## DCPI 131/2010

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 131 OF 2010

--------------------

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| BETWEEN | SEN HEM PRATAP | | | Plaintiff | |
|  | and | | |  | |
|  | HANG YUE ENGINEERING LIMITED | | | Defendant | |
|  | | --------------------- |  | |

Coram : Deputy District Judge Grace Chan in Court

Dates of hearing : 19 – 21 December 2011

Date of handing down Judgment : 1 February 2012

# JUDGMENT

***BACKGROUND***

1. The Plaintiff (“**Pratap**”) was employed by the Defendant ("**Hang Yue**") to work as a steelworker in its construction site at Lung Hong Street, Lung Kwu Tan, Area 38, New Territories (“**Site**”) since 14 May 2008. Hang Yue was the sub-contractor of the Site to build six large fuel tanks for fuel storage.
2. In the morning of 12 November 2008, Pratap had an accident while working at one of the fuel tanks, as a result of which he sustained injuries to his right eye. He now claims damages against Hang Yue in the sum of $110,718.54.
3. Pratap has also commenced an employees’ compensation claim against Hang Yue under *DCEC 913/2009*. But for reasons unknown to me, the claim was stayed as a result of the application made by Pratap through his former solicitors (on the instruction of the Director of the Legal Aid). Further, legal aid was later discharged. Pratap thus acts in person in this trial.
4. By way of the Statement of Claim and witness statement, Pratap claims that on 12 November 2008, he was instructed by Hang Yue to grind a metal sheet of a fuel tank by using an electric grinder. However, he was not provided with a pair of suitable eye goggles to protect his eyes, despite repeated request for the same to the safety officer of Hang Yue called Siu Wai [his full name is Cheung Chi Wai] (“**Wai**”). Instead, he was given a visor (or what Hang Yue calls a “face shield”.) (For convenience, I shall use the word “**Face Shield**” to denote what Pratap was allegedly wearing at the time of the Accident in my Judgment below.) In the course of grinding, a metal fragment flew out and hit the pupil of his right eye (“**Accident**”). As a result, he sustained right eye injury and a permanent scar was left at his right eye pupil.
5. Pratap alleges that the accident and his injury were caused by the breach of contract of employment, negligence and/or breach of duty on the part of Hang Yue. In particular, he alleges that Hang Yue failed to provide a suitable or effective eye goggles or protective screen and to ensure that he used the eye goggles and the protective screen, and to provide a safe system of work to him.
6. By its Defence, Hang Yue admits that on the day in question, Pratap was its employee but made no admission as to the circumstances leading to the Accident. It puts Pratap to strict prove his case. It further avers that it had provided both the eye goggles (exhibit D-1)[[1]](#footnote-1) and Face Shield (exhibit D-2)[[2]](#footnote-2) to Pratap for him to use and that both offered equally sufficient protection for carrying out the grinding work. It therefore denies that the accident was caused by any negligence, breach of contract or breach of duty on its part. It claims that the accident was caused solely or contributed to by the negligence on the part of Pratap.
7. On quantum, Hang Yue disputes each and every items of the Revised Statement of Claim. It also asks for credit to be given to a sum of $9,236 already paid to Pratap in relation to this accident (Pratap does not seem to dispute this sum).

***ISSUES***

1. In view of the background set out above, the core issues for determination at trial are :
   1. How did the Accident happen?
   2. Was the accident caused by the negligence or breach of duty on the part of Hang Yue?
   3. Was there any contributory negligence on the part of Pratap?
   4. What is amount of damages payable under each head?
2. On the above issues, Pratap is the only witness for his case. Hang Yue has called its senior project manager, Ms. Lui (“**Lui**”) to give evidence.
3. Wai, who allegedly had direct contact with Pratap in work, is not called to give evidence for Hang Yue. I am told that Wai has already left the employment with Hang Yue and that he does not wish to take leave from his new employer in order to give evidence in Court. It is unknown why Hang Yue does not issue a witness subpoena to Wai in the circumstance.

