# DCPI 1445/2005

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1445 OF 2005

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BETWEEN

## LING MAN KUEN（凌文權） Plaintiff

### and

CHOW CHAN MING（周燦明） 1st Defendant

HOLAKE (HONG KONG) LIMITED

（好歷（香港）有限公司） 2nd Defendant

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Coram : Her Honour Judge C.B. Chan in Court

Dates of Trial : 5th to 8th, 16th and 19th June 2006

Date of Handing down Judgment : 21st August 2006

**JUDGMENT**

1. In this Action the Plaintiff applies for damages against the 1st and 2nd Defendants arising from an assault by the 1st Defendant against the Plaintiff.
2. The Plaintiff was employed by the 2nd Defendant as an assistant engineer responsible for the maintenance and inspection of the safety of lifts and escalators.
3. The 1st Defendant was an employee of the 2nd Defendant.
4. The 2nd Defendant was and is a limited company in the business of erecting, assembling, maintaining and inspecting elevators and escalators.
5. The Plaintiff’s claim against the 1st Defendant is that the 1st Defendant intentionally and wrongfully assaulted the Plaintiff by striking his fists in the Plaintiff’s head, shoulders and chest.
6. The Plaintiff’s claim against the 2nd Defendant is based on negligence and/or breach of implied term of contract of employment and/or breach of statutory of the 2nd Defendant, its servants and agents and in the alternative, vicarious liability on the part of the 2nd Defendant. It seems that the Plaintiff is not pursuing his claim that the 2nd Defendant has instructed, caused or permitted and/or caused Mr. Tang Chi Kin to cause or permit the 1st Defendant to assault the Plaintiff as pleaded in paragraph 4(d).
7. Particulars of Negligence of the 2nd Defendant:-
   1. Failing to take any responsible step and measure to protect the Plaintiff from violent attacks of the 1st Defendant;
   2. Failing to take reasonable care for the Plaintiff’s health and safety;
   3. Exposing the Plaintiff to an unnecessary risk of injuries;
   4. Instructing, causing and/or permitting the 1st Defendant to assault the Plaintiff;
   5. Permitting and/or causing Mr. Tang Chi Kin who caused or permitted the 1st Defendant to assault the Plaintiff.

Particulars of the 2nd Defendant’s breach of Contract of Employment relied on is the same as is the Particulars of Negligence pleaded.

The 1st Defendant’s Defence and Counterclaim

1. The 1st Defendant alleged that he tried to calm down the Plaintiff who was scolding him with foul language and the Plaintiff used his fists to punch the stomach of the 1st Defendant. They then exchanged blows. Colleagues came and separated them. The 1st Defendant did not plead contributory negligence but counterclaimed for damages in the amount of HK$154,328.00. There was no plea of set off. It is a matter of costs.

The 2nd Defendant’s Defence

1. The 2nd Defendant admitted that it was the employer of both the Plaintiff and the 1st Defendant. Its defence is similar to the 1st Defendant’s, that the Plaintiff swore at the 1st Defendant and used his fist to assault the 1st Defendant. The 2nd Defendant also pleaded that if the 1st Defendant did assault the Plaintiff, it was an unauthorized and independent act for which the 2nd Defendant should not be held vicariously liable. The 2nd Defendant did not plead contributory negligence. It also filed Notice of Contribution and Indemnity against D1. However it was only served on the 1st Defendant a few days’ before trial. It was conceded by the 2nd Defendant that the claim for contribution against the 1st Defendant is not an issue in this trial because of inadequate notice to the 1st Defendant.

The Evidence

1. The Plaintiff gave evidence. He also called Mr. Chan Tsui Yan and Mr. Wong Kam Keung his former colleagues to give evidence.
2. The 1st Defendant gave evidence and called Mr. Choi Yuk Kam, Mr. Lin Chun Sing and the 2nd Defendant called Mr. Ng Yan Leung, Mr. Lo Kwok Leung Johnny, Mr. Lee Siu Sun and Mr. Danny Luk Chau Ming to give evidence.

The Issues

1. (1) Did the 1st Defendant start the assault with the first blow?

(2) If the 1st Defendant did not start the assault with the first blow and was acting in self-defence, did the 1st Defendant use excessive force and thereby hurt the Plaintiff? Alternatively, was the 1st Defendant assaulted by the Plaintiff and if so, did he sustain injury?

(3) If the 1st Defendant is liable for the assault did the Plaintiff’s injuries complained of arise from the alleged assault?

(4) Did the assault arise out of or was closely connected with the 1st Defendant’s employment with the 2nd Defendant?

(5) If so, should the 2nd Defendant be held vicariously liable for the 1st Defendant’s act?

(6) Was the 2nd Defendant negligent as pleaded?

(7) Was the 2nd Defendant in breach of the terms of the employment contract with the Plaintiff?

The 1st Issue

Evidence of the Plaintiff

1. The Plaintiff adduced his witness statement into evidence and gave oral evidence related to the assault. He stated that he worked as an assistant engineer for the 2nd Defendant training to be a Safety Officer in work related to the installation and maintenance of elevators and escalators. In about May 2000 he was transferred by Tang Chi Kin, the Manager of the Engineering Department of the 2nd Defendant to a project related to the decoration of lifts. He had never done this type of the job and was inexperienced but was willing to learn. The 1st Defendant was the Workshop Supervisor.
2. In the morning of 29 October 2002, while the Plaintiff was working inside the office of the 2nd Defendant at Tai Yip Street, Kwun Tong, the 1st Defendant entered the room and blamed him for inaccurate specifications given to the 1st Defendant for Kwun Yuet Court, Wanchai. The parties entered into an argument about this. The 1st Defendant then swore at him and slammed on the table. At that time the 1st Defendant was standing at the corner inside the control room of the 2nd Defendant’s office. The 1st Defendant was facing him. The Plaintiff stood up and asked what do you mean. He put his hand on the right shoulder of the 1st Defendant as a friendly gesture. After that the 1st Defendant assaulted him by punching him for 8-10 times which lasted almost a minute. In self defence, he tried to push the 1st Defendant away but he was not sure if he was able to push the 1st Defendant off. As a result of this assault, the left forehead was swollen and the top of the ridge of his nose was injured. He also suffered bruises on his chest. After the assault they were separated by a colleague Ng (DW5). Their superior Tang Chi Kin (“Mr. Tang”) came inside the room and brought them back to his office. Inside the office where they were told that it was wrong to have a fight inside the office. He said that as the 1st Defendant and the Plaintiff were arguing over something related to a project of the office, they would not be sacked. If it were not so, they would have been sacked. After this Mr. Tang took them to a Café nearby where they talked about the lay-out plans. Mr. Tang ordered 2 boiled eggs for the Plaintiff to use to roll over his black eyes to remove the bruises.
3. Later that day when the Plaintiff was on his way to the Project Site at Kwun Yuet Court to take photographs of the site, the Plaintiff felt sick. He telephoned a friend of his to come to accompany him to United Christian Hospital whilst waiting in hospital he called up Mr. Tang who assured him that the 2nd Defendant was insured for employees’ compensation. He told the Plaintiff that he should report that he was injured in an accidental fall and should not report that his injuries came as a result of an assault. The Plaintiff then wrote a report that he was injured when he slipped on the sand and debris and fell and injured himself at Kwan Yuet Court. Subsequently the Plaintiff was told by Mr. Tang through Lau Yuk Sim his staff that he should change his report of the accident to state that he fell on Hung To Road on his way to the office of a client. He did so to comply with this request.
4. Hence the 2nd Defendant reported in a Form 2 to the Labor Department that the Plaintiff fell on Hung To Road on his way to the office of a client. About half a year later in March 2003, the Plaintiff lodged with the Labour Department a notice of change of information when he gave the assault as the cause of the injuries that he suffered.
5. Under cross-examination, the Plaintiff admitted that he had met a traffic accident while working for Asia TV in 1996. He had been granted sick leave for almost 3 years during which he had had 5 operations. His major injuries were on his left knee. He also continued to seek psychiatric treatment for sometime. He denied that he had been asked about the history of his mental condition when examined by the two neurologists who prepared the joint medical report. He also denied he deliberately hid his history of mental illness from the medical experts who failed to refer to this in their reports.
6. The Plaintiff’s witness Mr. Wong Kam Keung the former telephone receptionist of the 2nd Defendant gave evidence to state on the early morning of 29 October 2002, in the Control Room of the 2nd Defendant’s premises, a room where staff gather every early morning various staff of the 2nd Defendant met to have breakfast before they received their assignments. He drew a floor plan of the Control Room to show where the different persons were positioned in the Control Room. He saw the Plaintiff and the 1st Defendant discuss plans. Someone said there was a lack of measurements. Then they were using foul language. The 1st Defendant swore at the Plaintiff. The Plaintiff told him not to swear at him. The 1st Defendant slammed on the table and stood up. The 1st Defendant said, I will say what I like about your mother, referring to foul language about the Plaintiff’s mother. He struck a blow at the Plaintiff. The Plaintiff pushed against the 1st Defendant’s stomach. The 1st Defendant kept beating him. Then Ng Yan Leung came into the room and separated them. He stated that he did not see the Plaintiff hitting the 1st Defendant. He saw the Plaintiff putting his hands on the 1st Defendant’s stomach preventing him from hitting him. He said it was because the 1st Defendant was taller than the Plaintiff, most blows landed on the left forehead and location near left eye of the Plaintiff. He saw the left eye of the Plaintiff was swollen greatly and blood oozing from the bridge of the Plaintiff’s nose.

