi or Cheng as a contractor for the demolition works. When he was asked whether Jiang might have been employed by Kwok, Yeung said that he believed not. He did not make any suggestion that Jiang might have been employed by Ah Loi or Cheng.
12. On 26 October 2008, Yeung was interviewed by the police again and had made a statement under caution for suspected employment of illegal worker. In this interview, Yeung said he had seen Ah Loi in the House but he did not know this person. He did not know whether Ah Loi was a contractor. He claimed for the first time that there was another contractor responsible for the bursting works but he did not say who this other contractor was, and he did not say that this contractor was or related to Ah Loi.
13. When Yeung was interviewed by the Labour Department on 3 November 2008, he claimed that he thought Jiang was Ah Loi’s employee. He again claimed that he did not know Ah Loi and did not know his full name or telephone number.
14. The statement made by Kwok when he was interviewed by the police on the date of the Accident was telling. Kwok has clearly told the police that apart from himself, there was one other contractor Yeung, and nobody else. Kwok was the foreman of Yeung and coordinated the work in the Swimming Pool. If there was indeed another contractor dealing with the bursting works, Kwok must know and would certainly be expected to inform the police when he was interviewed.
15. Up Cheer and Yeung have not called Kwok to testify. Both Jiang and the Fund Board invited the court to draw adverse inference against Up Cheer and Yeung from their failure to call Kwok to give evidence in this case.
16. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, at 340, Lord Brooke LJ has set out the following principles:-

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness’s absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

This was followed and applied by Recorder H Wong SC in *Lai Cheong Ming v Cheng Chung Yu Eric trading as Hui Fung Metal Work Factory* HCPI 504 of 2009, unreported, 7 January 2013 at paragraph 25.

1. In *Lai Sau Keung v Maxcredit Engineering Ltd* [2004] 1 HKC 434 at 443, the Court of Appeal quoted and applied the following passage of Newton and Norris JJ in *O’Donnell v Reichard* [1975] VR 916 at 929, which was cited in *Cavendish Funding Ltd v Henry Spencer & Sons Ltd* [1998] 6 EG 146 at 148-149:-

“It is sufficient to say that in our opinion for the purposes of the present case the law may be stated to be that where a person without explanation fails to call as a witness a person who he might reasonably be expected to call, if that person's evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person's evidence would not have helped that party's case; if the jury draw that inference then they may properly take it into account against the party in question for two purposes, namely:

(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; ...”

1. In *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at paragraph 44, Lord Sumption has stated that:-

“There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party’s failure to rebut it. For my part I would adopt, with a modification which I shall come to[101], the more balanced view expressed by Lord Lowry with the support of the rest of the committee in *R v IRC, ex parte TC Coombs & Co* [1991] 2 AC 283, 300:

‘In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party’s failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.

Cf *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340.’ ”

1. The identity of Jiang’s employer and the question of whether or not Cheng or Ah Loi was another independent contractor engaged by Up Cheer or Wendy Chan were undoubtedly central issues of this case. In view of Kwok’s unequivocal statement to the Labour Department, it is obvious that his evidence as to the existence of a third contractor (Cheng or Ah Loi) is crucial. Kwok was Yeung’s employee and there was no suggestion that Kwok could not be located. Yeung explained that he has never thought of calling Kwok to give evidence. I do not consider this an acceptable explanation.
2. The inference that this court could and would therefore draw from the failure to call Kwok to give evidence is that Kwok, if called would have given unfavourable evidence against Up Cheer and Yeung.
3. Cheng did not appear in the proceedings, thus there is no evidence from Cheng at all. The evidence of Jiang in this regard was that he did not know Cheng.
4. Having considered all the evidence, I do not accept that there was sufficient evidence to prove that Cheng, whether by himself or through Ah Loi, was engaged as an independent contractor to undertake the bursting works at the House. It follows that Cheng could not be the employer of Jiang.

*Was Yeung the employer of Jiang ?*

1. Up Cheer and Yeung contended that Yeung was not Jiang’s employer. They challenged Jiang’s evidence by referring to (1) the statement given by Jiang to the police on 25 October 2008, the date after the Accident, in which Jiang said that he was employed by a person called Ah Loi (“有一個叫做阿來嘅男人請我做工”); and (2) the Notification of Accident (“Notification”) completed and filed by Jiang dated 20 January 2009 in which Jiang put the name “Mr Chan” on the box for the name of his employer.
2. Jiang explained that he was in the hospital when he made the police statement. He had not yet undergone the surgery at that time and he was very painful. He had to take medications during the interview to relieve the pain. He also said that the medications and the pain made him dizzy and he was not fully conscious. He just wanted to finish the statement so that he could sleep. He supported his contention by referring to the record in the statement that on the date before, the doctor has opined that the mental condition of Jiang was not suitable to give evidence or statement. There was no permission given by the doctor to the police when they approached Jiang to give the statement on 25 October 2008.
3. Jiang explained that he was confused when he filled in the Notification. He received no assistance in the completion of the Notification. He thought he has to fill in a name there, so he just put a name in instead of leaving it blank.
4. As fairly accepted by Mr Poon, Counsel for Up Cheer and Yeung, the contents in the Notification are not conclusive on employer’s liability although they are one of the facts that this court will consider. The same applies to the statement made by Jiang to the police.
5. In evaluating the evidence, I also take into account the following:-
6. The background of Jiang.
7. There was no dispute that Jiang was an employee working in the House at the time of the Accident.
8. The circumstances in which he was employed.
9. The condition of Jiang when he made the statement with the police.
10. The lack of contention from any party that Mr Chan was Jiang’s employer.
11. The lack of sufficient evidence to prove that Ah Loi was the employer of Jiang.
12. The clear evidence that Kwok was not the employer of Jiang.
13. Apart from Kwok, Yeung was the only other contractor who undertook the demolition works in the House.
14. The mere fact that no charge was laid by the police against Yeung would not be a reason restraining this court from finding, if otherwise proved on balance of probabilities, that Yeung was the employer of Jiang. The evidence available to the police at that time and the evidence available to this court might be different. The standard of proof required in a criminal prosecution and the standard required in a civil case are different. There might also be other reasons unknown to this court for not laying the charge against Yeung. This court shall not speculate one way or the other.
15. Having considered all the evidence, I find that Yeung was the employer of Jiang at the time of the Accident.