***HOW DID THE ACCIDENT HAPPEN***

***Pratap’s Evidence***

1. It is Pratap’s evidence that at all material times, Hang Yue was to build fuel tanks at the Site. In so doing, pieces of metal sheets needed to be welded together. After the welding, the boundary of the metal sheets had to be smoothened by electric grinders. His job was to use the electric grinder to cut and smooth the metal sheets.
2. On the date of the Accident, he was working in one of the fuel tanks that were being built. There were a lot of metal beams or rods placed around. The workers were hurried to work fast. The work condition was crowded. He was wearing a Face Shield while doing the grinding work. He demonstrates to me in the trial how he wore the Face Shield at the time of the Accident: it covers from his forehead up to his chin, but a gap is left between his face and the 2 sides and the underneath of the Face Shield.
3. He agrees that goggles similar to exhibit P-1[[3]](#footnote-3) were provided to him by Hang Yue at some stage, but not at the time of the Accident. The goggles however were not safe and proper, as, by its original design, there were many holes at the temple areas of the goggles. Further, the strap of the goggles was loosened sometime after use so that the goggles could be tightly worn. As a result, metal fragments or dust could go through the tiny holes of the goggles or the gap between the nose and the lower part of the goggles into his eyes easily.
4. He also relates that after lapse of time, scratches and damage appeared on the goggles. So, he went to ask Wai for another pair of goggles, but was only given a Face Shield similar to the one as exhibit P-2[[4]](#footnote-4) for use. The Face Shield, Pratap says, cannot offer sufficient protection to his face or eyes during the grinding work. This is because there were a lot of metal fragments or dust generated from the grinding work; and the metal fragments or dust would easily deflect and bounce onto or back from the metal beams and rods that were placed around. In fact, it turned out that when he was working, a metal fragment suddenly became embedded into his right eye. He sustained right eye injury as a result.

***Hang Yue’s Evidence***

1. There is no eye witness from the Defendant to the Accident. Ms. Lui, the only defence witness, did not witness the Accident. But she points out that Pratap was given a pair of goggles on 29 October 2008, which was about 2 weeks before the Accident, and he had signed to acknowledge receipt.