Evidence Adduced by the 1st Defendant

1. The 1st Defendant stated that on the morning of 29 October 2002 at around 8:30 a.m., he brought the layout plans of the lift that the Plaintiff had given him two days ago to talk to the Plaintiff in the Control Room in the office of the 2nd Defendant. He saw the Plaintiff in the Control Room. He told the Plaintiff that the measurement on the plan is inaccurate. The Plaintiff replied that all the measurements were accurate. The 1st Defendant pointed to him that one part did not comply with the safety rules. The Plaintiff asked him to perform his job as he had done on the last occasion where the Plaintiff delivered a plan and measurements as in this present one. The 1st Defendant stated that he could not do so as the specifications for this lift decoration project were more precise. There was an argument that ensued between them. Foul language was used. Both parties used foul language. In the argument, the Plaintiff got angry and swore at him. He said, “Whatever I asked you to do, you play tricks on me. You shift responsibility.” The 1st Defendant stated that it was the Plaintiff’s responsibility. The Plaintiff then sat near his side. The Plaintiff kept swearing at him. The 1st Defendant tapped his hand on the table to ask him to keep quiet. The Plaintiff asked him not to tap his hand on the table. The Plaintiff said that he had been unhappy with the 1st Defendant for a long time. They looked at one another. When the 1st Defendant was not observant, the Plaintiff threw a punch at his stomach. He then pushed the Plaintiff away. The Plaintiff came forward again to beat him. The Plaintiff threw punches at his left shoulder 2 to 3 times. The 1st Defendant pushed him away. He fought back by throwing 2 – 3 punches. The 2 – 3 punches landed on the Plaintiff’s shoulder, the front of his chest near his shoulders. The Plaintiff tried to beat him further. He pushed the Plaintiff to the side. He felt pain and numbness on his hands. He lost strength. The Plaintiff kept beating him. He retreated to the wall and fended him off with his right hand. He stopped at that moment right at the time when Ng Yan Leung came into the room to separate them.
2. Subsequently, Mr. Tang Chi Kin came into the room and took them both into his office. They then went to a Café next door to talk over the plans as requested by Mr. Tang.
3. He admitted under cross-examination that he had been convicted of the offence of Assault Occasioning Actual Bodily Harm against a former colleague by the nickname of “Tai Pan Chow” in 1994. He was fined $500. Arising from that he resolved never to fight at work again.
4. Choi Yuk Kam (“Mr. Choi”) (DW2) gave evidence on behalf of the 1st Defendant. Mr. Choi was at the time the head of the Maintenance Unit of the 2nd Defendant. He adduced his witness statement into evidence. In his witness statement he stated that on the date of the incident at about 8:20 a.m., he was in the Control Room of the 2nd Defendant. He saw the Plaintiff and the 1st Defendant argue over the plans of a lift maintenance project. The parties argued with each other. Suddenly the Plaintiff stated, “I have tolerated you a long time!” The Plaintiff then used his left hand to hit the 1st Defendant’s left shoulder. The 1st Defendant and the Plaintiff then pushed and struggled against one another. He saw the Plaintiff push the 1st Defendant into the corner of a wall. Eventually he saw Ng Yan Leung come to separate the Plaintiff and the 1st Defendant. In oral evidence he stated that when he got into the Control Room the Plaintiff and the 1st Defendant were already having an argument. Throughout the incident he could not see the Plaintiff’s face. He saw the Plaintiff put his hand on the 1st Defendant’s shoulder and twisted the 1st Defendant’s left hand or arm and there was injury with the resultant dislocation of the 1st Defendant’s shoulder.
5. When cross-examined by the Plaintiff’s Counsel whether he saw the 1st Defendant hit the Plaintiff, he stated,
6. “How would he be able to do so as the 1st Defendant was seated and the Plaintiff was standing?" He confirmed that the 1st Defendant was seated during the assault. He stated that the Plaintiff was not known for swearing.
7. Mr. Lin Chun Sing, a skilled maintenance workman adduced his witness statement into evidence, which he gave on behalf of the 1st Defendant. He was not in the Control Room when the incident aforesaid happened. He stated that around 8:20 a.m. he was at the front door of his company and heard a quarrel. When he passed through the window of the Control Room and looked inside, he saw the 1st Defendant standing in the corner of the room and the Plaintiff threw a few punches at the 1st Defendant until others separated them. In oral evidence He stated that he saw the Plaintiff in front of the 1st Defendant and he saw two persons struggling. His view was through a glass. He saw movements of arms and the whole thing lasted less than a minute. During the whole time he did not see blood on anyone’s face.
8. Under cross-examination he stated that even if something blocked his view it was because of the Plaintiff’s back. He e stated that he could not tell which part of the body of the 1st Defendant was punched. When he first noticed the fight, it had already started. He could not see who was the one who separated the fight. He stated under cross-examination that during the fight the 1st Defendant was standing and not seated. The Plaintiff was also standing.

