DCPI 1469/2006

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1469 OF 2006

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BETWEEN

LAI WAI TAN PETER Plaintiff

and

SECRETARY FOR JUSTICE acting for

HONG KONG POLICE FORCE Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon. Judge Leung (in Court)

Date of hearing: 30-31 July, 2 August 2007

Date of handing down judgment: 9 October 2007

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff was a police officer. He claims damages for injuries suffered as a result of a slip-and-fall accident inside a toilet of a police station in 2004. Both liability and quantum are in issue.

**BACKGROUND**

1. The accident happened on 19 August 2004. At the time, the Plaintiff was a senior police constable attached to the Tai Po Police Station (**“the Station”**). At about 1:30 pm, the Plaintiff was inside the toilet (**“the Toilet”**) situated on the 9th Floor of the Station. He was with Sergeant Au Fu Wing (**“Au”**) at the time. On their way out, the Plaintiff allegedly slipped and fell. He landed with his buttock and his head hit the floor. He was sent to the hospital.
2. According to his pleading, the Plaintiff slipped on some water on the floor. The claim was framed on the basis of negligence, breach of employer’s implied contractual duty and breach of statutory duty on the part of the Defendant. The Plaintiff also relied on the evidential rule of *res ipsa loquitur*.
3. The defence is that the floor was not wet and slippery. The Defendant had taken sufficient measures to ensure the safety of the visitors to the Toilet. As confirmed by Ms Tsui for the Defendant, the Defendant did not dispute that the Plaintiff fell. But he fell because of his own carelessness. Therefore even if the Defendant should be liable, the Plaintiff was guilty of substantial contributory negligence.

**ISSUES**

1. The issues for determination are broadly as follows:
   1. Whether the Plaintiff slipped and fell due to the wet and slippery condition of the floor as alleged.
   2. If yes, whether the Defendant was in breach of its duty.
   3. Whether the Plaintiff was guilty of contributory negligence.
   4. The quantum of damages.

**THE ACCIDENT**

**The Toilet**

1. The dispute is whether the condition of the Toilet’s floor at the material time was wet and slippery.
2. The layout and setting of the Toilet are evident from the floor plan and the photographs of the interior of the Toilet. The whole 9th Floor of the Station is designated as the male changing room. There are rows of lockers inside as well as 2 toilets at the 2 ends of the floor respectively, the Toilet being one of them. They in fact serve as both toilets and shower rooms. Entering the Toilet, one would find 4 urinals and 4 cubicles of toilets located to the left of the door. In front there are 4 sinks for washing hands lined up perpendicular to the direction of the door. Passing by the sinks to the other end of the Toilet and turning left, one would find 4 shower compartments.
3. There appeared to be no dispute that immediately prior to the accident, Au washed his hands in the second sink counting from the direction of the door and the Plaintiff washed his hands in the sink to Au’s left. Au finished and moved away from the sink towards the door. At about that moment, the Plaintiff fell behind Au.

**The Plaintiff**

1. According to his statement, the Plaintiff stepped on some water and slipped. In court, the Plaintiff explained he did not really notice the condition of the floor; but chances were that he stepped on water and therefore slipped.

**Au**

1. According to Au, the floor of the Toilet was clean and dry at the material time. It was common ground that Au was assigned by his superior specifically to escort the Plaintiff that day (for reason which I shall explain in due course). Au had been with the Plaintiff since lunch until the accident happened. He effectively had to watch the Plaintiff. Once they entered the Toilet, Au watched which toilet cubicle the Plaintiff entered before he entered the adjacent one. If Au managed to see the floor (where the Plaintiff subsequent fell) when he entered the Toilet, this might have been nothing more than a glance by the way.
2. Au explained that after the accident, he talked to the Plaintiff who was now lying on the floor. From his angle, Au saw the floor around was also dry. Even if this is accepted, Au could not tell the condition of the spot of the fall which was now underneath the Plaintiff.
3. I doubt whether the pre-accident condition of the spot underneath the Plaintiff could ever be known. Au confirmed that the Plaintiff lied still on the floor until the ambulance men arrived. When they arrived, they fixed the position of the Plaintiff’s head and then removed him in a stretcher from the scene. By then, the condition of the material spot of the floor must have been disturbed beyond meaningful examination. Any wetness would have been wiped.

