DCPI No. 2398/2009

IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2398 OF 2009

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BETWEEN

GAUCHAN SOM PRASAD Plaintiff

and

HIN WAH CONSTRUCTION COMPANY

LIMITED 1st Defendant

HONG KONG CONSTRUCTION

(CIVIL ENGINEERING) LIMITED 2nd Defendant

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

Coram: HH Judge Lok in Court

Dates of trial: 25, 26 & 27 January 2011

Dates of submission of Further Written Submissions: 7 February & 1 March 2011

Date of handing down of Judgment: 26 July 2011

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JUDGMENT

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1. This is a claim for damages for personal injuries in respect of a work-related accident on 29 January 2007.
2. It is the Plaintiff’s case that, on the day of the accident, he was employed by the 1st Defendant as a general labourer to work at the site for slope maintenance 11SE-C/FR22 at Tai Hang Road, Hong Kong (“the Site”), and the 1st Defendant was a sub-contractor of the 2nd Defendant for the works at the Site. On the day of the accident, the Plaintiff alleges that he was working at the Site trying to remove a metal frame which was stuck in the concrete. As he tried to move the frame, he injured his back. The Plaintiff claims that the accident was caused by the negligence, breach of the implied terms of the contract of employment, breach of statutory duty and breach of occupiers’ duty on the part of the Defendants.
3. According to the Defence filed by the 1st Defendant, it accepts that the Plaintiff was its employee and that the Plaintiff was working at the Site at the time of the accident. However, the 1st Defendant disputes that it was negligent. Despite the giving of proper notification, the 1st Defendant is absent at the trial. On the other hand, the 2nd Defendant disputes that the Plaintiff was working at the Site on the day of the alleged accident. According to the initial Form 2 filed by the 1st Defendant with the Labour Department, the accident occurred at a different construction site at Headland Road which had nothing to do with the 2nd Defendant. Even if the accident happened at the Site in the manner as described by the Plaintiff, the 2nd Defendant claims that it owed no duty of care to the workers employed by the 1st Defendant who was an independent contractor. Both Defendants also claim that the Plaintiff was guilty of contributory negligence himself.
4. At the trial, the Plaintiff and the 2nd Defendant are able to agree the quantum of the Plaintiff’s claim in the sum of $480,000 inclusive of interest but on top of the award of the related employees’ compensation proceedings (“the EC Award”). However as the 1st Defendant is absent at the trial, in the case that liability is established against the 1st Defendant, the Plaintiff must prove the quantum of his claim to the satisfaction of the court.
5. Based on the aforesaid, the issues in the present case can be listed out as follows:
6. whether the Plaintiff was working at the Site on the day of the accident and whether the accident happened in the manner as described by him?
7. assuming that the accident happened in the manner as described by the Plaintiff, whether the Defendants are liable for the accident?
8. whether the Plaintiff should be found guilty of contributory negligence in respect of the accident?
9. what is the appropriate quantum of the Plaintiff claim?

I will deal with these issues in turn.

*Occurrence of the accident*

*(i) The Plaintiff’s witnesses*

1. The Plaintiff himself testifies at the trial. According to him, he commenced working for the 1st Defendant at the Site on 16 December 2006. One of the works at the Site was to construct a concrete ditch in the slope. For such kind of work, the workers had to construct a formwork for the ditch with wooden and metal frames. Once the formwork had been constructed, the workers would then pour liquid concrete into the formwork. After the concrete had solidified, the workers would then remove the wooden and metal frames of the formwork.
2. On 29 January 2007, the Plaintiff was dismantling and removing the metal frames from the newly constructed ditch. Before the accident, he had already removed about 17 to 18 metal frames, each weighing about 20-25 kilograms, from the ditch on that day. At about 4:50pm which was near the end of his working hours, he tried to remove another metal frame from the ditch. When he did so, there was a tree nearby and he had difficulty to find a foothold for removing the frame, and he had to manipulate the metal frame out of the ditch from around the tree. Further, because of the excess flow of liquid concrete, that frame was stuck in the concrete and it was therefore heavier than normal to remove the frame. According to the Plaintiff, it was like removing a frame weighting about 50-60 kilograms. When the Plaintiff repeatedly tried to lift the metal frame from the ditch, he suddenly felt severe pain in his lower back. The pain did not improve on the following day, and so the Plaintiff sought medical treatment from a Government clinic.
3. Normally, it required 2 workers to remove the metal frames from the ditch. However as all the workers were busy on that day, the Plaintiff was told to remove the metal frames by himself. When he had difficulty in removing the particular metal frame stuck in the concrete, he tried to ask for help from other workers but without any success. One particular worker refused the Plaintiff’s request and the other worker was just too busy with his work.
4. Another worker employed by the 1st Defendant, Mr. Gurung Bhakta Bahadur, also testifies at the trial. He has been working for the 1st Defendant for about 5 to 6 years. Although he cannot remember the exact date of the accident, he confirms that the Plaintiff injured himself when he was removing a metal frame from the ditch at the Site. At that time, he was working at a distance of about 9 to 12 metres away from the Plaintiff on the lower part of a slope.