The Evidence adduced by the 2nd Defendant

1. Ng Yan Leung stated that he did not witness the fight. He was the one who separated the Plaintiff and the 1st Defendant. After the fight he could not see any signs of external injury on the Plaintiff. There was no bleeding on his face. His eyes were not black.
2. Mr. Lo Kwok Leung Johnny was in the Control Room at the time of the fight. His location is marked in the plan drawn by himself at page 122 of the Bundle of Documents. He shows himself at the right front corner of the room next to the TV set. He was at the time a registered lift engineer employed by the 2nd Defendant. On the morning in question he heard the Plaintiff and the 1st Defendant arguing something about work. Subsequently the Plaintiff and the 1st Defendant started fighting. As he was standing behind Lung Yee Kit, he could not see them very clearly.
3. Before the fight both of them used foul language. The fight lasted about 20 seconds. All that he saw in the fight was that the Plaintiff and the 1st Defendant pushed each other. He felt they were involved in a struggling, pushing of each other instead of fending the other off. From the distance across the room, he did not see any facial injuries on the Plaintiff. However, he did not walk close to look.
4. He stated that the 1st Defendant had assaulted a colleague nicknamed “Tai Pan Chow” in 1994. When asked whether he agreed the 1st Defendant was hot tempered, he said that the 1st Defendant was a bit rough. When asked about the Plaintiff whether he was rough, he said that during the time he worked with the Plaintiff, he found him to be a gentleman.

Analysis of the Evidence

1. I found the contents of the 1st Defendant’s evidence related to the verbal exchange that transpired leading up to the assault and the assault itself to be unbelievable. When the 1st Defendant gave evidence, I saw that the 1st Defendant is physically strong. From his demeanour in evidence and the manner of speaking, it seemed to me that he is someone who is quick-tempered angry person. He is also a rough person. He is a man given to strong reactions. When he gave evidence it seemed to me he did his best to control himself. The Plaintiff is physically smaller and shorter. He appeared from his demeanour to be a quiet, and physically weaker person.
2. In the 1st Defendant’s description of the exchanges between himself and the Plaintiff leading up to the assault, he portrayed himself to be a patient man that is not easily provoked. From my perception of the 1st Defendant referred to aforesaid, it seems to me to be highly improbable that he would have sat quietly in the exchanges between the parties in the midst of scolding and swearing by the Plaintiff. I therefore find his description of the verbal exchanges leading up to the assault and the assault to be wholly unbelievable. The 1st Defendant’s evidence that it was the Plaintiff who struck the first blow at him seems to me to be unbelievable. It would not be the natural reaction a much of smaller and thinner man of a quiet personality to initiate an assault by striking a blow at a bigger stronger man who is a rough type of man.
3. In his oral evidence he stated that the Plaintiff landed blows on his left shoulder. In cross-examination by the Plaintiff’s Counsel he was asked why this was not mentioned in his witness statement. He insisted that it was stated therein. In fact his witness statement only mentioned that the Plaintiff assaulted him in his stomach. This evidence of the Plaintiff’s assault on the 1st Defendant left shoulder seems to be a recent allegation.
4. In relation to the temperament of the Plaintiff and the 1st Defendant, Mr. Lo Kwok Leung, Johnny, DW5 was asked whether the 1st Defendant has a reputation for being hot tempered. He stated, “He’s just a bit rough”. It seems to me that this was a polite way of saying he was a rough man. When asked whether the Plaintiff was rough, he said, “During the time we worked together I found him a gentleman.”
5. As regards the evidence of Mr. Choi, I find his evidence not credible because he stated that the 1st Defendant was seated in the whole assault and the Plaintiff was standing. This is most unlikely in terms of the physical strength of the 1st Defendant and the temperament of the 1st Defendant. In fact Lin Chun Sing, DW3 stated that the 1st Defendant was standing during the fight. Mr. Choi described the 1st Defendant’s left shoulder was injured because the Plaintiff pulled the 1st Defendant’s arm and twisted it. Having regard to the respective physical strength, of the Plaintiff and the 1st Defendant, the height of the parties, this seems most unlikely and improbable. The Plaintiff is shorter and not physically strong whilst the 1st Defendant had the appearance of a man with a strong physique. I do not find the evidence of Mr. Choi to be reliable. If that had happened, no doubt the 1st Defendant would have remembered such a deliberate action by the Plaintiff which must have caused him a lot of pain. If it in fact happened he would have stated that in his witness statement as well as in his oral evidence. It is interesting that the 1st Defendant did not mention about the Plaintiff assaulting him on his left shoulder in his witness statement. It was only in oral evidence that he mentioned the Plaintiff punched his left shoulder. He did not state that the Plaintiff pulled the 1st Defendant’s arm and twisted it. No other witness stated that the Plaintiff pulled the arm of the 1st Defendant and twisted it. I come to the view that the evidence stated by Mr. Choi is wholly unreliable and I do not accept it.
6. Lin Chun Sing stated that he saw the assault from the entrance to the office a distance away. He stated that the back of the Plaintiff blocked part of his view. He said he saw movements between them that looked like fighting movements. He said the fight started before he looked inside the room. He could not see who it was that separated the Plaintiff and the 1st Defendant. In my view, his evidence from his vantage point is not reliable. He could not even see who was inside the room. I do not regard his evidence as accurate or reliable.
7. Mr. Johnny Lo stated that as he was standing behind Lung Yee Kit he could not see much. He said that he saw the Plaintiff and the 1st Defendant pushing each other. He did not see the Plaintiff punch the 1st Defendant. He felt they were involved in struggling with each other and they pushed each other. He does not state evidence that is of help to either party. I do not find his evidence to be of any help because his view was blocked by Lung Yee Kit
8. The Plaintiff’s evidence showed that in the exchanges before the assault, in the arguments that ensued, the 1st Defendant used foul language. The Plaintiff then stood up whilst speaking to the 1st Defendant to ask what he meant. The 1st Defendant slammed his hand on the table and the Plaintiff put his hand on the left shoulder of the 1st Defendant to placate him. It was then that the 1st Defendant reacted with violence to punch him first.
9. It seems that the Plaintiff was involved in emotional exchanges between the parties before the assault. When he stood up and subsequently asked the 1st Defendant what he meant by his foul language, the Plaintiff must have acted with some emotion. The action of putting his hand on the left shoulder of the 1st Defendant must have been an action not merely to demonstrate friendliness but try to put a stop to the foul language by the 1st Defendant as he asked the 1st Defendant what he meant by his foul language. However I accept that the Plaintiff did not start the assault on the 1st Defendant and did not strike the 1st Defendant’s shoulder nor was the placing of the Plaintiff’s hand on the 1st Defendant’s shoulder an aggressive act. As I found that it could have been an action to seek to stop the further use of foul language or to calm him down. At any rate, the 1st Defendant’s action of striking the Plaintiff with his fist is not commensurate with the Plaintiff’s action of placing his hand on the 1st Defendant’s shoulder and was wholly unjustified. The 1st Defendant by then lost his cool and began to land blows on the Plaintiff. I accept that when the 1st Defendant landed blows on the Plaintiff, the Plaintiff kept pushing the 1st Defendant away, and used his hands to fend him off. I accept the submission of the Plaintiff’s Counsel that the 1st Defendant may have dislocated his left shoulder on the force of the blows he threw on the Plaintiff.