*Duty of care owed by Yeung as the employer*

1. An employer owes a duty of care to the employees to provide sufficient training, proper instructions and supervision and a safe system of work. The nature of work is a factor that has to be considered in deciding whether a careful organization and supervision is required in the interests of employees’ safety or it can be left to the employee on the spot to do it reasonably safely. (See: *Charlesworth & Percy on Negligence*, 13th ed, para 11-68; *Cathay Pacific Airways Ltd v Wong Sau Lai* (2006) 9 HKCFAR 371).
2. The duty of employer is personal to him. He cannot be relieved from this responsibility by simply saying that the employees could equally have foreseen the risks associated with the unsafe system of work, and could have designed for themselves a safe system of work. (*Gurung Krishna Jang v Precious Swing Limited*, unreported, HCPI 486 of 2009, 16 November 2010).
3. In *Winter v Cardiff Rural District Council* [1950] All ER 819, Lord Oaksey has held that:-

“In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. 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 foremen or workmen on the spot.”

(applied in *Cheung Suk Wai v Attorney General* [1966] 4 HKC 288 and *Fong Yuet Ha v Success Employment Services Limited*, unreported, CACV 100/2012, 28 December 2012)

1. The demolition works are hazardous in its nature. It is common sense that the fall of concrete slab would cause personal injury and in serious case, can be fatal. It is lucky that we are not dealing with a fatal case. The coordination on the timing and sequence of the coring and bursting works, and the coordination between different tasks undertaken by the workers are crucial. Sufficient training and supervision should be provided to employees. These are the duties of the employer.
2. It was Jiang’s testimony in court that he was using the machine to drill holes in one side of the wall of the Swimming Pool when the wall adjacent to it suddenly became detached and collapsed. He was standing upright and on his left was a male worker operating another drilling machine. During the process of coring holes, Jiang’s left foot was stepping on the narrow base slab while his right foot was on one end of a wooden plank, which was placed over a ladder scaffold behind him. Jiang said that immediately before the Accident, he noticed that the male worker was using the bursting machine to demolish the wall that subsequently fell. Jiang’s testimony in court on the happening of the Accident was largely the same as his report to the officer of the Labour Department who compiled the accident report (“Accident Report”).
3. The Labour Department officer stated in the Accident Report that his investigation revealed two different versions of Jiang’s work on the date of the Accident. One of the versions was told by Jiang. The other version was told by Yeung and Kwok who said that Jiang was responsible for breaking the concrete of the rear concrete wall. They said that they had seen Jiang once using an electric concrete breaker in his hands to break the concrete of the rear concrete wall on the date of the Accident. Kwok also reported to have confirmed that he saw no other workers except Jiang responsible for breaking the rear concrete wall on the date of the Accident.
4. It was Yeung’s own evidence that he was not at the scene when the Accident happened. His evidence on how the Accident had happened or might have happened and what he told the Labour Department officer about his observation on the date of the Accident were of little value.
5. This court did not have the benefit of hearing Kwok’s evidence. We have evidence that there were other workers (Ms Ma and Mrs Tsang) clearing debris on the site. They were on the other side of the work area at the time of the Accident. The wooden plank that got displaced during the collapse of the large reinforced concrete slab had slightly hit the heads of Ms Ma and Mrs Tsang and they sustained bruise injury of their heads. We have also seen photos taken on the date of Accident showing a number of baskets of debris at the bottom of the Swimming Pool. I agree with Mr Lim, counsel for the Fund Board, that it is unlikely that Jiang was the only worker who produced the amount of debris shown on the photo.
6. Further, no bursting machine was found on the photo. If Jiang was using a bursting machine at the time of the Accident, the machine ought to have been shown on the photo.
7. It is clear that Yeung, as the employer, has not provided a safe system of works. There was no training, no proper supervision and no proper coordination on the undertaking of different steps of the demolition. There was no provision of sufficient protective equipment to the workers as well. Take for instance, Jiang was not provided with any protective shoes. If he has been provided with one, the extent of his foot injury might have been much alleviated.
8. I find that Yeung was in breach of his duty of care as an employer and the breach caused the injury sustained by Jiang at the time of the Accident.