*(ii) The witness statement filed by the 1st Defendant*

1. The 1st Defendant has filed a witness statement of one Mr. Chan Chun Yat. He was the site foreman employed by the 1st Defendant to work at the Site. Mr. Chan confirms that the 1st Defendant was a sub-contractor of the 2nd Defendant at the Site, and that the Plaintiff was employed by the 1st Defendant as a construction site worker to work at the Site on the day of the accident. On the day following the accident, the Plaintiff informed him about the accident and he therefore relayed such information to the Safety Officer of the 2nd Defendant. Although the 1st Defendant and Mr. Chan are both absent at the trial, the Plaintiff and the 2nd Defendant agree that the court can treat the contents of such statement as hearsay evidence.

*(iii) The 2nd Defendant’s witness*

1. The 2nd Defendant’s witness is one Mr. Yau King Wah, who was employed by the 2nd Defendant to work as a foreman at the Site at the material time. According to Mr. Yau, the works at the Site were commissioned to the 2nd Defendant by the Civil Engineering and Development Department of the Hong Kong Government. The 2nd Defendant then sub-contracted all the works at the Site to the 1st Defendant. Mr. Yau was the only person employed by the 2nd Defendant to work at the Site, and his duties included supervising the progress of the works and serving as a liaison officer between the 1st and the 2nd Defendants. Usually, Mr. Yau would arrive at the Site in the morning, inspecting the progress of the works and discussing with the 1st Defendant’s foreman about the works at the Site. He also supervised the workers employed by the 1st Defendant to work at the Site, to whom he occasionally gave some work-related instructions. On some days, Mr. Yau had to return to the office of the 2nd Defendant in the afternoon for meetings relating to safety issues. At the material time, Mr. Yau also served as a foreman of the 2nd Defendant at another construction site in Stubbs Road, but he spent most of his working time at the Site.
2. Another duty of Mr. Yau was to monitor the attendance records of the workers at the Site. He would be stationed at the entrance of the Site every morning and he kept a log-book for the workers to sign to confirm their attendance at work. Mr. Yau maintains that all the workers signed the log-book in his presence.
3. According to Mr. Yau, the Plaintiff was not working at the Site on the day of the accident. Although there was a signature apparently of the Plaintiff on the day of the accident in the log-book, Mr. Yau claims that such signature was put down by someone after the accident. In fact, Mr. Yau had to go back to the 2nd Defendant’s office at least twice a week. On each of such occasion, he would photocopy the relevant updated attendance records for the purpose of preparing a report to the Resident Engineer. According to the photocopied attendance records kept by the 2nd Defendant, there was no signature of the Plaintiff on the day of the accident. Hence, according to Mr. Yau, the log-book had been altered subsequently with a view to show that the Plaintiff was working on the day of the accident which was not the case.
4. Another piece of evidence relied on by the 2nd Defendant to dispute the Plaintiff’s attendance at work at the Site on the day of the accident is the initial Form 2 submitted by the 1st Defendant to the Labour Department dated 28 February 2007. According to that document, the Plaintiff’s accident occurred at a different construction site at Headland Road where the 1st Defendant was the main contractor of the site with one of its subsidiaries as its sub-contractor. However, after a period of time, the 1st Defendant amended the Form 2 to state that the accident actually took place at the Site. The amendments also included the information that the 1st and the 2nd Defendants were the sub-contractor and the main contractor of the Site respectively at the time of the accident.