**Tse**

1. Nevertheless there was apparent investigation by the Defendant after the accident. This was conducted by Senior Inspector Tse Tan Sang, Wesly (**“Tse”**). According to his report and evidence, he arrived at the Toilet soon after the accident. Au briefed him about the accident. He then inspected various parts of the Toilet. He confirmed that the floor was “*absolutely dry with no water found dampening the floor*”. He also checked the cleaning record and said that the Toilet was cleaned at least twice a day. The Toilet was last cleaned at 10:30-11:00 and checked at 12:15 prior to the accident. No slippery condition was allegedly observed. He added in court that the record contained remarks about dry, clean and non-slippery floor. He ruled out “*dropping/excessive water from any source*.” This, he concluded, was a “*pure accident without any connection with Occupational Safety and Health aspects and official duty.*”
2. The conclusion about the *absolutely* dry condition of the floor of the Toilet is in my judgment an inherently difficult one to accept. The difficulty becomes real when the other evidence is considered.
3. Tse explained that the cleaning record, which he referred to, could no longer be located. I can understand why Mr Hung for the Plaintiff was sceptical about this, as the Defendant must know the relevance of such record to possible future claims. Indeed employees’ compensation proceedings were commenced months after the accident. Contrary to Tse, the cleaning team leader of the cleaning contractor, Yasanga Lawan (**“Lawan”**) said in court that she was not aware of any such cleaning record.
4. Tse was at the material time a Commander of the Patrol Unit. Yet he seemed to have shouldered the responsibility of investigating and giving his opinion as to whether this was an accident arising in and out of the Plaintiff’s duty and whether the Occupational and Safety and Health Ordinance was complied with. The added difficulty is that the objectiveness of such investigation is called into question. This relates to the Plaintiff’s history.
5. The Plaintiff was a subject of police disciplinary proceedings. There were episodes of the Plaintiff causing physical harm to himself in December 2003 and May 2004 respectively. The disciplinary proceedings had thus been suspended pending his recovery and fitness to attend. The accident in question happened on the first day of his return to duty after his sick leave since the May 2004 episode. In the very morning after he reported duty, he was instructed to attend the disciplinary board hearing in the same afternoon. In view of the Plaintiff’s history, Au was therefore assigned to escort him. Prior to setting out from the Station to the board that afternoon, the Plaintiff, accompanied by Au, went to the Toilet where the accident happened.
6. In his report and statement, Tse saw fit to refer to the above history of the Plaintiff. Such reference would be relevant only if this was suspected to be another episode of self-inflicted harm. However there was no further investigation or conclusion to that effect eventually. As mentioned above, Ms Tsui for the Defendant confirmed during trial that this is not the Defendant’s case. This could not be the Defendant’s case according to the pleading too.
7. The case of *So Amy v Au Leslie* [1005] 2 HKC 113 cited by Mr Hung for the Plaintiff explains that the court should be on guard whether to receive similar facts evidence. The Court of Appeal (at 122B-E) said:

“……Of course, in civil cases the courts will admit evidence of similar facts if it is logically probative, ie if it is logically relevant in determining the matter which is in issue; but **facts which prove nothing more than likelihood of repetition, although logically relevant, should be rejected on grounds of fairness, since they tend to waste time, embarrass the inquiry with collateral issues, prejudice the parties with the fact finding tribunal, and encourage attack without notice: see *AG v Nottingham Corp* [1904] 1 Ch 673.** In his judgment in that case, Farwell J draws attention to the distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts, which will, if established, tend to elucidate that question. As the judge points out, to make the latter admissible **that party tendering the evidence must satisfy the court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute and also to satisfy the court that the evidence which is prepared to adduce will be reasonably conclusive……**”

(emphasis added)

1. Ms Tsui submitted that the Plaintiff’s history could still be relevant for another reason. I shall consider that in due course. But I do not believe that Tse could have known or contemplated such relevance which Ms Tsui now had in mind. I cannot help concluding that Tse’s investigation was affected by the preconception about the Plaintiff, a temptation not too surprising in view of the Plaintiff’s history.