***Discussion***

1. Ms. Cheng, Counsel for Hang Yue, submits to me that Pratap has failed to discharge his duty of proof because he failed to show to this Court how the accident had happened. She comments that Pratap has given inconsistent evidence on the 2 sketches attached to his witness statement and on the “metal connectors” mentioned in his witness statement.
2. I would simply reject Ms. Cheng’s argument on the sketches. Although Pratap says in his witness statement that the sketches depicted correctly and accurately how the accident happened, it would be against common sense if one is to take this to mean the sketches had embodied *all* the details of the Accident; after all, the choice of the word “sketches” speaks for itself. Given the Accident entails a metal fragment or dust suddenly shot to and injured an eye, it would be too strenuous a duty to impose on Pratap to require him be able to tell, or to draw, the exact route from where and of how the metal fragment or dust travelled from grinding work to hit his right eye.
3. As to Ms. Cheng’s submission on the “metal connectors”, it cannot be disputed that in his oral evidence, Pratap mentions about the metal beams and rods but not the “metal connectors” (as appeared in his witness statement). It is also true that at some point of his oral evidence, he says that he does not know what a “metal connector” was. But after clarification, he finally confirms that the metal beams and rods mean the “metal connectors” referred to in his witness statement.
4. I think in considering the above difference in the terminology between Pratap’s witness statement and his oral evidence, one has to bear in mind that Pratap speaks little, if any, English. What he has said in his witness statement or in court has to go through the medium of an interpreter. Any term that is translated between Nepalese and English depends very much on the understanding and language ability of the interpreters as well as whether there are exact equivalent words between the two languages. I notice that the interpreter that translated the witness statement of Pratap is different from the lady interpreter of the trial. Discrepancy on the terminology used is, in my view, unavoidable and understandable in the circumstances. The discrepancy should not be taken in any way to undermine the credibility of Pratap.
5. Submission is also made by Ms. Cheng that Pratap has shifted his allegation during the trial. In his witness statement, he alleges that he was not provided with a pair of effective goggles; but in his oral evidence in court, he admits that goggles were actually provided to him at some stage (though not at the time of the Accident). He then goes on to say that even if the goggles were provided to him at the time of the Accident, he would not have used them anyway because he was using a bigger electric grinder at that time. The variations and inconsistencies, Ms. Cheng says, should undermine Pratap’s credibility. I do not agree. What Pratap says in his witness statement is that he was not provided with goggles for *most of the time* when he did the grinding work[[5]](#footnote-5); he does not say that he was *never* provided with goggles. In my Judgment, he is fair in admitting that goggles were provided to him at some stage (though not at the time of the Accident) by Hang Yue, even though this piece of evidence might tend to support Hang Yue’s defence.
6. There is allegation that goggles were provided to Pratap on 29 October 2008 and he had signed a receipt to acknowledge the same. I have carefully read the alleged receipt. On the face of it, the receipt shows that Pratap had received a “護目鏡” [eye protection glasses] and 2 masks on 29 October 2008. First of all, I notice that the receipt is written in Chinese, a language which cannot be understood by Pratap. Nothing therein says that the content has been translated to him from Chinese into his language. Secondly, the date of 29 October 2008 was stamp-chopped onto the receipt, but at the right top corner of the receipt, there is another printed date called “Effective Date: 2 June 2008”. What this “Effective Date” actually means and whether it might be the actual date of this receipt remains a mystery unsolved by the evidence before me. Thirdly, Hang Yue conveniently equates “護目鏡” to “goggles” in order to support its allegation that goggles were provided to Pratap 2 weeks before the Accident. But one must not lose sight of the fact that a “visor” or “face shield”, both of which are eye protection items, is not included in the receipt. Given it is also Hang Yue’s defence that both goggles and Face Shield were provided to Pratap, it would be inherently improbable and unreasonable that this receipt does not provide for a separate item called “visor” or “face shield”. The fact that there is no such separate item shows more likely than not that “護目鏡” in this receipt does not only include goggles, but also visors or face shields. All these factors together convince me that the receipt is not a piece of conclusive evidence to show that Pratap must have been given goggles on 29 October 2008. I conclude that it is unsafe to place any weight on the receipt due to the observations I have just listed out above.
7. On the whole, I find Pratap an honest and reliable witness. His evidence on how the accident happened is unshaken under cross-examination. He gives his evidence fairly (see para 20 above). He, also very fairly, agrees that the Face Shield used by him at the time of the Accident did not have cracks or holes. He did not for a moment try to hide this from me or to exaggerate the condition of the Face Shield. I believe and accept his evidence.
8. I believe and find as facts that at the time of the Accident, Pratap was *only* given and was *only* wearing a Face Shield but not a pair of goggles. For reasons which will become obvious below, whether he was wearing the Face Shield produced as exhibit P-2 by him or produced as exhibit D-2 by Hang Yue at the time of the Accident is, in my view, not relevant. After all, I note that the size of both Face Shields (which is marked at the left upper corner of the respective Face Shield) is the same, namely 8” x 15.5”.
9. I believe and find that metal (be it called metal beams or metal rods or metal connectors) were placed around his work place. I further believe and find that during grinding work, a lot of metal fragments and metal dust would be generated which would and did deflect and bounce onto or back from the metal. I find that at the time of the Accident, a metal fragment or metal dust did deflect and bounce to hit his right eye. As a result, his right eye sustained injuries.

***WAS THE ACCIDENT CAUSED BY NEGLIGENCE OR BREACH OF DUTY OF HANG YUE***

***Pratap’s Evidence***

1. In the trial, Pratap gives evidence to the effect that when the eye goggles given to him by Hang Yue were worn out, a new pair was not provided to him despite his repeated request. Instead, he was just given a Face Shield.
2. Yet it is also his evidence that depending on the size of the electric grinder that was given to him for work, he would choose whether to use eye goggles or Face Shield: if he worked with a bigger electric grinder, he would use a Face Shield; if he worked with a smaller electric grinder, he would use eye goggles. And since he was given a bigger electric grinder to use at the time of the Accident, he chose to use a Face Shield instead of eye goggles (even if the same was really provided to him at that time).
3. He also says that the Face Shield provided to him could not offer sufficient protection to his face and eyes because the metal fragments or dust bounced everywhere and could come into contact with his eyes through the uncovered gap on both sides and the underneath of the Face Shield. He suggests that a face shield akin to the helmet of a motorcyclist, or large enough to cover from his forehead to his chest, would offer better and sufficient protection. But he is not sure if such a Face Shield was available on the market.