*UP CHEER*

1. Under common law and the Occupiers Liability Ordinance, an owner of a premises, as occupier, owes a duty to his visitors to take reasonable care to see that the visitors will be reasonably safe in using the premises for the purposes for which he is permitted to be there. The duty is not an absolute duty. The standard of care depends on all the circumstances of the case, including, for example, whether the visitor is injured by the negligence of an independent contractor employed by the occupier, the nature of work entrusted to the independent contractor and the terms of the contract. (Section 3(2) of the Occupiers Liability Ordinance; *Wan Tsz Lok v Hung Fai Electrical Engineering Limited*, unreported, HCPI 1117 of 2004, 17 November 2008.)
2. The legal principles relevant to the occupiers’ liability where an independent contractor was engaged to do the works in the premises can be summarized as follows:-
3. An occupier is a person who has sufficient degree of control over the premises. Exclusive occupation is not required. (*Wheat v E. Lacon & Co Ltd* (1966) AC 552, *per* Lord Denning)
4. There can be two or more occupiers at the premises at the same time.
5. Where there are more than one occupier in a premises, each of them is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. (*Wheat v E Lacon & Co Ltd, supra)*
6. In the case of a construction site, an owner who employs an independent contractor to execute works on the construction site usually is still regarded as having sufficient control of the site as to put him under a duty towards all those who might lawfully be on the site. (*Wheat v E. Lacon & Co Ltd, supra*, *Wan Tsz Nok, supra)*
7. In general, a person is not liable for the torts committed by his independent contractor, unless it was attributable to the negligence or other personal faults of the employer, or the circumstances are such that the law imposes a strict or absolute duty upon the employer which duty is not non-delegable. These non-delegable is often not merely a duty to take care, but a duty to provide that care is taken, so there will be a breach if care is not taken.
8. An occupier does not avoid liability simply by engaging an independent contractor. An occupier cannot turn round and say that it is the independent contractor’s responsibility and he has no responsibility at all. (*Ting Kam Yuen, the administrator of the estate of Ho Lam, Deceased v The Hong Kong Buddhist Association*, unreported, HCPI 1203 of 1996, 10 April 1999; *Yeung Kam Fuk v Len Shing Constructions Co Ltd* [1986] HKC 160)
9. A person who engages an independent contractor may be liable for his own negligence, for example in failing to take reasonable care to select a competent contractor. Having engaged an independent contractor does not exclude the possibility of an occupier committing the tort of negligence himself (*Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2010) 14 HKCFAR 14; *Bottomley v Todmorden Cricket Club* [2004] PIQR P275)
10. An occupier may be absolved from responsibility if it falls within the exception in Section 3(4)(b) of the Occupiers Liability Ordinance where damage is caused to a visitor by a danger due to the faulty execution of work of construction, maintenance or repair by an independent contractor employed by the occupier if the requirements under the subsection are fulfilled.
11. Section 3(4)(b) requires that in all the circumstances the occupier (i) had acted reasonably in entrusting the work to an independent contractor and (ii) had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done. It may be reasonable to delegate work of construction to an independent contractor. However, that is not sufficient to bring the occupier within the exception. The requirements in the subsection must be fulfilled. (*Cheng Oi Wah (Administratrix of the estate of Lam Lun Shui, deceased) v Cheng Yuk Koon*, [1984] HKC 286, quoting *AMF International Ltd v Magnet Bowling Ltd* [1968] 1 WLR 1028)
12. The words “without more” in section 3(4)(b) of the Occupiers Liability Ordinance connote the meaning that even if the employer has acted reasonably in entrusting the work to an independent contractor and had taken such step (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and the work was properly executed, he will still be answerable for the tort committed by his contractor or his contractor’s employees under some special or more aggravating circumstances, which include the employer’s conduct or the circumstances in relation to the nature of the work to be done by the independent contractor. (*Wan Tsz Nok, supra*)
13. The burden of proving that the employer had so acted reasonably was on the employer. Once the employer has discharged his burden, it is up to the injured person to show that the case falls outside the ‘without more’ circumstances, such that the employer is liable for the tort committed by the contractor despite he had taken reasonable care in the employment of the contractor. (*Wan Tsz Nok, supra*)
14. The four steps test suggested by the learned authors of *Clerk & Lindsell on* Torts, and adopted by Mr Justice Hunter in *Yeung Kam Fuk v Len Shing Construction Co Ltd, supra* are (i) has the occupier acted reasonably in entrusting the work to an independent contractor; (ii) has the occupier used reasonable care in selecting the contractor; (iii) has the occupier taken reasonable steps (if any are possible) to supervise the carrying out of the work; (iv) has the occupier used reasonable care to check (if possible) that the work has been done properly. (*Yeung Kam Fuk, supra*; *Wan Tsz Nok, supra*)
15. I shall adopt the above principles and tests.
16. Up Cheer is the owner of the House, including the Swimming Pool. The Swimming Pool is at the backyard of the House where Wendy Chan (the sole shareholder and director of Up Cheer) and her family members were living at the time when the Swimming Pool was in the course of being demolished. The contractors and the workers have to enter the main gate where the management officers would check the people in and out. There are also evidence of interactions between the workers and the people in the House. Take for instance, the Filipino maids in the House have arranged afternoon tea for the workers, including Jiang. Jiang could see who was in the House. Although Up Cheer through Wendy Chan might not have active participation in the actual conduct of the works at the Swimming Pool, obviously Up Cheer (through Wendy Chan) has control over the access to the Swimming Pool.
17. Wendy Chan said that she did not go to the site at the time of the Accident. She also claimed that she did not have control over the access to the Swimming Pool when the demolition were contracted out to independent contractors.
18. Wendy Chan might have chosen not to go to the site during the demolition. That is not the same as not having access and could not go there. There is no evidence that Wendy Chan, her family members or any one authorized by Up Cheer to live in the House were prohibited from going to the Swimming Pool. I do not accept Wendy Chan’s evidence that she or Up Cheer has no control over the Swimming Pool when the construction was in progress. I am satisfied that Up Cheer was an occupier of the site.
19. Moving to the four steps test. First, has Up Cheer acted reasonably in entrusting work to an independent contractor? I am of the view that it is reasonable for Up Cheer to entrust an independent contractor to carry out the demolition.
20. Second, has Up Cheer used reasonable care in selecting the contractor? I have already decided that the only contractor engaged by Up Cheer directly was Yeung. Yeung admitted that he has no experience in the demolition works. He was not a registered general contractor to carry out demolition works. He only learnt how to use the coring machines from the shopkeeper when he first bought the machines for this project, which was the very first project he undertook to carry out coring works. He trained his workers, Ng and Wong to use the coring machines after he has practiced the use of the machine for 3 hours. There was no evidence of any safety measures set up in the site. Up Cheer has clearly not taken any reasonable care in selecting Yeung as the contractor, who only learnt how to do the job when he got it.
21. Third, has Up Cheer taken reasonable steps (if possible) to supervise the carrying out of the work? Wendy Chan repeatedly said in her evidence that she did not concern herself with the works or its progress. She has done nothing to supervise the carrying out of the work. Wendy Chan said she has no means nor knowledge to supervise the progress and safety of the works. She might not have the knowledge to do so. However she has the means to supervise, for example, she could have asked for professional advice, she could have enquired with Yeung before she engaged him so as to satisfy herself that the demolition work would be properly and safely done. However, she has done nothing.
22. Fourth, has Up Cheer used reasonable care to check (if possible) that the work has been done properly? On the evidence of Wendy Chan, she has not done anything to check the work. The answer must be no.
23. Up Cheer has not taken such steps as it reasonably ought in order to satisfy itself that the contractor was competent and that the work had been properly done. Even if it is reasonable for Up Cheer to entrust the works to an independent contractor, Up Cheer cannot escape the liability.
24. The next defence raised by Up Cheer was that Jiang was the employee of an independent contractor and therefore should not be considered as a ‘visitor’ vis-à-vis Up Cheer. The case of *Ma Kam Yeung v Fu Hay Kin* [1998] 2 HKLRD 615 was cited in support. The plaintiff in the *Ma* case was a carpenter employed by an independent contractor to carry out renovation works at the 1st defendant’s house. The plaintiff was injured by a cutting saw while he was working in the house. Deputy Judge Gill held that the injury was not sustained as a result of the condition of the house or equipment provided by the owner, but because of the activity conducted. The owner is an average householder who has no special knowledge or capacity to ensure the safety of the employee of an independent contractor and should not be held liable.
25. The *Ma* case was decided before the Court of Final Appeal decision in *Luen Hing Fat, supra*. The decisions of *Ting Kam Yuen* and *Yeung* *Kam Fuk* referred to above were not cited to the court in that case.
26. The decision in the *Ma* case was at odds with the House of Lords decision in *Ferguson v Welsh* [1987] 1 WLR 1553 (which was not cited in the *Ma* case). In *Ferguson*, a district council engaged a principal contractor, Mr Spence, to carry out the demolition work. The contract expressly prohibited sub-contracting without the consent of the district council. Nonetheless, the principal contractor has sub-contracted the work to Welsh brothers without seeking the council’s consent. The employee of the sub-contractor, Mr Ferguson, was injured while working in the site. The House of Lord held that the employee was a visitor vis-à-vis the district council. At page 1559C to F, Lord Keith held that :-

