

HONG KONG / JUDGMENT

CHOI YING CHI v. LOYAL ENGINEERING LTD

COURT

Court of First Instance

DECIDED

25 September 2007

CASE / FILE NUMBER

HCPI53/2006

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bjbj HCPI 53/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NO. 53 OF 2006

BETWEEN CHOI YING CHI Plaintiff and LOYAL ENGINEERING LIMITED Defendant

Before : Hon Suffiad J in Court Dates of Hearing : 6 and 9 11 July 2007 Date of Judgment : 25
September 2007

J U D G M E N T

AUTONUMOUT The plaintiff, a fitness trainer employed by the defendant working at the defendant s fitness centre at the material time, claimed damages for personal injuries sustained by him in the course of his employment in respect of two accidents said to have happened on 28 July 2004 and 18 March 2005 respectively. Plaintiff s case AUTONUMOUT The plaintiff s case was that he was employed by the defendant as a fitness trainer at the defendant s fitness centre situated in Mongkok from 2002 onwards. AUTONUMOUT Part of his duties at the fitness centre was to collect and replace dumbbells and barbells left scattered on the floor of the centre by patrons. AUTONUMOUT On 28 July 2004, at about 8:00 p.m. in the evening, he attempted to replace a 90 lb dumbbell onto the rack. When he was lifting the dumbbell, he sprained or injured his lower back (the 1st Accident). AUTONUMOUT He did not seek medical treatment for it immediately, but on the following day, the 29 July, he aggravated the injury that evening, and because he had pain in his lower back, he sought medical treatment at the Accident and Emergency Department (Dept) of Kwong Wah Hospital () for the injury to his lower back. AUTONUMOUT He was given sick leave for the injury by the KWH from 30 July to 8 August.

AUTONUMOUT He resumed work on 9 August with the defendant but thereafter had to attend physiotherapy sessions and for which he was reimbursed by the defendant the fees for such physiotherapy. AUTONUMOUT Between August and December 2004, he was given sick leave intermittently, for the same lower back injury. AUTONUMOUT On 14 March 2005, the plaintiff again injured his lower back at work. AUTONUMOUT He consulted Dr Kuen () and was given four days of sick leave from 14 to 17 March as well as a certificate certifying that the plaintiff was only fit to carry out light duties due to the state of his lower back. AUTONUMOUT It was the plaintiff's case that he had informed Eric Lau, the assistant manager of the defendant, by phone on 14 and 15 March that he had been given four days of sick leave but was asked to go back to work by the assistant manager despite the sick leave granted to the plaintiff. AUTONUMOUT Accordingly, the plaintiff presented himself at work on 16 March. AUTONUMOUT On 18 March when the plaintiff was at work, at about 8:00 p.m. when he was collecting and re-racking barbells left on the floor by patrons, he again injured his back (the 2nd Accident). This time, he had to sit down and rest for some time. After resting he found that he could not even stand up or walk. As a result an ambulance was called for by others in the fitness centre. He was then taken to the KWH by ambulance. AUTONUMOUT Insofar as negligence is alleged against the defendant, it was the plaintiff's case that for the 1st Accident on 28 July 2004, that was the day on which the defendant held a road show. As a result the fitness centre was short-handed of trainers, the plaintiff being the only trainer left behind at the fitness centre. He alone had to collect and pick up all the dumbbells and barbells left scattered on the floor by patrons. AUTONUMOUT Furthermore, it was alleged that the defendant had not provided for a safe system of work and had failed to carry out an assessment of the risks involved. AUTONUMOUT It was also alleged that the defendant had failed to provide suitable aids or equipment for the plaintiff to carry out his work. AUTONUMOUT Based on the foregoing, the plaintiff says that the defendant was in breach of his duties as an employer and in breach of statutory duties, particulars of which have been given in the plaintiff's pleadings. Did the 1st Accident happen as alleged by plaintiff AUTONUMOUT The plaintiff's case was that the 1st Accident happened on 28 July 2004 at about 8:00 p.m. AUTONUMOUT An issue arose as to whether the 1st Accident happened as alleged by the plaintiff. That issue was complicated by the fact that the plaintiff had at different times subsequent to the alleged 1st Accident given different times and dates of that accident happening. AUTONUMOUT In some medical reports, the accident was said to have occurred on the 28 July while in other reports the date given was 29 July. AUTONUMOUT In the Form 2 made out by the defendant to the Labour Department, the date of accident was said to be 29 July. The defendant says that information was given to them by the plaintiff. AUTONUMOUT In the plaintiff's pleadings relating to the claim for ECC compensation arising from this accident, the date pleaded was 29 July. AUTONUMOUT Even in the pleadings in the present case, it was initially pleaded that this accident occurred on 29 July. It was only in May 2006 that the Statement of Claim herein was amended such that the date of the accident was amended to 28 July. AUTONUMOUT As for the time of the 1st Accident, in his witness statement, the plaintiff put it down to around 8:00 p.m. when he was the only fitness trainer on duty in the weight lifting area, and there were a number of customers using the facilities resulting in many dumbbells left on the ground. He kept collecting and returning dumbbells to their rack and sprained his back when he tried to lift a pair of dumbbells of 90 lbs.