***Hang Yue’s Evidence***

1. Lui, Hang Yue’s senior project manager of the Site and the supervisor of Wai, gives evidence to the effect that she is the person in charge of approving and ordering of safety equipment. As the senior project manager, she patrolled the Site once a day in the morning. She would patrol once more in the afternoon if any matters arose. She says that Hang Yue is very concerned with the safety of its workers. It requires its workers to obtain the Construction Workers Registration Card and Construction Industry Safety Training Certificate before commencement of work. Pratap had already obtained the same before he started to work for Hang Yue.
2. Further, when a worker including Pratap commenced work with Hang Yue, he was required to attend an induction course organized by the principal contractor of the Site. Hang Yue would also arrange its workers including Pratap to attend safety talks on such topics as confined space and arc welding.
3. She also gives evidence that the eye goggles (exhibit D-1) and Face Shield (exhibit D-2) offered *equally effective* protection for carrying out the grinding work in question. The Face Shield given to Pratap complies with the standard approved by the Labour Department and is generally used by workers of grinding work in the construction sites of Hong Kong. Further, 10 spare sets of goggles and Face Shields were made available in office if any worker needed any replacement.
4. Finally, she points out that no prosecution was laid by the Labour Department in respect of this Accident.

***Discussion***

1. Ms. Cheng submits to me that I should believe in Lui’s evidence rather than that of Pratap. But I have already ruled that Pratap is an honest witness and I believe in his evidence. I have also ruled that at the time of the Accident, only a Face Shield but not goggles were provided to him for the purpose of the grinding work.
2. I refuse to place weight on the evidence of Lui. It seems obvious to me that although Lui claimed that she patrolled the Site at least once a day, she did not take part in the day-to-day work supervision or safety training arrangement of the workers. I fail to find her name in any of the Tool Box Meeting Records (工友座談會記錄) [safety talks records] allegedly organized by Hang Yue.
3. Since on Tool Box Meeting Records, I think I should also point out that Tool Box Meeting Record on arc welding (which is relevant to grinding work) shows that the safety talk took place on 7 November 2008, just 5 days prior to the Accident. Bearing in mind Pratap started to work for Hang Yue on 14 May 2008, this safety talk was to a certain extent belated.
4. The fact that no prosecution was laid by the Labour Department is a non-pointer to the liability of Hang Yue in this case. It is pertinent for me to say that while the Accident took place on 12 November 2008, Hang Yue has *not* filed any Form 2 [Notice by Employer of the Death of an Employee or an Accident to an Employee resulting in Death or Incapacity] with the Labour Department. The Form 2 now disclosed in the trial bundle was filed by the principal contractor of the Site, Leighton Contractors’ Limited, on 17 June 2009 (more than 7 months after the Accident). It goes without saying that such belated reporting to the Labour Department would virtually make any intended or potential investigation into the Accident rather meaningless or fruitless, if not impossible.
5. Ms. Cheng argues that goggles and Face Shields are equal alternatives in terms of offering safety protection to workers for carrying out grinding work. She refers me to regulation 2 of *Factories and Industrial Undertakings (Protection of Eyes) Regulations*, Cap. 59S in which “eye protectors” are defined as:

“….any of the following (being equipment made to be worn by a person), that is to say, goggles, visors, spectacles and face screens.”

1. However, regulation 5 of *Factories and Industrial Undertakings (Protection of Eyes) Regulations*, Cap. 59S also stipulates that:

“The proprietor of any industrial undertaking to which these regulations apply shall provide for the use of every person employed in any specified process carried on in that undertaking ̶

1. approved eye protectors;
2. an approved shield; or
3. an approved fixed shield,

*as the case may require* for the protection of his eyes, *having regard to the specified process in which that person is employed and the risk of the injury to his eye from the carrying on of that process*.” (emphasis added)