*(iv) Assessment of the evidence*

1. Having carefully considered the evidence of the present case, I do not find Mr. Yau to be an impressive witness. Mr. Yau claims that the entries in the log-book were contemporaneous entries made by the workers every morning. However, a strange feature of these entries is that for each page it covers 5 days, but may not be the same week and can span into another week. On each page, the names are in exactly the same order for every day on the same page. But in real life, the workers would arrive at the Site individually and they would be some variations in the exact time they arrived at the Site. If the workers were signing the log-book each day, it would be very difficult to explain why, for say 5 days in week, they signed the log-book in the same order. Such feature suggests that the log-book might very well be signed in one-go or on a number of occasions subsequently, but not daily by the workers as alleged by Mr. Yau. I therefore have grave reservation about the creditability of Mr. Yau’s evidence.
2. Further, Mr. Yau claims that he took the log-book back to the 2nd Defendant’s office at least twice a week, on Tuesdays or Wednesdays and Fridays, and made photocopies of the latest attendance records. However, the copies he produced all have entries for 5 days. As Mr. Yau went back to the 2nd Defendant’s office at irregular intervals and if he took photocopies each time, then there should be photocopies of pages varying between entries from 1 to 5 days. When this is pointed out to Mr. Yau, he simply changes his evidence and claims that he only photocopied the records when each page was full. Such inconsistency certainly undermines the creditability of his evidence.
3. In my judgment, Mr. Yau is not a truthful or credible witness. He wants to show to the court that he was a responsible site foreman, and he would be at the entrance of the Site each morning with the log-book for each worker to sign to confirm their attendance at the Site. But because of the observations I made above, I do not accept that this was indeed the case. Further, at the time of the alleged accident, Mr. Yau was the site foreman of the 2nd Defendant supervising the works at two different sites, namely the Site and another construction site at Stubbs Road. If Mr. Yau had to supervise two sites, I doubt very much whether he could be at the Site each morning supervising the attendance of the workers. In his evidence, Mr. Yau seeks to provide an explanation by saying that he would spend most of the time at the Site rather than the site in Stubbs Road. When he is asked as to why this was the case, Mr Yau at one time testifies that because a lot of the workers at the Site were Nepalese, it required more supervision on his part. But at some other time, Mr. Yau says that he could save a lot of transportation costs himself by spending most of his working time at the Site rather than the Stubbs Road site. In my observation, it is very difficult to tell when Mr. Yau is telling the truth. I also reject Mr. Yau’s evidence that the works at the Site did not require that many workers as listed out in the log-book.
4. Based on the aforesaid analysis, I do not accept the 2nd Defendant’s contention that the entries in the log-book had been deliberately altered with a view to show that the Plaintiff was working on the day of the accident. Instead, I find that the entries were made by the workers in one-go to save the trouble of signing the log-book everyday. Hence, the entries in the log-book support rather than contradict the Plaintiff’s evidence that he was working at the Site on the day of the accident.
5. I also accept that it was an innocent error when the 1st Defendant stated in the original Form 2 that the accident occurred at another construction site at Headland Road. As the 1st Defendant had workers working at different sites at different times, such kind of error is quite understandable. Further, if the information in the amended Form 2 is not correct, it would virtually mean that there was some kind of collusion between the Plaintiff and the 1st Defendant. As I see it, this was highly unlikely to be the case. There is no logical reason as to why the 1st Defendant had to assist the Plaintiff in his claim in such manner, and so I accept that the provision of the incorrect information in the initial Form 2 was only a genuine mistake on the part of the 1st Defendant.
6. On the other hand, I find both the Plaintiff and Mr. Gurung to be honest and truthful witnesses. In particular, I am impressed that the Plaintiff can provide a very detailed account about the occurrence of the accident. To me, the Plaintiff cannot do so unless the accident happened in the way as described by him. He can also produce photographs about the location of the accident to support his evidence. Further, the evidence of the Plaintiff and Mr. Gurung has remained unshaken despite the vigorous cross-examination by the counsel for the 2nd Defendant, and so I accept that they are telling the truth in court. Hence, I find that the Plaintiff had injured his back on 29 January 2007 at the Site and the accident occurred in the way as described by him.