AUTONUMOUT When it was put to the plaintiff in cross examination that records kept by the defendant for Personal Training Course showed that the plaintiff had conducted two personal training courses on the evening of 28 July 2004, the first from 6:36 p.m. to 7:36 p.m. and the second one from 7:45 p.m. to 8:45 p.m., (both such records having been signed by the plaintiff) the plaintiff replied that the accident happened in the ten minutes or so in between the two courses. No mention however was made of the two personal training courses by the plaintiff in his witness statement nor that the accident happened in between those two courses given by him. AUTONUMOUT Such inconsistencies or discrepancies did not help the plaintiff's case. They enabled the defendant to submit that the evidence given by the plaintiff as to the occurrence of the 1st Accident was not believable and that the plaintiff had made up and changed his version of events as matters progressed to fit in with the evidence produced by the defendant as to the date of the road show and/or the two personal training courses. AUTONUMOUT However, one crucial piece of evidence to which, in my view, a substantial amount of weight should be given and which can resolve this issue, is that the medical report from the A&E Dept of KWH (signed by Dr Sung Kong (Sung)) stated that the plaintiff was examined by Dr Sung at 23:12 hours on 29 July 2004 with the complaint of sprain injury sustained to his low back at work on 28 July 2004. AUTONUMOUT What is recorded there can only have been told to Dr Sung by the plaintiff when he visited the A&E Dept of KWH on 29 July 2004. AUTONUMOUT This is entirely consistent with the plaintiff's case as it now stands after the amendments. AUTONUMOUT I can give weight to this evidence because very likely what is stated there would have been noted down contemporaneously by Dr Sung from what was told him by the plaintiff. What was told to him by the plaintiff as to the date of the accident would not suffer from any faulty memory on the part of the plaintiff since it was the day after the accident when the plaintiff saw Dr Sung. AUTONUMOUT I therefore find that the plaintiff did suffer a sprain at work on 28 July 2004 and he did visit the A&E Dept of KWH on the night of 29 July seeking medical treatment for that sprain. AUTONUMOUT Should it be necessary, I also find that it was due to the plaintiff's faulty memory (very likely at a much later time) as to dates which brought about the inconsistencies and discrepancies as to the date on which the 1st Accident occurred. AUTONUMOUT I also accept the evidence of the plaintiff that the accident had happened (when he strained his lower back) in between the two sessions of personal training courses which he gave to two students in the evening of 28 July 2004. Whether defendant negligent for 1st Accident AUTONUMOUT The plaintiff's evidence relating to the 1st Accident was that on that night, because there was a Road Show on the ground floor of the fitness centre, he was the only trainer on duty at around 8:00 p.m. which is the busy time for the weight lifting section. AUTONUMOUT As there were numerous customers at the weight lifting section, there were a number of dumbbells and barbells left scattered on the floor. He, being the only trainer around, had to keep collecting and returning the dumbbells and barbells to their racks. Because of the numerous customers doing weights training, he was unable to roll the dumbbells and barbells to their racks but had to squat down and lift them back to their racks. AUTONUMOUT Having repeated such actions in collecting and re racking the dumbbells and barbells, he sprained his back when he attempted to lift a pair of dumbbells around 90 lbs in weight. AUTONUMOUT Although this accident was not witnessed by any of the witnesses called by the defendant, the defence witness gave general