1. It is clear to me that regulation 2 must be read together with regulation 5. When read together, the 2 regulations imposes a duty on the proprietor of the relevant industrial undertaking to provide for approved eye protection tools to its workers, having regard to the specified work that its worker was employed and the risk of the injury to his eye in carrying out that specified work.
2. I do not think one would dispute that in grinding metal, metal fragments or dust or sometimes even sparkles are likely to emerge. Although it is undisputed that there was a protective guard affixed to the electric grinder given to Pratap for work at the time of the Accident, the protective guard is for prevention of injury to the hands or fingers; it is not meant to ward away metal fragments or dust that might be generated during grinding work. On the other hand, I have accepted that Pratap was engaged to work inside a fuel tank where metal beams or material were placed. According to the Tool Box Meeting Records produced by Hang Yue dated 22 May 2008 and 31 July 2008, there were more than 45 workers (Pratap was one of them) attended each of the safety talks before they commenced working in fuel tank Nos. 4 and 2 respectively. It is more likely than not that more or less the same number of workers would be working in the fuel tank that the Accident took place. Under such circumstances, any reasonable employer should have known or should have foreseen that a lot of metal fragments or dust would be generated from the grinding work, and would deflect and bounce anywhere including to the eyes or face of its workers. Merely a Face Shield, with its 2 sides and its underneath not concealed and left with a gap, is clearly not sufficient to protect the eyes of the workers under the circumstances.
3. Particular attention should also be drawn to the written material allegedly introduced in the safety talk on arc welding[[6]](#footnote-6). One of the safety requirements mentioned in the written material is to use eye protection glasses *and* (as opposed to “*or”*) face shield of approved standard. The written material certainly lends every support to my conclusion that merely a face shield does not offer sufficient safety to Pratap in the circumstances.
4. On the other hand, Ms. Cheng argues that there is no absolute obligation upon Hang Yue as an employer to devise a system for its workers including Pratap which would be free of risk. What requires of Hang Yue is to take reasonable precautions to reduce the risk as far as possible, but not to remove every risk which might confront its workforce. And Hang Yue as an employer is not an insurer of Pratap’s personal injury. See: *General Cleaning Contractors LD v Christmas* [1953] AC 180; *Wong Wai Ming v Hospital Authority* [2001] 3 HKLRD 209; *Ng Kong v Golden Caterers Limited*, HCPI 206/2004.
5. Above all, Ms. Cheng is adamant in saying that Pratap was an experienced construction worker and had been working for Hang Yue as a steelworker for nearly 6 months before the Accident. It would be reasonable for Hang Yue to leave it to Pratap to decide whether to use the goggles or Face Shield in the course of grinding work: *Walsh v Crown Decorative Products* [1993] P.I.Q.R. QP194 CA at P203- P204 per Purchas LJ.
6. While I agree that the duty of an employer to its workers is to take reasonable precautions against any foreseeable risk, I will simply repeat the conclusion made by me in para 37 to 40 above.
7. I say further that assuming (just assuming) that I was wrong in finding that only a Face Shield was provided and that assuming (just assuming) both goggles and Face Shield were provided to Pratap for his use at the time of the Accident, I am of the view that it would not be reasonable for Hang Yue to let Pratap decide which eye protection tool to use. I am not persuaded by Ms. Cheng that Pratap was an experienced grinding worker at the material time. I come to this view because Pratap was only working as a steelworker doing grinding work for about 6 months only (since 14 May 2008) prior to the Accident. Before that, his work experience in the construction sites did not touch on grinding work. In *Walsh v Crown Decorative Products (supra)*, the plaintiff was regarded as a skilled and experienced plumber by the English Court of Appeal because he, at the age of 59, had spent most of his working life as a plumber including 8 years as a plumber foreman. Pratap’s experience in grinding work is far much less than that of the plaintiff in *Walsh v Crown Decorative Products (supra)*.
8. Due to reasons aforesaid, I find that Hang Yue should have known or foreseen that there was a real risk of metal fragments or dust to deflect and bounce anywhere including to the eyes or face of Pratap. It should have but failed to provide effective goggles to Pratap at the time of the Accident. Further, even if (just assuming) goggles were provided, it should have not let Pratap decide which tool to use, but should have ensured that goggles at the very least be used by its workers including Pratap during grinding work. Therefore, it has failed to provide a safe system of work to Pratap and exposed Pratap to a risk of injury which it knew or ought to have known or foreseen. As a result, Pratap’s right eye sustained injury.

***CONTRIBUTORY NEGLIGENCE***

1. Given my finding above, especially that Pratap was not an experienced grinding worker, I cannot see Pratap should be held contributory negligent in any respect. I find that he is not negligent in any degree in this Accident.