“So the first matter for consideration is whether in relation to the council, Mr Ferguson was their visitor. … by putting Mr Spence [the principal contractor] into occupation of the building for purposes of demolition the council had clothed him with apparent or ostensible authority to invite other persons onto the premises, including sub-contractors and their employees. Such persons would know nothing of the limitation on Mr Spence’s actual authority, and were not reasonably to be treated as trespassers in a question with the council. In my opinion, there is evidence capable of establishing that Mr Spence had ostensible authority from the council to invite the Welsh brothers [the sub-contractor] and their employees onto to site. Mr Spence was placed in control of the site for demolition purposes, and to one who had no knowledge of the council’s policy of prohibiting sub-contracts this would indicate that he was entitled to invite whomsoever he pleased onto the site for the purpose of carrying out demolition.”

1. On this issue, Lord Goff held at page 1563B as follows:-

“**Whether he is so [a lawful visitor] or not must, in my opinion, depend upon the question whether the occupier who authorized him to enter had authority, actual (express or implied) or ostensible, from the other occupier to allow the third party onto the land. If he had, then the third party will be, vis-à-vis that other occupier, a lawful visitor**; if he had not, then the third party will be, vis-à-vis that other occupier, a trespasser. No doubt, in the ordinary circumstances of life, the occupier who allows the third party to come onto the land will frequently have implied or ostensible authority so to do on behalf of the other occupier – as will, I think, usually be the case when the first occupier is a builder, in occupation of a building site with the authority of the building owner, who authorises a servant or independent to come onto the site.” (emphasis added)

1. I do not consider the *Ma* case has laid down a general proposition that the employee of an independent contractor engaged by an average household owner of a property must be a stranger to the owner. The correct approach in my view is, as held in the *Ferguson* case, whether there was actual or ostensible authority from the owner to allow the employee to come onto the land.
2. Jiang stood in a stronger position than Mr Ferguson. In the present case, there was no prohibition from sub-contracting and Jiang was not an employee or invitee of a sub-contractor in any event. Yeung must have the authority, actual or apparent, from Up Cheer to allow workers to come onto the site to carry out the demolition. Jiang was not a stranger or trespasser in relation to Up Cheer. Jiang was a lawful visitor vis-à-vis Up Cheer.
3. In *Ferguson*, Lord Keith construed the equivalent of section 3(4)(b) of the Occupiers’ Liability Ordinance as follows:-