evidence as to the re-racking of dumbbells and barbells by trainers generally. AUTONUMOUT The evidence from the defendant was that those customers wishing to train with dumbbells and barbells would usually be in a very concentrated area of the centre where there are benches near to the racks holding the dumbbells with mirrors on the adjacent walls. Therefore the dumbbells and barbells after use would not be scattered over a large area of the floor even if not re racked by the customers themselves. AUTONUMOUT Secondly, it is usual for anyone re racking dumbbells or barbells, especially the heavier ones, to roll by pushing those dumbbells or barbells with the legs up to the racks and then lifting them back onto the racks. AUTONUMOUT Thirdly, the heaviest dumbbells are always placed on the lowest racks so that minimal lifting are required for them. AUTONUMOUT Fourthly, a trainer does not have to continuously re rack bells every second and minute since there are rules requiring the customers to re rack bells after use. It is only with some customers who do not follow the rules that bells after use by them will need to be re racked by staff of the fitness centre. Most of the customers will follow the rules and re rack bells themselves after use. AUTONUMOUT Fifthly, it is usual that in the last 10 or 15 minutes before the fitness centre closes each night that the trainers will together re rack any bells still left on the floor of the centre. AUTONUMOUT Lastly, there was evidence from the defendant that belts for weight lifting were provided by the gym for anyone needing to use them, even trainers. AUTONUMOUT The evidence given by the defendant is full of common sense and logic and that is what one will expect to happen in a fitness centre such as this one. AUTONUMOUT On the other hand, I find the evidence from the plaintiff as to what happened leading up to the 1st Accident to have been tainted with a measure of exaggeration. AUTONUMOUT For instance I cannot accept that because there were a number of customers around at the time, he had to carry each and every bell left on the floor back to its rack. I would have thought that there were a number of options open to him. He could have kicked roll the bells to one side first so that it would not be in the way of other people and then later, when there was less people around, to roll the bells back to its rack. AUTONUMOUT Nor can I accept that the plaintiff had to continuously and for long periods keep on lifting and carrying bells which were scattered all over the floor back to their racks without some rest in between. AUTONUMOUT I therefore do not accept the plaintiff s evidence in its entirety although I do find that in the course of returning some bells to their racks that night, the plaintiff did sprain his back which caused him some pain or discomfort. AUTONUMOUT I also find that belts for weight lifting were provided by the defendant for use in the gym. However, it would probably be quite unusual for a person, including the plaintiff to put on such a belt for the purposes of re-racking bells. Not surprisingly therefore the plaintiff did not make use of such belt. AUTONUMOUT Notwithstanding that there were 16 particulars of negligence pleaded by the plaintiff relating to the 1st Accident, in his opening relating to the 1st Accident, counsel for the plaintiff was content to rely on the following matters as showing negligence on the defendant : insufficient manpower; foreseeable risk in that the plaintiff was required to handle heavy objects weighing between 50 to 100 lbs; the system of work was unsafe and the defendant failed to conduct an assessment or evaluation on the plaintiff to ascertain if he was fit to carry out work of such nature in re racking bells from various parts of the fitness centre; and the defendant failed to provide the necessary equipment or aid for carrying out the work. AUTONUMOUT At the same time, in his opening, counsel for the plaintiff

specifically made it clear that this was not a posture case in that the plaintiff's case was not based on the fact that an incorrect posture was adopted by the plaintiff when lifting the 90 lb dumbbell which led to the accident. That must be so since the plaintiff was a qualified fitness trainer and as part of his qualification must be taken to be knowledgeable as to the proper posture to adopt when lifting weight. AUTONUMOUT On that basis and upon the facts as I have found, I am not persuaded that the defendant has been shown to be negligent for the 1st Accident.