*Liability of the 1st and the 2nd Defendants*

1. According to the evidence of the Plaintiff, it is clear that the accident was caused by the breach of duty of care on the part of his employer, the 1st Defendant, to provide sufficient manpower and mechanical aid to lift the metal frames. Further, the 1st Defendant was also in breach of its duty to provide a safe system of work by ensuring that there would not be excess flow of concrete in the formwork of the ditch causing the metal frames to get stuck in the concrete. As the 1st Defendant had failed in such duties, it is liable to the Plaintiff for the accident.
2. The 2nd Defendant was not the employer of the Plaintiff and so it did not owe the same duty of care to the Plaintiff. Despite that, the Plaintiff claims that the 2nd Defendant is liable for the accident because:
3. the 2nd Defendant owed a duty of care to the Plaintiff having assumed control over the system of work and safety at the Site;
4. the 2nd Defendant was “the person responsible for a workplace” within the meaning of s. 3(2) of the Occupational Safety and Health Ordinance, Cap. 509 (“OSHO”) and so it owed various statutory duties to the Plaintiff under the Occupational Safety and Health Regulations; and
5. the unsafe drain mould was part of the premises and so the 2nd Defendant, as the occupier of the Site, owed the common duty of care to the Plaintiff under the Occupiers Liability Ordinance, Cap. 314 (“OLO”).
6. In determining these issues, the court needs to make some factual findings about the role of the 2nd Defendant in respect of the construction works at the Site. In fact, the following facts are not in dispute. Firstly, the 2nd Defendant was commissioned by the Government to carry out construction and maintenance works at the Site. Secondly, the 2nd Defendant sub-contracted the works at the Site to the 1st Defendant. Thirdly, the Plaintiff mainly received instructions from the 1st Defendant’s foreman at the Site for his work. However, the 2nd Defendant had also sent a foreman, Mr. Yau, to supervise the works at the Site. According to Mr. Yau, most of the workers at the Site were Nepalese and so they required more supervision on his part. Occasionally, he had to give some work-related instructions to these workers. Fourthly, according to Clause 6 of the sub-contract between the 1st and the 2nd Defendants (“the Sub-Contract”), the 1st Defendant had to complete the works at the Site in accordance with the instructions given by the 2nd Defendant. Fifthly, the 2nd Defendant and its safety officers were responsible for the safety issues at the Site. Under the terms of the Sub-Contract, the 1st Defendant had to comply with the safety policies and regulations set by the 2nd Defendant, and the 1st Defendant’s representatives also had to attend regular meetings with the staff of the 2nd Defendant to discuss safety issues at the Site.
7. Based on these facts, it is clear that 2nd Defendant was not “the person responsible for a workplace” within the meaning of s. 3(2) of the OSHO, which reads as follows:

*“For the purposes of this Ordinance, the person responsible for a workplace is the employer of the employees who are employed to carry out work there, or if the employer does not exercise any degree of control over the relevant part or aspect of the workplace, means the occupier of the workplace.”*