“The enactment is designed to afford some protection from liability to an occupier who has engaged an independent contractor who has executed the work in a faulty manner. It is to be observed that it does specifically refer to demolition, but a broad and purposive interpretation may properly lead to the conclusion that demolition is embraced by the word ‘construction’. Further the pluperfect tense employed in the last words of the paragraph, ‘the work had been properly done’, might suggest that there is in contemplation only the situation where the work has been completed, but has been done in such a way that there exists a danger related to the state of the premises. That would, however, in my opinion, be an unduly strict construction, and there is no good reason for narrowing the protection afforded so as not to cover liability from dangers created by a negligent act or omission by the contractor in the course of his work on the premises. It cannot have been intended not to cover, for example, dangers to visitors from falling masonry or other objects brought about by the negligence of the contractor. It may be therefore inferred that an occupier might, in certain circumstances, be liable for something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done.”

1. The House of Lord in the *Ferguson* clearly recognized that an occupier shall take reasonable care to select a competent contractor and be satisfied that the work was being properly done. Lord Keith said at 1560G-H:-

“It may therefore be inferred that an occupier might, in certain circumstances, be liable for something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done.

It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor’s activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe.”

1. The above passage was quoted and followed by the English court of appeal in *Bottomley v Todmorden Cricket Club* [2004] PIQR P18, where it was held that the owner of the premises was liable for the injuries suffered by a volunteer who assisted the stunt team engaged by the owner in carrying out a pyrotechnic display at the owner’s premises at its fund raising event. Broke LJ said:-

“The injury suffered by Mr Bottomley were foreseeable if there was no proper safety plan: there was the requisite proximity between the club and Mr Bottomley, who was lawfully on the premises that evening, and it is fair, just and reasonable to impose liability on the club because it did not do what it ought to have done before it allowed this dangerous event to take place on its land.”

1. The injury suffered by Jiang was caused by the collapse of the adjacent wall. The Accident could be avoided if there was a safe system of work, or proper supervision.
2. Up Cheer was under a duty to take reasonable care to select a competent contractor. As I have held, Up Cheer has failed to do so, it shall therefore be liable.
3. Yeung as the principal contractor who has control over the site was an occupier. Yeung is also liable to Jiang under the Occupiers’ Liability Ordinance.
4. In summary, Yeung is liable as employer in the EC Action, and both Up Cheer and Yeung are liable in the PI Action.

*Contributory Negligence*

1. By reason of my finding on how the Accident had happened, I am satisfied that there is no issue of contributory negligence.

*QUANTUM*

1. At the time of the Accident, Jiang was 40 years old and he worked illegally in Hong Kong as construction site worker for about 1 month.
2. He sustained right shoulder, right arm and right foot injury and was admitted to hospital for treatment after the Accident. Open reduction and internal fixation of fracture dislocation was performed on his foot on 3 November 2008. Post-operation was uneventful and he was discharged from hospital on 7 November 2008.
3. He was then imprisoned for 1 week for his breach of condition of stay and thereafter was transferred back to the Mainland. He did not work since then. He was admitted to hospital in the Mainland, and has received herbal treatment and physiotherapy for 1 month. He did not receive any herbal treatment since October 2010. He could walk unaided in 2010.
4. Medical experts, Dr Fu and Dr Yen, confirmed in the joint medical report dated 21 February 2012 that the fracture of the 2nd to 4th metatarsal base of right foot with Lisfranc dislocation were the result of the Accident. There is no evidence of pre-existing pathology. Jiang’s right shoulder and forearm injury was diagnosed to be superficial laceration, and was also considered as resulted from the Accident. The back pain and right knee pain was opined to be unrelated to the Accident. The doctors further opined that he should have a surgery for the removal of wires implanted in his right foot, and undergo 3 months intensive physiotherapy thereafter.
5. As to Jiang’s working capacity, both doctors were of the view that Jiang cannot resume work as constructive site worker, but he can do other works that do not require much walking and climbing.
6. There are a few general issues that I shall deal with before I come to the quantum of damages.

*Appeal on the Assessment by the Assessment Board*

1. I will first deal with Jiang’s appeal against the assessment of the Employees’ Compensation (Ordinary Assessment) Board (“Assessment Board”) over Jiang’s total impairment and loss of earning capacity.
2. On 20 July 2011, the Assessment Board assessed Jiang’s total impairment and loss of working capacity to be 3.5%. This was then revised to 3% on 3 August 2011. Jiang appealed against this assessment pursuant to section 18 of the ECO.
3. In the joint medical report, Dr Fu assessed Jiang’s impairment and loss of earning capacity to be 6%, whereas Dr Yen assessed that both the total impairment and loss of earning capacity after removal of the implants are 1%.
4. The ground for Jiang’s appeal was that Dr Fu’s assessment should be adopted. In the joint medical report, Dr Fu did not give any specific reason for his assessment. There was also no evidence given to show the assessment of 3% by the Assessment Board was not correct. I dismiss the Appeal.