**Between 12:15 and 13:30**

1. The cleaner and the station sergeant actually responsible for cleaning and inspecting the Toilet respectively were not witnesses during the trial. However, assuming that the Toilet was last cleaned between 10:30-11:00 and checked at 12:15 as alleged, I find that this could not be indicative of the condition of the Toilet at the time of the accident (about 13:30) because the condition could have changed by then.
2. There were indeed various factors accounting for probable change in the condition of the Toilet since 12:15. The Plaintiff took some photographs of the interior of the Toilet this year. They depict that parts of the floor of the Toilet were quite wet during the day. Though no third party witnessed how the Plaintiff took these photographs, Lawan did confirm in court that the floor of the Toilet during the day could be as wet as that depicted in the photographs. According to her, the Toilet was particularly messy when the cleaning started at about 7 am every morning after the Toilet had been used by the different shifts of officers since 4:00 pm the previous day. The floor could also get wet after people had taken shower or washed their hands (or even clothes) in the sinks. People coming out of the shower rooms would have to pass by the sinks to walk to the door. She agreed that the officers after shower might walk out of the Toilet to the lockers while they were still wet. When asked about this, Au too did not rule out such possibility. This could happen during lunchtime when the officers using the recreation room on the 13th Floor could also come down to use the shower compartments of the Toilet and the changing room.
3. Answering me, Lawan said that the surface of the tile used for the floor of Toilet was matt and little coarse. The reasonable inference is that the floor should not be too slippery without wetness. Yet the floor did not have to be extensively wet to be slippery. Water could splash when people simply washed their hands in the sinks. The setting of the interior of the Toilet is that both the paper towel and the hand dryer were located away from the sinks. Water could drip from wet hands while people were on the way to the paper towel or even further away to the hand dryer. Even Au admitted that on the material day, after washing his hands, he just shook off the water in the sink and proceeded to the door.
4. It only took a few visitors to the Toilet during the time between 12:15 and 13:30 to create wetness adequate to render specific parts of the floor slippery. This was both an inherent and high probability in the circumstances of the case as revealed by the evidence.

**Form 2**

1. Contrary to Tse’s investigation report, the Form 2, which the Defendant filed in October 2004, reported that the Plaintiff fell “*due to wet floor*”. There was no convincing explanation which might reconcile the apparently inconsistent positions of the Defendant.

**Condition of the Plaintiff**

1. Ms Tsui for the Defendant submitted that the Plaintiff’s history was relevant to understanding the Plaintiff’s psychological state at the material time. She suggested that the Plaintiff was overwhelmed by the sudden summons to attend the disciplinary hearing on the very day of his return to duty. The Plaintiff was in deep thought of how to avoid or to delay this hearing (again) or was simply too worried about the outcome of the hearing. She suggested that the operation of these on his mind, rather than the condition of the floor, caused him to fall.
2. Lack of attention and care on the Plaintiff’s part at the time was indeed pleaded to be the cause or a contributing factor of the accident. However, there was an evidential gap between the suggestion of Ms Tsui and the fact. In the previous episodes, there was evidence of the Plaintiff’s self-infliction of physical harm or self-induced intoxication and hence the way he behaved on those occasions. In the present case, there was insufficient evidence of the primary facts from which I could infer that the Plaintiff might have moved around a certain way due to his then psychological state as suggested by Ms Tsui. If I draw inference from the mere fact that the Plaintiff had those previous episodes, I would be falling into the error mentioned in the case of *So Amy* (above).

**Conclusion**

1. It is the court’s duty to decide the case in accordance with the facts, which are substantiated by the evidence available, rather than preconception or projection of possible condition and conduct of the Plaintiff inside the Toilet, in the absence of the necessary evidence in support.
2. Considering the evidence, I am satisfied on the balance of probabilities that the Plaintiff slipped and fell as a result of wetness on the floor of the Toilet at the material time.

**BREACH**

**The duties**

1. The duty of the Defendant as employer to ensure the provision of a safe system of work including a safe place of work and the access thereto is not in dispute. Both parties acknowledged the principles in *Wilson and Clyde Coal Co v English* [1938] AC 57. The standard of care effectively coincides with that stipulated under section 6 of the *Occupational Health and Safety Ordinance*, Cap.509. I also did not see serious dispute that the Defendant had the duty as the occupier of the Toilet to ensure that the Plaintiff was reasonably safe inside it (as codified under section 3 of the *Occupiers Liability Ordinance*, Cap.314).