***THE AMOUNT OF DAMAGES PAYABLE***

***Injuries and Treatment***

1. Pratap was born in 1975 and was 33 years old at the time of the Accident. He is now 37.
2. He went to the A & E Department of Pok Oi Hospital in the following morning after the Accident. According to the medical report of Pok Oi Hospital dated 16 September 2009, a florescent staining revealed a foreign body over his right cornea. He was treated with some oral analgesics and was referred to Tuen Mun Eye Centre.
3. According to the medical report of Tuen Mun Hospital dated 15 July 2009, Pratap attended the Department of Ophthalmology of Tuen Mun Hospital on 14 November 2008. A small metallic foreign body was found over his right cornea with removal done. There was no permanent disability to his right eye. However, he received treatment for left eye anterior uveitis [an inflammatory condition affecting the unveal tissues of any eye] which is unrelated to the Accident.
4. He attended altogether 15 medical and follow-up sessions between 13 November 2008 and 7 September 2009. He was granted sick leave continuously from 13 to 24 November 2008 and then intermittently from 9 December 2008 to 13 July 2009. The total sick leave is 30 days.
5. According to the joint ophthalmological report dated 9 December 2010 prepared by Dr. S. H. Cheung (for Pratap) and Dr. Benedict Liang (for Hang Yue) (“**Joint Report**”), they conducted an examination on Pratap on 9 November 2010 and found that there were 3 non-axial corneal scars at the cornea of the right eye and thus Pratap must have suffered from more than one episodes of foreign body lodging onto the cornea in the past. But all 3 corneal scars are intra-stromal and non-axial which should not cause symptoms of discomfort nor cause disturbance of vision of the right eye. The left eye anterior uveitis affects his left eye alone and will cause symptoms of epiphora [watery discharges from an eye], photophobia [undue sensitivity of an eye to light] and blurred vision.
6. Both experts take the view that Pratap should be able to resume his pre-accident job. He has not suffered from impairment of the whole person or loss of earning capacity as a result of this Accident. The sick leave given was appropriate.
7. There is no reason to doubt the medical reports prepared by the hospitals, nor is there any reason to doubt the comment made by the joint experts in the Joint Reports. I accept the medical evidence as stated above.
8. On the other hand, Pratap claims in his witness statement dated 30 August 2010 that after the removal of foreign body from his right eye, his right eye was recovering well. But he still felt pain and burning sensation at his right eye and his visual power is very poor. He could not sleep well at night because of the pain and burning sensation. However, he tells me in the trial that the pain has lessened since then and he feels pain in his eye only when he is in sunlight or very bright light. The insomnia has also improved upon medication. Yet his visual power is deteriorating. Thus he has to wear spectacles now, for if he does not, he is unable to read the number of the bus route even the bus is right in front of him.
9. For the reasons stated earlier in my Judgment, I believe and accept Pratap’s evidence on his injuries. I accept that until his right eye was fully recovered, he did suffer pain and burning sensation at his right eye, and that the pain caused insomnia. But I would prefer the medical evidence in the Joint Report that upon recovery the scar at his right eye would not cause discomfort or disturbance in vision to him.

***Pain, Suffering and Loss of Amenities (“PSLA”)***

1. Pratap asks for PSLA in the sum of $50,000 in his Revised Statement of Damages prepared by his former solicitors and relies on *Chow Wai Hung v King Rise Engineering Ltd & Another* [2005] HKEC 935.
2. Ms. Cheng submits that *Chow Wai Hung* is not of assistance because it was overturned by the Court of Appeal (*CACV 213/2005*). The Answer to the Revised Statement of Damages pleads that a sum of only $5,000 should be appropriate for PSLA (if liability can be established). Ms. Cheng is unable to provide me with any authority on this suggested figure of $5,000.
3. In *Chow Wai Hung*, the plaintiff, a carpenter, was striking on a nail when the nail broke; a fragment of the nail hit and injured his right eye. He suffered right corneal abrasion. He was awarded $50,000 for PSLA by the trial judge. On appeal by the plaintiff, the CA overturned the trial judge’s assessment on the PSLA and increased the award from $50,000 to $150,000 on the ground that the trial judge had failed to take into consideration the post-traumatic stress disorder and a condition called “recurrent cornea erosion” suffered by the plaintiff. It would be too much of a broad-brush approach for Ms. Cheng to say that *Chow Wai Hung* is of no assistance to this Court simply because the trial judge’s assessment on the PSLA was overturned by the CA.
4. I have referred Ms. Cheng to *Nam Cheuk Yin v Ng Yim Hing trading as Best Choice Beauty Centre* [2003] 2 HKLRD 195. In that case, the plaintiff’s eye was injured in a facial treatment when the cream applied by the defendant onto the plaintiff’s face escaped to the plaintiff’s eye. Also, the defendant negligently rubbed the plaintiff’s eye when massaging her face. The plaintiff suffered no visual function impairment. She only suffered discomfort in her eye in dry and windy condition. For such minor injuries in 2003, the plaintiff was awarded $8,000 for the PSLA.
5. I do not think it can be disputed that Pratap’s eye injuries were more serious than that of the plaintiff in *Nam Cheuk Yin*. I simply reject Hang Yue’s suggestion of $5,000 for it is unreasonable and unrealistic in the circumstances. I find that the injuries sustained by Pratap are similar to that of the plaintiff in *Chow Wai Hung* (in so far as the eye injury is concerned). Taking into consideration all relevant factors, the reasonable sum to be awarded for PSLA is $50,000.