*Whether Jiang was unreasonable in failing to mitigate the loss*

1. The next general issue is on the question of mitigation of loss. Counsel for Up Cheer and Yeung, Mr Poon, submitted that Jiang failed to mitigate his loss by (1) not doing the surgery for the removal of the implants which was advised by both medical experts; and (2) he made no attempts to seek alternative jobs and the loss as a result was self-induced by Jiang.
2. Mr Poon relied on the following passage of Lord Justice Jenkins in *McAuley v London Transport Executive* [1957] 2 Lloyd’s Rep 500 at page 505:-

“if [a plaintiff] received advice to the effect that an operation will have a 90% chance of success and is strongly recommended to undergo the operation and does not do so, then the result must be, I think, that he has acted unreasonably, and that the damages ought to be assessed if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it.”

1. Mr Poon argued that at least by late 2011 when Jiang was examined by both Dr Fu and Dr Yen, he should have received advice by both medical experts that he should take the surgery to remove the implants. Mr Poon submitted that the lack of money to do the surgery is not a justifiable reason because Jiang would be able to recover the costs subsequently from the defendants.
2. In response, Mr Chan, counsel for Jiang, submitted that the common law requirements of mitigation has no place in the ECO. He relied on *Hong Kong Paper Mill Ltd v Chan Hin-wu* [1981] HKLR 556:-

“Whether or not *McAuley v London Transport Executive* lays down a principle which ought to be of general application in Hong Kong, in my judgment it clearly has no application to a claim for workmen's compensation. There is a great difference between a claim for damages in negligence at Common Law and a claim for compensation under the Workmen's Compensation Ordinance. Workmen's compensation must be assessed solely under the statutory provisions and, unless the Ordinance provides for a reduction of the basis compensation specified, no reduction may be made.”

1. I agree with Mr Chan. The Court of Appeal’s decision in the *Hong Kong Paper Mill* case is clear. The employees’ compensation shall be assessed with reference to the statutory provisions in the ECO only. The common law concept of mitigation of loss does not find a place in a claim under the ECO.
2. Would Jiang’s claim in the PI Action be affected because he has not undergone the surgery to the remove the implants? The approach on this issue should be on the reasonableness of the conduct of Jiang. It is fact sensitive.
3. As Lord Justice Jenkins said in the *McAuley* case:-

“The question must be one of fact, as I see it, in each particular case: Was the advice, and were the prospects of success of the proposed operation or treatment, clearly put to the plaintiff, so that he, as a reasonable man, would appreciate that he was being advised that this treatment or operation would put him right.”

1. In *Marcroft v Scruttons Ltd* [19540 1 Lloyds’ Rep 395, Lord Justice Singleton said:-

“A man who is in an anxiety state may have difficulty in making up his mind, but on a question as to the treatment which he should have his mind is, or ought to be, made up for him by his own medical advisers. That is one of the purposes of having medical advisers. The patient would not know what he ought to do; the patient takes medical advice, and the patient ought to be guided by his medical advisers.”

1. Viscount Simon LC has taken the following approach in *Richardson v Redpath Brown & Co Ltd* [1944] AC 62 at page 72:-

“… the question whether a workman is unreasonable in refusing to undergo a surgical operation is not to be determined by considering whether the best medical opinion would think such an operation advisable or safe, but by judging whether it is proved that the workman, having regard to all the circumstances (including medical advice offered to him against the operation) was unreasonable in so refusing.”

1. In *Sze Sing v Hip Hing Construction Co Ltd*, unreported, HCPI 1108 of 1997, 8 December 1998, Nguyen J considered the medical advices given to the plaintiff in that case and held that the proposed operation or treatment and the prospect of success were never clearly put to the plaintiff in that case. The question is whether having regard to all the circumstances, the plaintiff was unreasonable in refusing to undergo the operation.
2. In the present case, we only have evidence of the joint medical report in which both doctors stated their views that Jiang should take the surgery to remove the implants. This is not sufficient. There is no evidence on whether the doctors have given this advice to Jiang in person and whether they have explained to Jiang the importance of the surgery as well as the advantages and disadvantages (if any) of taking the surgery.
3. Jiang explained that he has no financial resources to do the surgery. He is not entitled to free medical care offered by the government hospitals in Hong Kong. On Jiang’s evidence, his medical advisers in the Mainland had not advised him on the surgery to remove the implants.
4. In light of the evidence before the court, I do not consider that Jiang has acted unreasonably in not undergoing the surgery.

*The Earnings of Jiang for the purpose of calculating the compensation*

1. The third general issue relevant to both the PI Action and the EC Action is the monthly earnings to be adopted for calculating the compensation.
2. Jiang was not legally employable in Hong Kong and could not have earned any wages in Hong Kong legally. The wages that Jiang has earned in Hong Kong should not be used to calculate the compensation.
3. In *Tsang Siu Hong v Kong Hoi For trading as Wing Hing Auto Engineering Service,* unreported, HCPI 173 of 2001, 10 March 2003, Deputy High Court Judge Wright said that:-

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

46. … The fundamental purpose of compensation is to put a claimant in the position he would have been in had the incident giving rise to the claim not occurred. The plaintiff had no legitimate expectation of continued remuneration at the elevated, Hong Kong level but, on the evidence, he was in regular employment on the Mainland which has been disrupted as a consequence of the injuries he sustained at the hands of the defendants.”

1. The monthly earnings to be adopted for computation of compensation shall be the wages that Jiang could have lawfully earned as a construction site worker in the Mainland. Jiang has not produced any cogent evidence on the wages he received while working as a construction worker in the Mainland.
2. Counsel of all parties agreed to adopt, in this case, the statistic of average wages published by the PRC government (“the Statistic”). According to the Statistic, the average wages of a construction worker in Guangxi (which is the hometown of Jiang) in 2008 was RMB22,300 per annum. The average monthly wages was RMB1,859 or HK$2,231.