1. In our present case, all the works at the Site had been sub-contracted to the 1st Defendant, and so the 1st Defendant, being the employer of the Plaintiff, had to exercise some degree of control over the relevant part of the Site. In such circumstances, the 1st Defendant, being the employer, was “the person responsible for a workplace” within the meaning of s. 3(2) and the 2nd Defendant therefore owed no statutory duty to the Plaintiff under the provisions of the OSHO and its subsidiary legislations.
2. It is also the Plaintiff’s case that the 2nd Defendant was an occupier of the Site and therefore owed the common duty of care to the Plaintiff under the provisions of the OLO. The Plaintiff claims that as the metal frames formed part of the formwork and the 2nd Defendant was one of the occupiers of the Site, the 2nd Defendant was in breach of its duty to remove the dangers associated with the use of the formwork which was part of the Site.
3. The 2nd Defendant was the principal contractor and so one may argue that it was at least one of the occupiers of the Site. Despite that, I do not agree that the 2nd Defendant was in breach of the common duty of care owed to the Plaintiff because the accident was caused by the defective system of work rather the unsafe condition of the Site.
4. Such distinction had been considered by the English Court of Appeal in *Fairchild v Glenhaven Funeral Services Ltd.* [2002] EWCA Civ 1881. In that case, an occupier of the premises engaged an independent contractor to carry out certain construction works at the premises. In the course of the works, the workmen employed by the contractor were exposed to asbestos dust in the premises and so the court had to consider whether the occupier was liable to the workmen for the injuries caused by the exposure to the asbestos dust.
5. In this regard, the Court of Appeal drew a distinction between “occupancy duties” and “activities duties”, with the former relating to “the static condition of the premises” and the latter relating to the “current operations” carried out in the premises. The occupier of the premises should take all reasonable care to prevent damage from unusual dangers associated with the static condition of the premises. As the workmen’s exposure to the asbestos dust was caused by the current operation negligently carried out by the independent contractor and not by the unusual dangers in the static condition of the premises, the Court of Appeal held that the occupier of the premises was not liable for the accident.
6. In the present case, I agree with Mr. Gidwani, counsel for the 2nd Defendant, that the accident was caused by the “current operation” and the defective system of work rather than by the unsafe condition of the premises, and the present case is one concerning “activity duties” rather than “occupancy duties”. The Plaintiff injured himself whilst lifting and removing the metal frame. He knew that the frame was partly stuck in the concrete and so it required greater strength to remove the frame. The Plaintiff asked for help but none was provided by his employer. Further, no lifting equipment was provided. The Plaintiff was therefore compelled to undertake the work himself on behalf of his employer. In such circumstances, the injury was caused by the work activity or defective system of work rather than occupancy or the condition of the premises *per se*. Hence, the 2nd Defendant is not liable simply because it was one of the occupiers of the Site.
7. The last issue I have to consider is whether the 2nd Defendant, being the principal contractor of the Site, owed a common law duty of care to the employees of the independent contractor including the Plaintiff in respect of an accident caused by defective system of work. Despite the extra time given to counsel for legal research, it seems that they cannot find any direct authority on the point. In *Fairchild v Glenhave*n, *supra.* and *Kwan Chu Kwong v Cheng Shui Hung*, unreported, DCPI 164 of 2004 (decision of Deputy District Judge W. Lam on 11 August 2005), the courts only held that, in the case that the accident was caused by the current operation carried out negligently by the independent contractor and not by any defect in the premises, the occupier of the premises would not be liable to pay damages to the injured worker employed by the independent contractor for such accident. These cases do not provide the answer if the occupier is also the principal contractor of a construction site who has some degree of control over the system of the work of the independent contractor.
8. One may also note that in the recent decision of *Luen Hing Fat Coating & Finishing Factory Ltd. v Waan Chuen Ming* [2011] 2 HKLRD 223, an occupier of the premises engaged an independent contractor to do certain work at its premises. The occupier lent the independent contractor an equipment which was not intrinsically dangerous or faculty, but nevertheless the occupier knew or ought to have known that the independent contractor would use the equipment to do the work by a method which was unsafe. The Court of Final Appeal held that the occupier was liable to pay damages to the servant of the independent contractor who was injured as a result of the unsafe use of the equipment. Again the facts are quite different from those in the present case.
9. I suspect the reason why there is a lack of case law on this particular issue is that the principal contractor is usually “the contractor responsible for a construction site” within the meaning of the Construction Sites (Safety) Regulations, Cap. 59. Under the said Regulations, the principal contractor owes various statutory duties to the workers working in a construction site, and so it would not be necessary for the injured workers to rely on the breach of the common law duty of care in their claims against the principal contractors of the sites. Apparently, the Plaintiff here cannot identify any provisions in the said Regulations which are applicable to the facts of the present case. Without the aid of statutory duty, the Plaintiff has to rely on the common law duty of care.
10. Whether the court should impose a duty of care should be guided by the general principles laid down in the landmark case of *Donoghue v Stevenson* [1932] AC 562. In *Luen Hing Fat Coating & Finishing Factory Ltd. v Waan Chuen Ming*, *supra.*, the Court of Final Appeal had also provided a very useful guideline for the application of the “foreseeability/proximity/fairness, justice and reasonableness” test in determining whether to impose a duty of care in a negligence claim.
11. To me, there are two important considerations as to whether the court should impose such duty on the part of the principal contractor: (i) whether the principal contractor knew or should have known about the defective system of work; and (ii) whether the principal contractor had any control or supervision over such defective system of work. Those are exactly the considerations listed out in the passage of the judgment of *Ferguson v Welsh* [1987] 1 WLR 1553 quoted in *Fairchild v Glenhave*n [at para. 130]:

*“It is possible to envisage circumstances in which occupier of property engaging the services of an independent contractor to carry out work on his premises may, as a result of his state of knowledge and opportunities of supervision, render himself liable to an employee of the contractor who is injured as a result of the defective system of work adopted by the employer. But I incline to think that his liability in such case would be rather that of joint tortfeasor than of an occupier.”*

1. In my judgment, the 2nd Defendant should be liable together with the 1st Defendant as joint tortfeasors for the accident. Unlike the facts in most of the other cases above, the 2nd Defendant was not just simply engaging the 1st Defendant to carry out the construction works at the Site. The 2nd Defendant had assumed responsibility for the safety of the workers working at the Site and control over the 1st Defendant’s system of work. In fact, it was stated in the Sub-Contract that the 1st Defendant had to follow the instructions of the 2nd Defendant in completing the works at the Site. The facts also indicate that the 2nd Defendant had sent a foreman to the Site to supervise the works of the 1st Defendant’s workers, and the foreman had occasionally given express work instructions to the workers of the 1st Defendant. Further, as being responsible for the safety issues at the Site, the 2nd Defendant did have direct control as to how certain works were performed at the Site, and the 1st Defendant’s representatives also had to attend regular meetings with the 2nd Defendant to discuss the safety issues at the Site.
2. Applying the “foreseeability/proximity/fairness, justice and reasonableness” test, there can be no doubt that the harm in question was foreseeable. It was also obvious that the work carried out by the Plaintiff at the time of the accident was dangerous, and the 2nd Defendant should have been aware of such unsafe operation. As the 2nd Defendant had taken an active role in controlling and supervising the 1st Defendant’s system of work, proximity did exist between the Plaintiff and the 2nd Defendant, and it is also fair, just and reasonable to impose a duty of care on the part of the 2nd Defendant for the protection of the workers working at the Site. As the 2nd Defendant was in breach of such duty in failing to ensure that the 1st Defendant’s system of work was safe in the circumstances, it is also liable as one of the joint tortfeasors for the accident.

*Contributory negligence*

1. Both Defendants raise the defence of contributory negligence.
2. The Plaintiff accepts that, by reason of the weight of the metal frames, it would normally require 2 workers to remove the metal frames from the newly constructed ditch. Further, if a particular metal frame got stuck in the concrete, it would be more difficult to remove the metal frame concerned. However, I accept the evidence of the Plaintiff that he had been expressly told by the foreman at the Site that he had to do the work himself. The Plaintiff had also tried to summon for assistance but there was no worker available to help, and there was no lifting equipment that could assist the Plaintiff with his work. In such circumstances, the Plaintiff had no choice but to carry out his work in accordance with the instruction and to get the work done.
3. In *Ng Kam v Sun Wan Co.*, unreported, CACV No. 38 of 1988 (decision of the Court of Appeal on 25 October 1988), Fuad VP said the following in the judgment:

*“The Plaintiff was that way, not performing his task in a dangerous way to save himself trouble. He was doing it in that way to get on with his employer’s business; in a way, as the judge found, that was condoned and tacitly encouraged by the employer … … … I do not think that an employer can be heard to say that his employee was being negligent in carrying out the work in that manner.”* [at para. 32]

1. In my judgment, the *dicta* of Fuad VP is also applicable in the present case. The Plaintiff was removing the metal frames alone not for saving himself trouble but to get on with his employer’s business. Hence, the Plaintiff should not be found guilty of contributory negligence.

*Quantum*

1. The Plaintiff and the 2nd Defendant agree the quantum of the Plaintiff’s claim in the sum of $480,000 inclusive of interest. However, such agreement only applies to the claim *vis-à-vis* the Plaintiff and the 2nd Defendant, and the Plaintiff would still have to prove his case on quantum against the 1st Defendant.

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

1. After the accident, the X-ray examination showed that the Plaintiff suffered from spondylolisthesis of L5/S1 level and degenerative changes in the lumbar spine. As a result of the lower back pain, he was granted sick leave from 29 January 2007 to 3 July 2008.
2. The present complaints of the Plaintiff include:
3. constant back pain which is worse in the morning and better after some movement;
4. pain when the Plaintiff walks on uneven ground or on a slope;
5. difficulty in walking for long distance without a walking stick;
6. pain radiating down to the front and the back of the right leg 2 to 3 times a day and lasting from 5 to 10 minutes;
7. difficulty in squatting and inability to run; and
8. inability to lift weights of more than 10-12 kilograms.