The 2nd Issue

1. As I found that the 1st Defendant struck the first blow and his action of striking the Plaintiff was not commensurate with what transpired before then this issue is not relevant. I find that the 1st Defendant started the assault with the 1st blow.

The 3rd Issue

1. Having found as I have I consider whether the injuries suffered by the Plaintiff arose from the assault. The 1st and 2nd Defendants seek to establish that the injuries pleaded by the Plaintiff arose from the fall stated in the Form 2 filed by the 2nd Defendant. This stated that the Plaintiff fell in Hung To on the way to the Project Site.
2. As regards whether the injuries sustained by the Plaintiff as pleaded by him were the results of his fall subsequent to the assault as stated in the Form 2 submitted by the 2nd Defendant, I find that the Plaintiff’s version of evidence must be true. His evidence was that he first gave a report to the 2nd Defendant that he had slipped in Kwan Yuet Court causing him injuries as the ground was slippery because of debris and sand on it. Later Mr. Tang told him to give another version of how the accident namely because Mr. Tang did not want to implicate his client. Mr. Tang suggested that he report that he fell on Hung To Road whilst walking from the 2nd Defendant’s premises to Kwan Yuet Court. The Plaintiff then wrote that he fell on the stairs of 1 Hung To Road. The 2nd Defendant has disclosed the two reports of accident written by the Plaintiff. These are at page 106 of the BD.
3. The Plaintiff’s Counsel submitted that if the Plaintiff actually suffered a fall, and he wrote the reports of falls on his own volition and not because Mr. Tang told him to cover up the assault being the cause of the injuries, by stating that he suffered a fall, there would be no need for the Plaintiff to change the version of where the fall occurred. For if the fall actually happened at Kwan Yuet Court, Mr. Tang would not have told him not to state that the fall happened at the worksite at Kwan Yuet Court, there would be no need for the Plaintiff to change the story as regards the site of the fall. The Plaintiff’s Counsel submits that this tends to show that the Plaintiff’s evidence is true namely Mr. Tang told him that he could apply for Employees Compensation but when doing so he had to cover up the fact that injuries were caused by the assault but instead state that it was caused by a fall. To a certain extent, there is some substance to this argument because when fabricating the location of an accident, it is not good for customer relations to invent that an accident happened in their premises. This could lead to an investigation by them and cause them trouble. It is another matter if the accident in actual fact happened in the location alleged.
4. The 2nd Defendant argued for the case that the injuries suffered by the Plaintiff arose from the fall after the assault. She submitted that it is a mystery as regards what could have happened between the time he left the Café where he went with Mr. Tang and the 1st Defendant to the time the Plaintiff arrived at the United Christian Hospital at 3:15 p.m. for treatment some 6 or 7 hours after the accident. Could he have within that time met with the fall, which he told the doctors about? The Plaintiff’s explanation to this was that he began to feel unwell from the injuries suffered in his head at around 12 noon. He telephoned his friend Lam Yau Keung to come to accompany him to the Accident and Emergency Department of United Christian Hospital in Kwun Tong. After getting there, he had to wait a long time before he was attended to. That explained the time when he saw the doctor was 3:15 p.m.
5. The 2nd Defendant’s Counsel again submitted that it is wholly unreasonable that Mr. Tang should ask him to lie to the doctors regarding the cause of the injuries. She submitted that it is even more unreasonable that the human resources officer Lau Yuk Sim and Mr. Tang should be involved to ask him to change his report of the location of the accident to that of 1 Hung To Road.
6. Neither Mr. Tang nor Lau Yuk Sim came to Court to give evidence despite the efforts of the 2nd Defendant to invite them to do so. They had not been willing to answer the allegations of the Plaintiff against them. There is therefore no evidence to contradict the evidence of the Plaintiff. Having heard the evidence of the Plaintiff, I found that there was a conviction of truth in his evidence explaining the reason why the 2nd Defendant reported in the Form 2 sent by them to the Labour Department that the Plaintiff suffered a fall at 1 Hung To Road and why he reported to the doctor at A & E Department that his injuries arose from a fall. I accept his evidence that his injuries were caused by the assault. Further the written reports of the Plaintiff of the two falls disclosed by the 2nd Defendant support the Plaintiff’s evidence that two versions of falls were given to the 2nd Defendant. I therefore find that there was no fall subsequent to the assault on the 29 October 2002 and the reason why the Form 2 referred to a fall at 1 Hung To Road is as stated by the Plaintiff.
7. I find therefore that the injuries suffered by the Plaintiff were caused by the 1st Defendant’s assault on him and not from a fall.

4th Issue

1. The claim of the Plaintiff against the 2nd Defendant is based on three grounds: negligence, breach of contractual terms of agreement and/or vicarious liability for the 1st Defendant’s act.
2. I shall in this issue address the Plaintiff’s alternative plea that the 2nd Defendant was vicariously liable for the intentional tortious act of the 1st Defendant.
3. The Plaintiff’s Counsel referred to *Ming An Insurance Co. (HK) Ltd. v. Ritz-Carlton Ltd.* [2002] 5 HKCFAR 569, where the Court of Final Appeal held that an employer would be vicariously liable for the unauthorized torts committed by his employees so long as the tort is so closely related with the employment that it would be fair and just to hold the employer vicariously liable. In that case the defendant operated the Ritz-Carlton Hotel whose employee, a doorman, drove a limousine negligently and the vehicle mounted the pavement and struck two pedestrians. The limousine did not belong to the defendant but was supplied by a contractor with chauffeurs. The defendant would in turn provide chauffeur-driven limousine service for the guests of the hotel. The limousines were parked in the forecourt of the hotel. Sometimes they had to be moved around. If the chauffeurs were off duty, some staff would act as “cat jockeys” whose duty was to drive the limousines off for a while so as to makes way for other limousines. It was the practice of some of the hotel staff to order food from other restaurants or shops. On the night of the accident, a bellboy was going to collect the food he and his colleagues had ordered. The chauffeur of the limousine in question had been off duty and left the keys with the doorman who drove the bellboy and then were involved in the accident. In the trial of the case between the injured pedestrians, the doorman did not take part and Ming An Insurance (HK) Co. Ltd. (“Ming An”) joined as a defendant. It was basically a contest between the hotel company’s insurers and the insured concerned under the MIB scheme. If the hotel company was not vicariously liable, then the burden of satisfying the judgment in favour of the injured pedestrians would fall wholly on Ming An. Seagroatt J. held that the hotel company was not vicariously liable for the doorman’s negligence. The Court of Appeal upheld the judgment. The reason for the judgment was that the doorman had no authority to drive off the limousine as it was beyond the scope of his duty. The Court of Final Appeal reversed the judgments and held that the hotel company was vicariously liable despite the finding that the doorman drove the limousine to collect food. The Court of Final Appeal endorsed the test formulated by the House of Lords in the case of *Lister v. Hesley Hall Ltd.* [2002] 1 AC 215.
4. Bokhary PJ said at page 278 F-G that,

“Under this new test, the question is whether the employee’s tort was so closely connected with his employment that it would be fair and just to hold his employer vicariously liable.”