*Quantum awarded in the EC Action*

*Section 9 Compensation*

1. Jiang was 40 years old at the time of the Accident. Pursuant to section 7 (1)(b) of ECO, the amount of section 9 compensation shall be a lump sum equal to 72 months’ pay multiplied by the loss of earning capacity.
2. The compensation awarded under section 9 is HK$2,231 x 72 months x 3% =HK$4,819.

*Section 10 Compensation*

1. Mr Poon referred to the following passage of HH Judge Leung in *Abu Bakkr Shiddik v MM & Co Auto Parts, Dismantling and General (a firm),* unreported, DCEC 903 of 2009, 12 January 2011, and submitted that Jiang should not be entitled to section 10 compensation because he was a visitor on 2-way permit and was not legally employable in Hong Kong:-

“Section 10(1) makes clear that compensation is awarded on the basis that the employee would at least have been capable of earning in some suitable employment or business but for the temporary incapacity after the accident. If the person is not lawfully employable, he could not be said to be capable of earning income from any suitable employment or business during the period of temporary incapacity. That was the situation of Shiddik when he was detained first by the police and then by the Immigration Department after the accident.”

1. The applicant in *Abu Bakkr Shiddik* is a Bangladeshi national who entered Hong Kong illegally. He took up employment in Hong Kong and was injured in the course of the employment. He was then arrested and detained. Upon his arrest, he lodged a claim that he was a subject of torture in his hometown, and he claimed protection under the Convention Against Torture and other Cruel and Degrading Treatment or Punishment (“CAT”). He was then released on recognizance pending the verification of his CAT claim. During this period, he was not allowed to take up employment in Hong Kong. He has been subsequently arrested, detained and imprisoned on various occasions for conviction of theft and other criminal activities.
2. A careful reading of the judgment of *Abu Bakkr Shiddik* clearly indicated that the reason for the refusal to award section 10 compensation to the applicant was not because he entered Hong Kong illegally. It was because during the period of the applicant’s temporary incapacity, he was staying in Hong Kong on recognizance pending the adjudication of his CAT claim, during which time he was not allowed to take employment. The relevant paragraphs in the judgment are as follows:-

“ 65. I have no basis to believe that Shiddik was permitted to take employment while he remained in Hong Kong on the recognizance during the period of temporary incapacity. As it is not shown that Shiddik was capable of being lawfully employed during the period of temporary incapacity, the premise for awarding section 10 compensation is lacking.

66. For the above reasons, I decline to make an award under section 10 of the ECO.”

1. The situation of Jiang was different. After the Accident, Jiang was admitted in the hospital for about 2 weeks, he was then imprisoned for 1 week. Thereafter, he went back to the Mainland. He was not prohibited from taking employment after his return to the Mainland. In other words, he was capable of making an earning during the period of temporary incapacity, he shall be entitled to section 10 award.
2. I use the notional earning of a construction worker in Guangxi, the place where Jiang could take employment. I consider Dr Fu’s opinion that a sick leave of 6 months is reasonable.
3. The compensation under section 10 shall be HK$2,231 x 4/5 x 6 = HK$10,709.

*Section 10A compensation*

1. It was common ground that Jiang was not entitled to compensation for medical expenses under section 10A of ECO as it was clearly provided in section 10A(1A) that medical treatment given outside Hong Kong was not included in the compensation given under that section. The medical expense incurred by Jiang in the Mainland is therefore not recoverable under section 10A of the ECO.

*Quantum awarded in the PI Action*

*PSLA*

1. The following cases quoted to me are relevant to the present case on the award of PSLA:-
2. *Cheng Muk Ping v Chan’s Machine Engineering Co Ltd,* unreported, DCPI 932 of 2007, 20 October 2008. The plaintiff in this case sustained a lisfranc fracture on his right foot second metatarsal. He received an operation of open reduction and internal fixation and his foot was put in a cast for 6 weeks. He had difficulty in walking up and down staircases and the loss of earning capacity was assessed to be from 8% to 10%. The PSLA awarded to the plaintiff was HK$180,000.
3. *Leung Chung Ngar Christopher v Yeung Man Wai*, unreported, HCPI 63 of 1999, 20 December 2000. The plaintiff’s left foot was went over by the defendant’s car, causing fractures of the metatarsal neck of the 3rd and 4th toe, and dislocation of the 5th metatarsophalangeal joint of the left foot. The PSLA awarded was HK$200,000.
4. *Kwok Kwan Lam v Lai Po Sing,* unreported, DCPI 1232 of 2012, 7 March 2014. The plaintiff’s left foot was run over by a forklift and he suffered left foot metatarsal fracture. The plaintiff was given a relatively long sick period and has residual disability. HK$280,000 was awarded as the PSLA.
5. In light of the extent of Jiang’s injuries, I award a sum of $250,000 for Jiang’s PSLA.