The Plaintiff is still taking painkiller twice a day.

1. The Plaintiff and the 2nd Defendant agree the quantum of PSLA in the sum of $220,000. After referring to the cases cited to me by Mr. Lim, counsel for the Plaintiff, including *Mohammed Shakil v Lam Siu Kwong* HCPI No. 610 of 2007, *Chan Chung Keung v Greenroll Ltd. t/a Conrad Hong Kong* HCPI Bo. 275 of 2005, *Ng Lai Fun Fanny v The Hong Kong Golf Club* HCPI No. 511 of 2005, *Limbu Ramesh v Chu Fung Man* HCPI No. 192 of 2005 and *Limbu Man Bahadur v Tsang Chan Fai* HCPI No. 486 of 2003, I find the quantum agreed by the parties to be reasonable. I therefore assess the damages for PSLA in the sum of $220,000.

*(ii) Loss of earnings*

1. At the time of the accident, the average monthly income of the Plaintiff was $10,000 ($400 x 25 days).
2. After the expiry of the sick leave period on 3 July 2008, it still took the Plaintiff 11 months to find a job as a cleaner. In my judgment, the Plaintiff should be able to claim for total loss of earnings for such period of time. By reason of his injury, the Plaintiff took up the alternative employment as a cleaner in June 2009 with a much lesser income, and he should therefore be allowed to claim for partial loss of earnings from June 2009 up to now. In such circumstances, the Plaintiff’s pre-trial loss of earnings can be assessed as follows:
3. February 2007 to May 2009

$10,000 x 28 months x 105% (MPF contribution): $294,000

1. June to December 2009

($10,000 - $5,500) x 7 months x 105% : $ 32,340

1. April 2010

($10,000 - $5,500) x 105% : $ 4,725

1. May 2010

($10,000 - $7,650) x 105% : $ 2,934.75

1. June 2010 to the trial date (January 2011)

($10,000 - $6,700) x 8 months x 105% : $ 27,720

$361.719.75

1. The Plaintiff is 64 1/2 years of age at the date of the trial, and so I would adopt a multiplier of 1.5. Hence, the post-trial loss of earnings can be assessed as follows:

($10,000 - $6,700) x 18 months x 105% : $ 62,370

1. The 2nd Defendant agrees the quantum of the Plaintiff’s claim for loss of earnings as mentioned above. As the sum claimed is reasonable in the circumstances, I assess the loss accordingly.
2. In view of the age of the Plaintiff, he is not claiming any damages for loss of earning capacity.

*(iii) Special damages*

1. The 2nd Defendant does not dispute the amount of $7,480 claimed by the Plaintiff for other special damages as particularised in the Revised Statement of Damages. As the amount claimed is reasonable, I allow the claim in full.
2. The quantum of the Plaintiff’s claim can therefore be summarised as follows:
3. PSLA : $220,000
4. Pre-trial loss of earnings : $361,719.75
5. Future loss of earnings : $62,370
6. Special damages : $ 7,480

$651,569.75

Less the EC Award in the sum of $179,766.88 $471,802.47

1. The Plaintiff and the 2nd Defendant agree the quantum of the Plaintiff’s claim in the sum of $480,000 inclusive of interest up to the date of judgment. Taking into account the aforesaid assessment, I am of the view that it is a reasonable figure. If the court is to include interest in the final amount, it would certainly exceed $480,000. As the Plaintiff is not asking for a higher sum against the 1st Defendant, I would assess the quantum of the claim against the 1st Defendant in the same amount of $480,000 inclusive of interest up to the date of judgment.
2. I therefore grant judgment in favour of the Plaintiff against both Defendants in the sum of $480,000. I also make an order *nisi* that the costs of the action be to the Plaintiff with certificate for counsel and that the Plaintiff’s costs to be taxed in accordance with Legal Aid Regulations, which shall be made absolute 14 days after the date of the handing down of this Judgment.

(David Lok)

District Judge

Mr. Patrick Lim, instructed by Messrs. Lo, Wong & Tsui, for the Plaintiff

The 1st Defendant, in person, absent

Mr. Victor Gidwani, instructed by Messrs. C. L. Chow & Macksion Chan, for the 2nd Defendant