1. His Lordship went on at 579 H-J that,

“By ‘close connection’ is meant a connection between the employee’s unauthorized tortious act and his employment which is so close to make it fair and just to hold his employer vicariously liable.”

1. His Lordship further had this to say at 582 G-I,

“Nowadays the concept of employment is not a narrow one, and it must be viewed broadly when applying the ‘close connection’ criterion. As Lord Clyde said in Lister v. Hesley Hall Ltd. [2002] 1 AC 215 at 234 D1 ‘in considering the scope of the employment a broad approach should be adopted’. In regard to vicarious liability, the nature of the employment is not to be ascertained merely by attempting to tabulate the employee’s duties. It is necessary to stand back to see how the employer’s activities were actually carried out and how that exposed the public to the risk of the tortuous harm caused by the employee.”

1. The relevant factors included the practice of driving to collect food for night snack in the limousines. This was said to be a purpose not just of the employees involved but also that of the company because it was in its business interest adequately to feed the employees.
2. Litton NPJ stated at 586 D-F that in applying the test,

“It must be remembered that the issue is not free standing, and matters such as the servants’ duties at the time when the tort occurred, whether he was acting in the interests of the employer or solely for himself, at cetera, are still relevant. And, casting one’s eyes a little wider, the court should also have regard to the business activities of the employer broadly speaking and ask if the risk which gave rise to the damage (here the servant’s reckless driving of someone else’s limousine) was created by those activities …”

1. Mortimer NPJ said this at 589 C-D,

“The application of the ‘close connection’ test involves a consideration of two matters. The first is whether it is established that at the time of the negligent driving [the doorman] was acting within the scope of his employment (however this concept is expressed). The second is whether his negligent driving was so closely connected with his employment as to be ‘fair and just’ to hold his employers, the Hotel, vicariously liable.”

1. He also took into account the fact that the practice of driving the limousines to collect food was known to the management which did not disapprove the said practice (590 B-C).
2. In the event, the appeal by the insurers was allowed and the hotel was held vicariously liable for the doorman’s negligence.
3. The Plaintiff’s Counsel referred to the case of *Lister v. Hesley Hall Ltd.*， supra, where the warden of a school boarding house sexually abused some of the boys in his care, the issue was whether the employer of the warden was vicariously liable for the warden’s tortious acts which were the employee’s intentional wrongdoing as opposed to the unintentional tort of negligence as in *Ming An Insurance Co. (HK) Ltd.*, supra. Therefore the test applies whether the torts in question were intentional or unintentional.
4. Lord Steyn said at 1322 H that,

“In my view the approach of the Court of Appeal in Trotman v. North Yorkshire Country Counsel (1999) LGR 584 was wrong. It is resulted in the case being treated as one of the employment furnishing a mere opportunity to commit the sexual abuse. The reality was that the county council were responsible for the care of the vulnerable children and employed by the deputy headmaster to carry out the duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment. The connection between the employment and the torts was very close. I would overrule Trotman v. North Yorkshire Country Council.”

1. The judgment of the House of Lords which allowed the plaintiffs’ appeal against the defendant employer followed the principle of “close connection” laid down in the landmark decisions of the Canadian Supreme Court referred to in Lister.
2. The Plaintiff’s Counsel referred to *Mattis v. Pollock [2003] 1 WLR 2158*, the defendant was the owner of a nightclub and employer of a bouncer who was employed to act aggressively towards the customers. The plaintiff was one of a group of customers who he admitted into the nightclub. Then some of the plaintiff’s friends arrived and the bouncer hit two of them with a weapon and was in turn hit with a bottle. The bouncer then escaped from the scene. The plaintiff and his friends then decided to go home but the bouncer reappeared and stabbed the plaintiff with a knife. At the first instance, the trial judge dismissed the plainitff’s claim on the ground that the initial incident had come to end by the time of the bouncer’s revenge and the knife attack took the bouncer outside his employment with the defendant. On appeal, it was reversed.
3. Furthermore Lord Clyde in 1327C stated that:
4. “If a broad approach is adopted it becomes inappropriate to concentrate too closely upon the particular act complained of. Not only do the purpose and the nature of the act have to be considered but the context and the circumstances in which it occurred have to be taken into account ……”
5. Judge LJ quoted at 2164 C-D the following passage of Lord Millet’s Judgment in *Dubai Aluminium Co. Ltd. v. Salaam [2002] 3 WLR 1913, 1941-1942*, para. 121,

“[it is] no answer to a claim against the employer to say that the employee was guilty of intentional wrong doing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer’s duty …… vicarious liability is not necessarily defeated if the employee acted for his own benefit.”

1. The 2nd Defendant’s Counsel referred to *Li Hoi Shuen v. Man Ming Engineering Trading [2006] 1 HKC 349* the case concerned the murder of the work supervisor from Hong Kong in Jeiyang City in the Mainland by the two “out of province” workers in the residence provided (though not chosen) by the employer. The murder was found not so closely connected to their employment for purposes of the vicarious liability test. The Court found that the workers, in murdering the deceased, were advancing their own interests and taking revenge. They were merely employed to provide unskilled labour for the maintenance or installation services. It was not their duty to maintain discipline or to apply physical violence on the deceased in their course of employment. On the contrary, it was their duty to conform to the discipline and instruction of the deceased.
2. The 2nd Defendant’s Counsel submitted that in the present case, the 1st Defendant and the Plaintiff did not work in the same department. The 1st Defendant was a workshop supervisor engaged for his skilled labour in maintenance and installation of elevators. It was not his duty to maintain discipline or to apply physical violence on the Plaintiff in the course of his employment. The act of assault, a criminal act, was an impulsive act of violence of the 1st Defendant in taking revenge upon the Plaintiff uncooperative work attitude, and was clearly not designed in anyway to advance or for the purposes of his work or the 2nd Defendant’s business.
3. She submitted that *Lister & Ors. v Hesley Hall Ltd.* could be distinguished from this case because the employer in *Lister & Ors. v Hesley Hall Ltd.* undertook to care for and protect the student residents through the service of the warden. He also had the authority to discipline them. There was thus a very close connection between the torts of the warden committed on the student residents and his employment as a warden.
4. This is entirely different from the scope of employments of the Hong Kong work supervisor (in Li Hoi Shuen) and the 1st Defendant (in the present case) whose duties relate to unskilled labour or technical skilled work, but not management or discipline of the fellow workers/victims involved.
5. Having considered these submissions I look to “the context and circumstances” in which the assault occurred. The assault occurred when the 1st Defendant took the plans drawn by the Plaintiff to the Control Room to talk to the Plaintiff to inform him that the measurements stated therein were not specific enough and he could not carry out the work based on those specifications. He has had a previous experience when he found the plans drawn by the Plaintiff were not sufficiently defined. He had encountered some inconvenience related to that. No doubt he was annoyed at the Plaintiff before he went into the Control Room with the view to sort this out with the Plaintiff. The Plaintiff was inexperienced in this area of work of decoration of lift interiors. In the interaction, the Defendant lost his cool and started to use foul language at the Plaintiff. This escalated to the assault of the 1st Defendant on the Plaintiff. The circumstances show that the dispute between the parties related to the plans drawn by the Plaintiff and it was partly due to the Plaintiff’s inexperience that the plans may not have been drawn with specific measurements. It is in the interaction of the two personalities each with his personality flaws and weaknesses, the 1st Defendant being rough and hot tempered, the assault was caused. The 1st Defendant was acting within the scope of his employment when he went to discuss the plans with the Plaintiff. The assault was not pre-meditated but came about as a result of the interaction of the parties. The assault took place while the 1st Defendant and the Plaintiff were engaged in duties at the very time and place demanded by his employment. The assault was in my view so closely connected with the employment of the 1st Defendant by the 2nd Defendant and the employment of the Plaintiff by the 2nd Defendant that it is ‘fair and just’ to hold the employer, the 2nd Defendant, vicariously liable.
6. I am also mindful of the quote of Lord Millet’s Judgment in *Dubai Aluminium Co. Ltd v Salaam [2002] 3 WLR 1913, 1941-1942* paragraph 121, aforesaid, which states,