**The cleaning system**

1. The cleaning of the communal facilities of the Station was contracted out. Mrs Yeung, the then executive officer working at the Tai Po Police District, gave evidence and explained how the cleaning contractor was chosen after the tender procedure. Mr Hung for the Plaintiff did not really contend that the contractor selected is per se below competence.
2. The conditions of the cleaning contract were contained in the terms of tender. According to the cleaning schedule, toilets and shower rooms should be cleaned 4 times at the 4 specified hours of the day: 8:00, 11:00, 13:00 and 15:00. Tse referred to this missing cleaning record, saying that the Toilet was cleaned at least 2 times a day. Lawan in her statement said that the workers would clean the toilets on the 9th Floor 3 times a day at 7:00-11:30, 13:30-14:30 and 15:00-16:00. In court, she said that the toilets would be cleaned 3 to 4 times a day, the last time being after office hour for wiping dry the floor and refilling paper, if necessary. It seems that the cleaning schedule was not adhered to. Deviation might not imply fault, if this was necessitated by the actual need to accommodate the circumstances. However, knowing the circumstances, I see deficiency in the cleaning system instead.
3. According to the schedule of areas in the Station to be cleaned, there are toilets on most of the floors. But clearly, the toilets on the 9th Floor are not just toilets or shower rooms but both. In addition, they are connected to the male changing room, which occupies the entire floor. The degree and manner of the officers using the toilets was reflected by the scene illustrated by Lawan above. This explained why the first round of cleaning in the morning took substantially longer that the other subsequent sessions. She also confirmed that during the day, including lunchtime, officers from the recreation room above would also use the showers inside the Toilet. Notwithstanding that, no distinction seemed to have been made in respect of the cleaning schedule for toilets like the Toilet as opposed to the other toilets in the Station.
4. Listening to Lawan in court, I would describe her cleaning team had barely sufficient manpower to manage the daily workload. Inspector Ma of the Support Office of the Station explained the supervision system. A station sergeant would carry out random inspection. The supervision partly relied on report of the condition of the facilities by the officers and cleaning team.
5. In a different context, the Court of Appeal spoke of the standard of care to be expected from an employer towards the safety of his employee: see *Cheung Kin Kwok Alen v Lau Kam Chee & Anor* [2004] 3 HKC 227 at 230D-G, per Rogers VP (agreeing with the trial judge’s reference to *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783):

“From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, **taking positive thought for the safety of his workers in the light of what he knows or ought to know;……he must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve.** If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

(emphasis added)

1. In the context of protecting employees from slipping, Mr Hung for the Plaintiff referred to *Davidson v Handley Page Ltd* [1945] 1 All ER 235. In that case, the employer instructed a labourer to spread sawdust on the floor to cover the frequently spilled oil liquid during work from time to time. A slip-and-fall accident happened. The court of appeal found that the dangerous condition at the material time was not attributed to the casual negligence of the labourer in not putting down the sawdust when it was required. Instead, since the slippery condition could occur any moment of the day but (at 237C):

“(although it may seem a little bit hard on employers in a place like a factory) if the system adopted for rendering a dangerous thing innocuous is **one which depends on the more or less fortuitous presence of the workman there at a particular moment, there is ample evidence on which the judge could say that that was a bas system and that the only proper system would have been one under which continuous attention was given……**”

(emphasis added)

1. No one advocates the mechanical application of the abovementioned observation of the English court. Yet in the circumstances as explained above, the high usage of the toilets and showers on the 9th Floor by different shifts of the officers (who also use the changing room there) should have warranted more frequent, if not constant, attention than some other toilets in the Station need. There was no evidence suggesting any difficulty in having this improved.
2. Considering all the circumstances, including those specifically analysed above, I am satisfied that the Defendant was in breach of its duties.
3. In view of my above findings, it is not necessary for me to consider the applicability of the principle of *res ipsa loquitur*.

**CONTRIBUTORY NEGLIGENCE**

1. On his admission in court that he did not notice the condition of the floor before and after entering the toilet, I find that the Plaintiff was careless. In my judgment, it did not matter whether there was a warning sign. The toilets on the 9th Floor are not open to anyone but the officers of the Station. They should be able to take the basic care when using a toilet/shower room which could be wet inside. Having said that, I heard no evidence that the Plaintiff walked or behaved in a manner which was unusual immediately before he slipped. I find the Plaintiff to be negligent but only to the extent of 25% in contributing to the accident. Cases like Yu *Shee Pui v Urban Council*, HCA 252/1979; *Lau Shui Chun v Leung Tung Ping Metal Factory Ltd*, HCPI 75/1997; and *Tse So Kam v Guardian Property Management Ltd*, DCPI 856/2005 cited have been considered.

**QUANTUM**

**Injuries and treatment**

1. The Plaintiff was sent to the hospital after the accident. He was conservatively treated and was discharged 2 weeks later. He received follow-up treatment and physiotherapy. Sick leave was granted until 26 April 2005. He resumed duties afterwards.