***Pre-trial Loss of Earnings***

1. Pratap has not made any claim under future loss of earnings or loss of earning capacity. He claims for pre-trial loss of earnings only.
2. It is his case that after the initial sick leave period expired on 24 November 2008; he resumed working as a steelworker for Hang Yue on 25 November 2008 at the Site but took leave from time to time to attend the follow-up sessions. But since he could no longer carry out his duties as actively as before due to poor visual power, he was terminated by Hang Yue on 18 April 2009 on the ground that his service was no longer required. It was not until 20 August 2009 when he was able to find a new job as a general labourer with China Overseas earning about $12,081.89 per month. He claims pre-trial loss of income in the sum of $53,208.13 covering the period from 12 November 2008 to 19 August 2009.
3. Hang Yue does not dispute that (1) Pratap was paid $450 per day prior to 15 January 2009 and $460 per day since 15 January 2009; (2) the total sick leave granted to Pratap was 30 days. But Hang Yue argues that among those 30 days, 3 days (namely 16 November 2008, 23 November 2008 and 15 March 2009) were Sundays which Pratap should not be entitled to salaries; thus a pre-trial loss of earnings of 27 days only should be paid by Hang Yue. Further, it does not agree to pay Pratap’s alleged loss of salaries between 19 April and 19 August 2009 (4 months).
4. In his witness statement and the Revised Statement of Damages, Pratap claims that despite his effort to look for jobs, he was unable to engage in any gainful employment between 19 April and 19 August 2009. He was able to secure a job with China Overseas on 20 August through the referral of his friend. But in his oral evidence in court, he also mentioned that he could not work during this period because he got to focus on and fight this case.
5. I bear in mind that the Joint Report suggests that Pratap should be able to resume pre-accident job. I remind myself that it is Pratap’s evidence that one of the reasons of not working during 19 April and 19 August 2009 was to concentrate on this litigation. But I also take into account that he was required to attend regular follow up sessions at Tuen Mun Eye Centre even *after* his employment with Hang Yue was terminated on 18 April 2009. He had to attend Tuen Mun Eye Centre twice in May 2009, namely on 7 May and 21 May; and thereafter once a month in June and July 2009[[7]](#footnote-7).
6. In my view, an employer is unlikely to welcome any new employee taking 2 days’ sick leave within the first month of employment and thereafter once a month in the following second and third months of employment, especially when the sick leave was related to an injury caused by the previous, not present, employment. In the circumstances, I take the view that it is reasonable for Pratap to take sick leave up to the date of follow up session of 13 July 2009, partly for attending the follow up sessions at Tuen Mun Eye Centre and partly for allowing him reasonable time to locate a new job.
7. According to the list of earnings filed by Hang Yue in the employees’ compensation case, the total earnings of Pratap from 14 May to 31 October 2009 were $59,067. The average monthly income was $10,740 ($59,067 ÷ 5.5 months), which means he worked on average 24 days a month ($10,740 ÷ $450 = about 24 days) prior to the Accident. I cannot see why I should not adopt 24 days as the average number of working days of Pratap in computing his pre-trial loss of income.
8. The sick leave granted to him prior to 15 January 2009 (when his daily pay rate was $450) was 16 days, among which 2 days were Sundays. The sick leave granted to him since 15 January 2009 (when his daily pay rate was increased to $460) up to 18 April 2009 was 10 days, among which 1 day was a Sunday.
9. The pre-trial loss of earnings is thus assessed as follows:

Prior to 15 January 2009

(16 – 2) days x $450 $ 6,300

From 15 January 2009 to 18 April 2009

(10 – 1) days x $460 $ 4,140

From 19 April 2009 to 13 July 2009

$460 x 24 days x 2 23/30 months $ 30,544

$ 40,984

***Pre-trial Loss of Mandatory Provident Fund***

1. Based on the pre-trial loss of earnings assessed as aforesaid, the pre-trial loss of mandatory provident fund is:

$40,984 x 5% = $ 2,049.20

***Special Damages***

1. Pratap claims medical expenses of $1,500; fee for purchasing glasses at $1,200; nourishing and tonic food expenses of $2,000 and travelling expenses of $150 in his Revised Statement of Damages.
2. Hang Yue does not dispute the medical fees subject to production of receipts. Apart from that, it disputes all other items including a very modest claim of travelling expenses in the sum of $150 (for at least 15 medical sessions at Pok Oi or Tuen Mun Hospital).
3. I have no difficulty in accepting that Pratap has incurred $1,500 medical expenses, for the medical appointment dates basically correspond with the sick leave days. I allow this sum in full
4. Pratap gives evidence to the effect that because of the injuries sustained by him in the Accident, his visual power has gone worse. He was advised by the doctor to wear glasses to aid his visual power. Yet, he has not produced any medical chit or slip to prove such medical advice, nor has he produced the receipt for the purchase of glasses. Further, according to the opinion given in the Joint Report, the right eye scar should not cause symptoms of discomfort or disturbance of vision of his right eye. On balance, I will disallow the claim for purchase of glasses in the sum of $1,200.
5. I note that although travelling expenses of $150 is claimed in the Revised Statement of Damages, Pratap’s witness statement actually deposes that he incurred $450 travelling expenses to attend follow-up sessions at the hospitals. I am not in a position to know why there is such a discrepancy here. Pratap has not clarified this point in his evidence. I am thus left with no choice but to consider if to allow $150 (not $450) under the head of travelling expenses. And my answer is certainly in the affirmative, for the amount claimed is necessary and in fact modest by the living standard of Hong Kong. I cannot accept Hang Yue’s unreasonable argument of awarding $50 travelling expenses in this case.
6. The claim for nourishing and tonic food is not allowed, for there is no receipt produced. Further, Pratap explains in his evidence that all he purchased was some fresh daily food such as meat; those cannot fall within the perimeter of tonic food.
7. The total special damages allowed are thus:

$1,500 + $150 = $ 1,650

***Summary on Quantum***

1. I set out below the assessment given by me:

PSLA $ 50,000.00

Pre-trial loss of earnings $ 40,984.00

Pre-trial loss of MPF $ 2,049.20

Special damages $ 1,650.00

$ 94,683.20

LESS payment already received ($ 9,236.00)

TOTAL: $ 85,447.20

***CONCLUSION***

1. I will enter judgment in favour of Pratap in the sum of $85,447.20.
2. Interest will be payable on PSLA at the rate of 2% per annum from the date of service of the Writ to the date of judgment, and on other special damages at half judgment rate from the date of the accident to the date of judgment.
3. I will make a costs order *nisi* that the costs of the action are to be paid by Hang Yue to Pratap, to be taxed if not agreed. If there is no application to vary the costs order *nisi*, it will become *absolute* within 14 days from the date of this Judgment.

(Grace Chan)

Deputy District Judge

The Plaintiff acting in person & present

Ms. Bonnie Cheng instructed by Messrs. Lam, Lee & Lai for the Defendant

1. See photos on pp 379-383 (exhibit D-1) of the trial bundle. [↑](#footnote-ref-1)
2. See photos on pp 384-387 (exhibit D-2) of the trail bundle. [↑](#footnote-ref-2)
3. See photos on pp 370 – 375 (exhibit P-1) of the trial bundle. [↑](#footnote-ref-3)
4. See photos on pp 375-378 (exhibit P-2) of the trial bundle. [↑](#footnote-ref-4)
5. See para 11 of Pratap’s witness statement. [↑](#footnote-ref-5)
6. See p 227 point 5iii) of the trial bundle. [↑](#footnote-ref-6)
7. See para 28 of Pratap’s witness statement. [↑](#footnote-ref-7)