*“[it is] no answer to a claim against the employer to say that the employee was guilty of intentional wrong doing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer’s duty. . . vicarious liability is not necessarily defeated if the employee acted for his own benefit.”*

I find the assault arose out of or was closely connected with the 1st Defendant’s employment with the 2nd Defendant.

The 5th Issue

1. I find the 2nd Defendant vicariously liable for the 1st Defendant act.

The 6th Issue

1. The Plaintiff’s Counsel submitted that if the 2nd Defendant was negligent, then it was also in breach of the terms of employment. The particulars of negligence pleaded in the Statement of Claim in paragraph 4 (a) to (e) have been referred to.
2. The Plaintiff’s Counsel submitted that in the 1st Defendant’s case, he has in 1994 assaulted his colleague “Tai Pan Chow” and was convicted of Assault Occasioning Actual Bodily Harm. Mr. Tang, a Director of the 2nd Defendant knew this. He took no steps to warn the 1st Defendant not to assault any staff again. He referred to the authority *Nicole Egan v Macquarie Area Health Service [2002] NSWCA 26* in this case, the plaintiff and the first defendant were nurses employed at a hospital run by the second defendant. The plaintiff alleged that while assisting a patient the first defendant struck her on the coccyx with a percussion hammer. While the plaintiff did not claim her coccyx had been fractured, she brought evidence of postural problems and persistent pain. She sued both defendants for negligence in tort claiming that the 1st defendant was primarily liable and the second defendant was vicariously liable as an employer.
3. There is evidence that horseplay was common in the hospital and the probability of the occurrence of the risk of injury was not slight. The management took no steps to address this.
4. In passing the judgment, Heydon JA stated in paragraph 46 that:-

“Not only was there a reasonably foreseeable risk of injury arising from horseplay in general in consequence of the defendant’s failure to give instructions or counselling against that practice, but there was a reasonably foreseeable risk of injury to patients and to members of staff handling them if the horseplay were directed against those members at the time they were handling the patients.”

1. Having considered the facts of the case, I do not find that the circumstances were such that there was a foreseeable risk of injury to the workers of the 2nd Defendant merely because the 1st Defendant had assaulted a colleague in 1994.
2. The Plaintiff’s Counsel also referred to the case of *Wong Wai Ming v. Hospital Authority* [2001] 3 HKLRD, (p. 212G-H, per Keith JA) where the court of appeal laid down the legal principle that an employer was under a duty to take reasonable care for his employee’s safety. When one employment was more dangerous than another, a greater degree of care must be taken.
3. In my view, the circumstances of work in the 2nd Defendant’s offices could not be considered to be dangerous because the 1st Defendant is working there. He is a rough man and is likely to be hot tempered. But the last time he assaulted a colleague was 8 years ago. There was no previous grudges or fights between the Plaintiff and the 1st Defendant. It could not be said that there was a real risk that the 1st Defendant would exert physical violence on the Plaintiff. I find that the Plaintiff has not established the case on negligence and breach of contractual terms against the 2nd Defendant.

Quantum

1. The injuries and their effects on the Plaintiff are clearly described in the medical reports on the Plaintiff. The Medical Report from the Department of Neurosurgery of the United Christian Hospital dated 12 May 2003 most clearly states the Plaintiff’s injuries. It states:

“Right forehead and left temporal, face was injured. There was no loss of consciousness or convulsion after accident, but he had vomiting for 3 times later. He complained of distending headache and blurred vision and epistasis. The epistasis was stopped spontaneously. He also had right should and chest wall pain. On examination, Glasgow coma scale was full. There was 1 cm bruising over right forehead. Tenderness over left temporal region, left chest wall and right shoulder. . .

Headache subsided with symptomatic treatment. CT brain showed no fracture or intracranial haematoma.

X-ray skull, face, chest and right shoulder also showed no fractures. He was discharged on 01.11.2003. . .The diagnosis was minor head injury and symptomatic treatment was given according to patient’s condition.”

1. The Plaintiff complained of having persistent headache, dizziness, insomnia, blurred vision, occasional muscle cramps, occasional imbalance, and difficulties with attention, absent-mindedness, as well as anxious, depressive, apprehensive and irritable moods after the assault. The medical officers of the Neurosurgery Department of the United Christian Hospital diagnosed him to have post-concussion syndrome. However they also stated in the report dated 31 December 2003 at page 227 of the BD that there was no focal neurological deficit.
2. All the medical experts agree that the injury was a minor head injury. However, arising from the Plaintiff’s complaints he was treated by the department of Neurosurgery and the Department of Opthalmology of United Christian Hospital and also received psychiatric counselling. Arising from his complaints he was granted a long period of sick leave from 29th October 2002 to 8th November 2002 and from 13th November 2002 to 14th July 2004.
3. The Joint Report of the Neurologists state that there is no organic neurological basis for the alleged symptoms complained by the Plaintiff. These symptoms could be the result of a psychiatric disability. They state that he merits a psychiatric evaluation. They also state that there is no impairment of the whole person from the neurological perspective and that he should be able to resume his pre-accident job as an electrical engineer. They state that most recovery of neurological functions after a very mild head injury occurs within the first 6 months of the accident, although some further improvement can continue up to 1 year. With the Plaintiff’s very mild head injury, the duration of sick leave should be 6 months.
4. The parties did not obtain Psychiatrists’ Reports, and instead obtained a Joint Psychologists’ Report. The Psychologists in their Joint Report carefully outlined the Plaintiff’s pre-injury functioning, the assault incident and its sequel. It is clear that they had carefully listened to the Plaintiff and his complaints as well as his mental train of thoughts and attitudes.
5. However they formed the view that,

“Mr. Ling has a striving and resilient character. The alleged assault and injury at work, and the subsequent unsympathetic and harsh treatments of his employer left him feeling demoralized, angry, and a sense of failure. He felt very much aggrieved, and could not simply let go of his hurts. He is assessed to have mild adjustment reactions to the material incident and its sequelae. His difficulties and symptoms, however, do not attain the clinical severity for diagnosis of any psychiatric disorder. His cognitive or memory impairments are insignificant, and could be due to his dysphoric mood and preoccupation with seeking to redress his hurt.