**Orthopaedic expert opinion**

1. The Plaintiff was examined by Dr. Baldwin Chan (engaged on his behalf) and Dr. Yeung Sai Hung (engaged on behalf of the Defendant). Their expert reports dated 11 October 2005 and 23 April 2007 respectively were adduced as evidence without their being called to testify.
2. The experts had the following opinion in common:
   1. The Plaintiff had soft tissue injury at the neck and back region. There was no significant injury such as fracture, dislocation or spinal instability (or radioculopathy).
   2. Recovery should take 4 to 8 months. The sick leave period was reasonable.
   3. The conservative treatment was both reasonable and appropriate. The Plaintiff had reached maximum medical improvement so that no further treatment was recommended.
   4. The residual pain at the back and neck was caused by de-conditioning of the neck and back muscles as a result of the prolonged absence from work since his previous injuries.
   5. His previous injuries should therefore account for approximately 1/3 of his current symptoms and impairment.
   6. The neck and back muscle de-conditioning would improve with time, though slowly.
   7. He should be able to resume police duty indoor.
3. They differed in their assessment of the Plaintiff’s degree of impairment. Dr. Chan gave 4%. Reduced by 1/3 to take into account the contribution by the previous injuries and consequential sick leave, the degree of impairment caused by the accident in question became 3%. Dr. Yeung gave 2%. Reduced alike, the degree of impairment caused by the accident in question became 1.7%. Their difference lies in their view as to whether there was pain amplification by the Plaintiff.
4. Dr. Yeung found that the subjective pain demonstrated by the Plaintiff was not supported by objectively verifiable findings. This was suggestive of pain amplification. According to the memorandum dated 20 March 2006 from the hospital, the results of the Waddell Test administered by the physiotherapist in September and December 2004 were 4/5 and 3/5 respectively. According to Dr Chan, a positive sign of 3/5 or more suggests a clinical pattern of non-organic pain focused behaviour. However the results of the Waddell Test conducted by Dr Chan in October 2005 suggested no non-organic sign of pain behaviour.
5. I do not speculate why the results of the test for non-organic signs of pain behaviour varied at different times. Irrespective of that, the medical expert opinion is in my judgment sufficiently ad idem. The injuries and consequential impairment caused by the accident in question to the Plaintiff can hardly be categorised as serious.

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

1. It was said that the Plaintiff has become unable to carry out numerous household and sports activities after the accident in question. He also claimed his sex life has become unsatisfactory and he felt depressed about it.
2. Mr Hung for the Plaintiff first relied on the following cases to show that an award for mere back pain should be in the region of HK$170,000-300,000: *Chan Kwei Duen v East Country Co Ltd*, DCPI 665/2005, 3 February 2006; *Mandeep Singh v Southwell Construction Co Ltd*, HCPI 575/2005, 22 September 2006; *Yeung Tai Hung v Hong Kong Baptist Hospital Au Shue Hung Health Centre*, HCPI 686/2004, 20 July 2006.
3. He then relied on the following cases to show that an award for mere neck pain should be in the region of HK$180,000-250,000: *Leung Siu Ping v Mak Sin Yee & Anor* [2002] 3 HKLRD 119, 16 August 2002; *Limbu Ramesh v Chu Fung Man*, HCPI 192/2005, 28 April 2006; *Darcy Grant Dmetrichuk v Tung Wah Group of Hospitals Wong Fut Nam College*, HCPI 416/2005, 18 May 2006.
4. Considering both back and neck condition, Mr Hung submitted that the award for the PSLA in this case should be HK$210,000-240,000.
5. Ms Tsui for the Defendant relied on *Ahmed Masood v Chung Kau Engineering Co Ltd*, DCPI 517/2003, 28 January 2005 (concerning back condition) and *Chan Siu Youn v Ng Kam Man & Ors*, HCPI 533/1999, 28 July 2000 (concerning neck condition) and submitted the award should be HK$100,000. A reduction by 1/3 was proposed to take into account the pre-existing condition. HK$70,000, she submitted, should be the award.
6. In my judgment, both the injuries and the consequential PSLA suffered by the Plaintiff were hardly serious. Regarding his private life, he apparently managed to start a new relationship just a few months after his separation from his previous girlfriend in 2006. Considering the above cases and the Plaintiff’s circumstances (to the extent really caused by the accident in question), I take the view that an award should not exceed HK$180,000. This is the amount I award.