*Pre-trial loss of earning*

1. The loss of earning during the 6 months period of sick leave (less about ¾ month while he was hospitalized and imprisoned) is HK$2,231 x 5.25 =HK$11,713. Jiang is a Mainland national and thus was not entitled to MPF.
2. Both Dr Fu and Dr Yen considered that Jiang could take up jobs other than construction site workers. After the period of sick leave (that is from 24 April 2009) Jiang should be able to resume lighter works. Jiang’s loss was a partial loss of the difference between the average wages that could be earned as a construction worker in Guangxi (which was RMB 22,300 per annum according to the Statistic) and the average wages that could be earned as a worker in general and other service (which was RMB19,818 per annum according to the Statistic). The difference was RMB2,482 or HK$2,979 per annum.
3. Mr Lim submitted that the partial loss was wiped out by supervening event. Jiang’s inability to return to work as construction worker was because of his back pain. (*Jobling v Associated Dairies* [1982] AC 794)
4. Mr Lim relied on the CT scan report of Jiang dated 19 December 2013 which showed that Jiang suffered from protrusion of the L3/4 and L4/5 lumbar disc. This report was made after the joint medical report, and was therefore not seen and considered by the medical experts. Mr Lim suggested that the CT scan report showed degenerative changes which was probably caused by Jiang’s working as a construction worker since 2003. The degenerative changes to the lumbar spine gave rise to back pain and this is a supervening event which rendered Jiang unfit to work as a construction worker. He therefore submitted that even if there was no Accident happened to Jiang, he would be unable to work as a construction worker.
5. It is unfortunate that this court does not have the benefit of medical opinion on the report of the CT scan. In the absence of medical opinion, I do not consider it safe to conclude that the protrusion of lumbar disc was degenerative changes resulted from his working as a construction worker since 2003 and further that it was the degenerative changes that caused his inability to work as construction worker after the Accident.
6. I allow the pre-trial loss of earning after the period of sick leave in the sum of HK$2,979 x 6 years = HK$17,874.
7. The total pre-trial loss of earning is therefore HK$11,713 + HK$17,874 = HK$29,587.

*Post trial loss of earning*

1. Jiang was aged 46 at the date of the trial, adopting a discount of 2.5%, the multiplier is 11.46. The post trial loss of earning is the annual wages of HK$2,979 x 11.46 = HK$34,140.

*Loss of earning capacity*

1. The Privy Council in *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176 at 183B defined loss of earning capacity as a claim to cover the risk that, at some future date during the plaintiff’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The plaintiff must show that the risk is “substantial” or “real” but not “speculative” and fanciful (*Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132).
2. I agree with Mr Poon’s submission that in light of the medical evidence, the reduction in Jiang’s working efficiency is minimal. There is also no evidence that Jiang would suffer disadvantage in the labour market if he changes to other occupation.
3. I disallow this claim.

*Past Medical Expenses*

1. Jiang accepted that the amount of HK$6,000 proposed by Up Cheer and Yeung is a reasonable amount of past medical expenses incurred by him. I allow this claim.

*Future Medical Expenses*

1. As to the future medical expenses, it is common ground that Jiang should undergo the surgery to remove the implants, and the costs estimated by the medical experts are HK$30,000. I accept that Jiang will incur other medical expenses for his recuperation and rehabilitation. I consider the sum of HK$10,000 claimed by Jiang reasonable. The total award for future medical expenses is HK$40,000.

*Summary on damages AWARDED*

1. The damages awarded in the EC Action are:-

Section 9 compensation $ 4,819

Section 10 compensation $10,709

Total: $15,528

1. The damages awarded in the PI Action are: -

Pain, suffering and loss of amenities $250,000

Pre-trial loss of earning $29,587

Post-trial loss of earning $34,140

Past medical expenses $6,000

Future medical expenses $40,000

Total: $359,727

1. Jiang shall give credit to the amount of employees’ compensation awarded. There shall not be double recovery. The total amount of compensation that Jiang shall receive in both the PI Action and the EC Action shall not exceed HK$359,727.

*Interest*

1. I also allow an interest on the amount of awarded PSLA at 2% from the date of the writ to the date of judgment; and on the amount of the awarded pre-trial loss of earnings and special damages at half judgment rate from the date of the Accident to the date of judgment.

*Costs*

1. I make an order *nisi* that (1) the costs of Jiang and the Fund Board in the PI Action be paid by Up Cheer and Yeung; (2) the costs of Jiang in the EC Action be paid by Yeung; (3) the costs of the Fund Board in the EC Action be paid by Jiang and Yeung. All the above costs are to be taxed if not agreed, with certificate for counsel.
2. As to Up Cheer’s costs in the EC Action, I take into account that the costs it incurred in the EC Action should be substantially overlapped with its costs in the PI Action, as well as the conduct of Up Cheer, in particular the inconsistency in Up Cheer’s evidence on the identity of Jiang’s employer, I make an order *nisi* that there be no order as to Up Cheer’s costs in the EC Action.
3. The above cost orders *nisi* shall become absolute if no application to vary the same is made within 28 days from the date of this judgment. Jiang’s own costs be taxed pursuant to the Legal Aid Regulations.
4. I thank counsel’s helpful assistance.

( Elaine Liu )

Deputy District Judge

DCPI 2047/2011

Mr Frederick Chan, instructed by Cheng & Wong, assigned by the Director of Legal Aid, for the plaintiff

Mr Jackson Poon, instructed by Huen & Partners for the 1st and 2nd defendants

The 3rd defendant, absent

Mr Patrick Lim, instructed by Gallant Y T Ho & Co, for the 4th defendant

DCEC 1267/2010

Mr Frederick Chan, instructed by Cheng & Wong, assigned by the Director of Legal Aid, for the applicant

Mr Jackson Poon, instructed by Huen & Partners for the 1st and 3rd respondents

The 4th respondent, absent

Mr Patrick Lim, instructed by Gallant Y T Ho & Co, for the 5th respondent