1. They were of the view that although he may be expected to have some mild residual symptoms, the duration of sick leave of up to 6 months appears appropriate. The Report states that he should be able to resume his former job provided that he could secure one. They say that his earning capacity and life expectancy are unlikely to be affected.
2. In the light of the aforesaid, I go to the heads of damages to consider quantum.

# PSLA

1. The Plaintiff’s Counsel submitted authorities to seek to justify the amount of $150,000.00 sought in the Amended Statement of Damages.
2. The Plaintiff’s Counsel referred to *Mak Hung Yin v. Tsang Koon Chung and The Secretary For Justice for and on behalf of the Director of Social Welfare and Leung Chi Shing* HCPI1038 of 1997 handed down on 9 August 2000, the Plaintiff suffered a linear laceration on his head and had an epidural haematoma. The haematoma was removed in a cranial operation. The Plaintiff complained that as a result of the assault and the surgical operation, he suffers from frequent headaches, insomnia, loss of memory, and left leg cramps. The Plaintiff was however a heavy drinker and dependent on heroin. Before the incident, he suffered from headaches, insomnia and weakness of limbs but these became more serious after the incident. The learned Judge bore in mind that the alcoholism and heroin addition are likely to contribute to and heighten the occurrence of the Plaintiff’s complaints, which could not solely be attributed to the assault.
3. The Plaintiff was awarded $90,000.00 in PSLA. In this case, the Plaintiff’s injuries were not as serious as he did not suffer from epidural haematoma hence did not have an operation. On the other-hand, the Plaintiff in the stated case referred to have symptoms, which were attributed to a pre-existing cause of his alcoholism and heroin addiction.
4. In *Cheng Lai Kuen v Nan Fung Textiles Ltd [1998] 2HKC*, a Court of Appeal decision handed down on 28 April 1998, the Appellant issued a writ against the respondent claiming damages. In the amended statement of claim she alleged that in the accident she suffered injuries to her head, chest, limbs and hip. She also alleged that she was pregnant at the time and suffered a miscarriage in the fall. Since then she had been suffering from post-concussion syndrome involving chronic headaches and loss of memory with residual pain in her chest, left upper and lower limbs. In the Court below she was awarded PSLA of $150,000.00. The medical report stated that apart from a bruise over her left forehead, tenderness of her left shoulder and decrease in power and range of movement in her left lower limb, no fracture was noted. Investigations including ultrasound and X-ray examinations revealed no abnormality. She was assessed to have suffered 2% permanent impairment. The Appellant was discharged two days after admission. At the trial the Appellant claimed that since the incident, she had symptoms of poor memory, depression, hearing voices and visual hallucinations and she had received psychiatric treatment. The Appellant appealed against the assessment of damages. The Court of Appeal found that as the Appellant suffered no more than minor injuries and that the Appellant had since fully recovered and was able to resume her former work, the assessment of PSLA at $150,000.00 was upheld.
5. In *Wong Kin Chung Michael v. Fenban Shipping Company Limited, Delphic Shipping Company Limited, Lam Shiu Kan formerly trading as Kuen Kee Kwok Wing Transportation And Stevedores Company* *(unreported) HCPI 195/2000* the Plaintiff was sent to QEH in an unconscious state. He received a 4 cm scalp laceration in the occipital region of his head, which was sutured. X-ray did not reveal any fractures to either the skull or the spine. C.T. Brain scan was conducted but no intracranial lesion was detected. He remained in hospital for six days for observation and was discharged home. The clinical diagnosis by the hospital was a severe head injury. Resulting from the injury, the Plaintiff complained of dizziness and headache. He also had persistent neck and back pain as well as upper limbs numbness and weakness. The headache and dizziness subsided but the neck pain still persisted, particularly when he turned his head to the right side. At times the pain radiates down to the scapular and mid-thoracic region. There was occasional left upper limb numbness. The Plaintiff was awarded $250,000 under PSLA.
6. On the other-hand, the 2nd Defendant’s Counsel submitted that the Plaintiff exaggerated his symptoms and disabilities that are not supported by medical evidence. She stated that according to the neurological experts’ agreed report, the Plaintiff sustained a very mild head injury. There is no organic neurological basis for the alleged severe symptoms. The nature and magnitude of the global cognitive dysfunction were inconsistent with the mild degree of the head injury.
7. She also submitted that the psychologists in their agreed report at page 257 of the BD state that the Plaintiff has mild adjustment reactions to the incident and its sequelae. His difficulties and symptoms, however, do not attain the clinical severity for diagnosis of any psychiatric disorder.
8. She referred to the Plaintiff’s evidence upon cross-examination when he admitted that his medical records related to his symptoms arising from accidents before 2002 show that he had headaches and dizziness and that he had attended neurological and psychiatric treatment. She argued that these pre-existing symptoms should not be discounted for the purposes of assessing PSLA. She submitted that the appropriate PSLA should be in the range of $50,000.00 and $80,000.00.
9. She relied on the following authorities:

(1) *Mak Hung Yin (HCPI No. 1038 of 1993)* referred to by the Plaintiff’s Counsel aforesaid. .

(2) *Tong Kin Leung (HCPI No. 789 of 1996)* the Plaintiff suffered head injury and had 5% impairment due to post concussion syndrome. PSLA was assessed at $90,000.00 on 20 October 1999.

(3) *Ng Shing Chun (HCA No. 1004 of 1981)* is a case where a pedestrian was struck by a vehicle. He sustained head injuries with loss of consciousness resulting in his being unable to lift heavy objects. PSLA was assessed at $20,000.00 on 27 February 1984 and is equivalent to $77,805.00 in 1998.

1. Having regard to the injuries of the Plaintiff, the authorities and considered the submissions of respective Counsels, particularly the submission of the 2nd Defendant’s Counsel that the Plaintiff had pre-existing symptoms from earlier accidents, I am of the view that PSLA should be assessed at $100,000.00.

Pre-Trial Loss of Earnings

1. The Plaintiff seeks loss of earnings for the full period of his sick leave as well as loss of earnings arising from a reduced income as a result of the Plaintiff being unable to return to his pre-accident employment as an assistant engineer in lift maintenance. The Plaintiff’s evidence is that the dizziness and headaches suffered and other effects of post concussion syndrome could make it risky for him to do the lift maintenance as the work could entail climbing into the lift well and could be dangerous.
2. The period of sick leave granted was 20.43 months. The Plaintiff’s monthly income as an assistant engineer in the 2nd Defendant’s employment was HK$13,500.00. He had another month’s salary for year-end bonus. His incomes for the year up to October 2002 plus the year-end bonus added up to HK$178,881.85. Therefore his monthly income averaged out at:-