**Pre-trial loss of earnings**

1. Ms Tsui for the Defendant confirmed that the Plaintiff was entitled to earnings during the sick leave period: HK$22,318 x 12 x 237/365 = HK$173,896.96. This had been covered in the employees’ compensation.

**Future loss of earnings**

1. The Plaintiff resumed duties after his sick leave. His pleaded case was that he had planned to retire early from the Police Force to take up sedentary work such as a security guard or a taxi driver after the age of 50. He claimed that due to the residual pain at his neck and back, he was rendered unable to carry out this plan and had to resort to other alternative jobs. On this basis, the Plaintiff claimed effectively the difference in earnings from being a security guard or a taxi driver (allegedly HK$10,000) and those from the other alternative jobs (allegedly HK$7,000).
2. With a view to substantiating such claim, the Plaintiff sought to adduce into evidence a further expert report from Dr Chan dated 10 days prior to the trial. Eventually, Mr Hung for the Plaintiff withdrew the application. I must therefore disregard that report and consider this part of the claim on the basis of the evidence presently in hands.
3. According to his own expert, Dr Chan, the Plaintiff was capable of resuming his police indoor duties. To decease the chance of exacerbation after prolonged sitting, he was advised to take 1-2 minutes of break very hour. Reasonably inferred, the impact of his condition on his ability to carry on with his police indoor duties should be minimal.
4. Both Dr Chan and Dr Yeung opined that the Plaintiff’s ability to cope with high demand of physical strength (as required in outdoor police duties) had been compromised as a result of the de-conditioning of his neck and back muscles. However, as explained above, this was contributed to by his prolonged sick leave after his previous injuries. Dr Chan advised that he should undergo physical assessment to ensure he could cope with such demand. But there was never suggestion that the Plaintiff would not be able to cope with work such as security guard or taxi driver (rather than outdoor police officer) after such assessment or appropriate (re-)training.
5. With the evidence in hands, I am just not satisfied that the Plaintiff has established the claim for the loss of earnings on the basis as alleged.
6. Relating to the calculation of such loss of earnings, there was argument on the appropriate multiplier as a result of the recent verdict and order of compulsory retirement of the Plaintiff earlier than his intended retirement age of 50. The verdict was pending appeal. This recent change in circumstances had nothing to do with the accident in question. However in view of my decision against an award under this head of claim, it would not be necessary for me to say more on this.

**Loss of earning capacity**

1. The difficulty which the Plaintiff may be faced with in seeking alternative employment and staying employed, if any, after his early retirement should be addressed with reference to his loss of earning capacity. This is the disadvantage which the Plaintiff may suffer in the labour market: see *Moeliker v A Reyrolle & Co Ltd* [1977] WLR 132. In this regard, I am prepared to make a lump sum award of HK$50,000.

**Miscellaneous special damages**

1. Miscellaneous special damages were agreed at HK$6,000.

**Summary**

1. The award is summarised as follows:

PSLA HK$180,000.00

Pre-trial loss of earnings HK$173,896.96

Loss of earning capacity HK$ 50,000.00

Miscellaneous special damages HK$ 6,000.00

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HK$409,896.96

1. Interest on damages for PSLA at 2% per annum from the date of writ (14 August 2006) to today amounts to HK$4,149.00. Interest on pre-trial loss at 5.375% per annum from the date of accident (19 August 2004) to today amounts to HK$29,341.67. Inclusive of interest, the total award would be HK$443,387.63. The amount shall be reduced by 25%, representing contributory negligence and hence HK$332,540.72.
2. Credit shall be given to the employees’ compensation of HK$219,958.45 (inclusive of interest). The remainder would be HK$112,582.27.

**ORDER**

1. The Defendant shall pay to the Defendant damages in the above sum with interest thereon at the judgment rate from today until full payment. I make an order nisi that the Defendant shall pay the Plaintiff’s costs of this action, including any costs reserved, to be taxed if not agreed. For clarity, I certify the engagement of counsel. The Plaintiff’s own costs shall be taxed in accordance with the legal aid regulations. The costs order will become absolute in the absence of appointment to argue in 14 days.

Simon Leung

District Judge

Representation:

Mr Andy Hung instructed by Messrs Au-yeung, Cheng, Ho & Tin for the Plaintiff upon the instruction of the Director of Legal Aid

Ms Jennifer Tsui instructed by the Department of Justice for the Defendant