HK$178,881.85 ÷ 12 = HK$14,906.08

1. The Plaintiff’s Counsel submitted that apart from the consideration of the joint neurological and psychological reports, which suggests that a period of six months sick leave is reasonable, the Court should look at the progress reports on the Plaintiff prepared by the Department of Neurosurgery and Occupational Therapy Department of the United Christian Hospital. In these reports, at pages 211, 213, 215, 217, 219 up to 225, the Plaintiff was required to attend cognitive training and supportive counselling. He submitted that even according to the joint medical Psychological report dated 6 June 2004, it was considered that 10 sessions of intensive psychological counseling was required for his treatment. Given that the treatment was intensive, one would not expect the Plaintiff to be able to return to work during the conselling period. Even after the Plaintiff had completed his counseling treatment, it would certainly take some 3 to 4 months for him to find another job.
2. According to the Occupational Therapy Department of United Christian Hospital, the Plaintiff complained of persistent headache, insomnia and post-trauma reactions 14 months after the injury. He was treated with cognitive training and supportive counselling from 8 months after injury until 18 months thereafter. He was diagnosed as requiring this training and counselling to improve his functioning. The Plaintiff’s Counsel suggests that in the circumstances, a sick leave period of 18 months is fully justified.
3. I consider the opinion of the experts who state that the Plaintiff could go back to his pre-accident work. The neurologists did not discount the Plaintiff’s symptoms but suggest that his symptoms may be the result of psychiatric disability and stated that a psychiatrist’s opinion should be obtained. Instead of a Psychiatric Report being obtained, the parties obtained a Joint Psychologists Report. The Psychologists state that a period of sick leave of 6 months is reasonable having regard to his symptoms. This is their opinion based on their assessment of the Plaintiff at about 17 months after the incident. At that point they say, that his psychological and personal functioning may be improved by amongst others, the completion of a course of 10 sessions of intensive psychological counselling. They state that, “The counselling sessions should be aimed at helping the Plaintiff let go of his grudges and hurts, reduce his mild depressed mood and feelings of insecurity and help him *stay in focus to complete his studies* and *resume constructive and full-time work*.” They also say that as a result of his mild head injury, he may be expected to have some mild residual symptoms. Having regard to the aforesaid, it seems to be the case that the Psychologists found, at the time of the assessment that, a residual effect from the symptoms exists and that affects the Plaintiff’s focus and ability to resume constructive and full-time work. From the aforesaid, it would seem that the Psychologists were of the view that the Plaintiff was psychologically challenged in his effectiveness and ability to resume constructive and full-time work at the time of the assessment for the Report. The time when the Psychologists suggest that the Plaintiff seek the intensive psychological counselling was in April 2004, 17 months after the accident. Hence, within this period, and until the Plaintiff has had the 10 sessions of intensive counselling, the Psychologists’ assessment must be that the Plaintiff ability to wholly focus at work and to resume constructive and full-time work must be affected.
4. I look closely at the Report from Dr. Lo Man Kwong the case medical officer of Yung Fung Shee Psychiatric Centre where the Plaintiff sought treatment from March 2004. His report states that the Plaintiff’s psychiatric morbidity of post concussional syndrome is considered “being attributed to his report of assault at work site in October 2002. In spite of adequate course of psychiatric treatment being offered, residual mood symptoms and somatic discomforts, as well as the associated social and occupational impairment are expected to be persisting into considerable time in future”.
5. Having considered the reports aforesaid and having regard to all the opinions and analysis aforesaid, I am of the view that the Plaintiff should be given a period of 8 months sick leave. The evidence suggests that the Plaintiff would not be able to work at full capacity and concentration and focus for a period of at least another 12 months. For within this period he was still receiving cognitive training and other help from the occupational therapists. I grant full loss of earnings for 8 months and partial loss of earnings for the period of 12 months thereafter on the basis that the Plaintiff could only work at a reduced capacity hence earning a lower salary of $8,000.00 per month. I adopt $8,000.00 p.m. as his possible earnings on the basis that his earnings at present as an assistant engineer in an estate management company is only slightly over $10,000.00 per month. If he were not able to focus and resume “constructive full-time work”, it must be the case that he could only function in less than “constructive full-time work”. I therefore form a rough assessment that he would only be working at partial capacity in a job which may not be as demanding of care as a lift engineer, which the Plaintiff said could be dangerous as it entails climbing into a lift well to maintain the lift mechanism. In view of the lack of evidence of what the Plaintiff could have earned at a reduced productivity I choose a sum that I regard as reasonable being about 80% of his present earnings. I therefore come to a sum of $8,000.00 p.m. as a monthly earning where the Plaintiff works at less than full capacity.
6. $14,906 x 8 x 1.05 = $125,210.40 and the sum of ($14,906 – 8,000) x 12 x 1.05 = $87,015.60. These total the sum of $212,226.00.

Loss of Future Earning

1. The Plaintiff’s Counsel submits that as it is the opinion of the neurologists and psychologists that the Plaintiff could return to his original job, he is not seeking this.

Loss of Earning Capacity

1. The Plaintiff’s Counsel seeks a new head of loss of future earning capacity on the basis of the Psychiatric Report on the Plaintiff at page 283 B of the BD. The Psychiatric Report state that he is considered to have permanent psychiatric disability, which is attributable to his suffering from post-concussion syndrome. The Report stated that the impairment value is estimated to be 5% in accordance with guidelines set by the American Medical Association. The Plaintiff’s Counsel submits that this would give substantial risk that the Plaintiff would lose his job in the future and having regard to *Moeliker v Reyolle [1977] 1 WLR, 132* he is asking for a 12 month period for calculating his loss of future earning capacity. He claims $13,500 X 12 which comes to HK$160,000.00.
2. In considering this claim, it is noted that it is not pleaded as a head of damages. Even were it pleaded, the opinion stated therein is that of a treating psychiatrist. The opinion seems to be contrary to that of the psychologists and the neurologists who take the view that there is no permanent impairment arising from the incident. I am not able to award any sum under this head.

Medical Expenses

1. The amount under this head is $5,738.00 and I grant this. The hospital fee is $5,738.00 and I also grant this.

Future Medical Expenses

1. This relates to the statement in the Psychological Report that the Plaintiff should attend 10 sessions of intensive psychological counselling at a cost of $1,500 per session in the private sector. I am of the view that the Plaintiff should be given this sum to consult private psychologists for intensive sessions as suggested by the Psychologists. This is despite the fact that he has access to government psychologists at the Yung Fung Shee Psychiatric Centre where no doubt the time given to him by the psychologists could not be as long as he would have in a private setting. I grant this amount in the sum of $15,000.00.
2. The Plaintiff’s Counsel conceded that this is not a case for claiming Aggravated and Exemplary Damages.
3. Total Damages comes to $100,000.00 + $212,226.00 + $5,738.00 + $68 + $15,000.00 = $333,032.00. The employee’s compensation awarded was $278,193.35. After deducting the employee’s compensation, the damages assessed is $54,838.65.
4. Judgment for the Plaintiff against the 1st and 2nd Defendants in the sum of $54,838.65 with interest thereon at judgment rate from date of Writ to date of judgment and thereafter at judgment rate until payment. I grant an order nisi for costs of the action to be paid to the Plaintiff by the 1st and 2nd Defendants to be taxed if not agreed with Certificate for Counsel. The 1st Defendant’s Counterclaim is dismissed with an order nisi that costs of the Counterclaim to be paid by the 1st Defendant to the Plaintiff and the 2nd Defendant to be taxed if not agreed with Certificate for Counsel.

C.B. Chan

District Judge

Representation:

Mr. Peter Wong instructed by Messrs. Rita Law & Co. for the Plaintiff.

Mr. James C.C. Cheng instructed by Messrs. Johnnie Yam, Jacky Lee & Co. for the 1st Defendant.

Ms. Phillis Loh instructed by Messrs. Deacons for the 2nd Defendant.