AUTONUMOUT The work that was carried out by the plaintiff in re racking bells were very ordinary and mundane work for a fitness trainer. It cannot be said to be work of a hazardous or dangerous type. AUTONUMOUT While that work did involve bells which could weigh up to 90 or even 100 lbs, re racking work per se would only involve a minimal of lifting of such weights, usually when the bells have been rolled up to their racks. AUTONUMOUT Nor should such kind of work require the defendant to obtain evaluation or assessment report to ensure that the plaintiff was fit to carry out such work when the plaintiff has the requisite qualifications as a fitness trainer. AUTONUMOUT I have come to the conclusion that the defendant have not been remiss in any way or have fallen below reasonable standards in respect of the 1st Accident and therefore have not been shown to be negligent for the 1st Accident. The 2nd Accident AUTONUMOUT Turning now to deal with the 2nd Accident which occurred on 18 March 2005. AUTONUMOUT Insofar as the alleged negligence by the defendant involves the same allegations as the 1st Accident, my findings relating thereto as well as my conclusions are no different. AUTONUMOUT However, there are additional considerations relating to the 2nd Accident which do not apply to the 1st Accident and which I must consider. AUTONUMOUT It was the plaintiff's case that although the 2nd Accident happened on 18 March 2005, that accident was preceded by certain events. AUTONUMOUT The plaintiff's evidence was that he consulted Dr Ko on 14 March 2005 because of his continuing back pain. Dr Ko gave the plaintiff sick leave from 14 to 17 March and also certified him to be fit only for light work. AUTONUMOUT The plaintiff says he told Eric Lau Wai (), the assistant manager of the defendant's fitness centre of the four days of sick leave granted to him by Dr Ko on 14 March by phone. The plaintiff also called Lau by phone on 15 March but was told by Lau that there was a shortage of manpower at the fitness centre on 16 March and asked the plaintiff to resume work immediately. It was for this reason that the plaintiff felt he had no alternative but to resume work. The plaintiff returned to work on 16 March and duly handed in the sick leave certificate as well as the certificate for light work from Dr Ko. AUTONUMOUT On the other hand, the evidence from Lau was that the plaintiff informed him on 14 March by phone of sick leave being granted to the plaintiff only for 14 and 15 March. AUTONUMOUT On 16 March the plaintiff returned to work by himself and said that he (the plaintiff) had forgotten to bring along his sick leave certificate. AUTONUMOUT It is the evidence of Lau that some time on 17 March, the sick leave certificate together with the certificate for light work relating to the plaintiff was left on his desk. On seeing the sick leave certificate he realised that the sick leave was from 14 to 17 March. He knew that the plaintiff had a personal training session with a client (which was fixed by the plaintiff himself) and thought that the plaintiff did not want to miss the personal training session. Therefore he did not do anything about the plaintiff working on 17 March although the plaintiff should have been on sick leave.

AUTONUMOUT There is also a second matter which I need to deal with before making findings of

fact. AUTONUMOUT The defendant called totally three witnesses. They were Ho Kwok Leung (), Lau and Chan Man (Chan). AUTONUMOUT In his paragraph 23 of his witness statement, after dealing with how he came by the sick leave certificate and certificate for light work on 17 March in the preceding paragraph, Lau stated As the Plaintiff has adduced medical certificate requesting the assignment of light duty, so the Defendant only assigned light duty to the Plaintiff since his resumption of work until his resignation. The management also repeatedly mentioned to other colleagues during regular meetings that due to the doctor s recommendation, the Plaintiff was not obliged to clear the dumbbells, barbells and iron ingots as well as transporting work. AUTONUMOUT That position was wholly disputed by the plaintiff who says that he had never been exempted by the defendant from heavy duty and given only light work.

AUTONUMOUT When Lau took to the witness stand on the third day of the trial (10 July 2007) he adopted his witness statement as his evidence chief after confirming the contents as true and correct without the least indication that paragraph 23 required any amendment or was in any way incorrect or inaccurate. AUTONUMOUT That remained the position when he was cross examined by counsel for the plaintiff for the remainder of that day in court. His cross examination could not be completed that day and the hearing was adjourned to the following day, 11 July.

AUTONUMOUT When Lau resumed the witness stand for cross examination on 11 July, his position changed drastically. Almost immediately, his evidence was that the plaintiff had been exempted from re racking dumbbells and barbells by the defendant since about December 2004, i.e. some between the 1st and 2nd Accidents after a decision had been taken by the defendant at a meeting. That decision exempting the plaintiff from such heavy duty was made known to all the fitness trainer in the fitness centre. AUTONUMOUT When confronted with paragraph 23 of his witness statement as to the timing, he said that paragraph 23 related to some time in mid December 2004. AUTONUMOUT Lau went on to say in cross examination that because such a decision had been taken exempting the plaintiff from heavy duty and that decision was known to all the other trainers at the centre, when he saw the certificate from Dr Ko on 17 March 2005 certifying the plaintiff for light work only, all he did was to enquire from the other trainers that they were aware that the plaintiff had already been exempted from heavy duty (since December 2004). When he was satisfied that the other trainers knew of such exemption granted to the plaintiff, he did not speak to the plaintiff on the matter any more. He accepted it was an omission by him not to have spoken to the plaintiff on 17 March that the plaintiff should stop re racking duties. AUTONUMOUT Chan was called to give evidence for the defendant after Lau had finished his evidence. AUTONUMOUT Paragraph 10 of the witness statement of Chan originally stated My working hours on the two days which the Plaintiff claimed to have accidents both stated from 7 a.m. to 4 p.m./ 4.30 p.m. Although I did stay to conduct personal training course after working hours on 18th March 2005, I did not know there was the accident as claimed by the plaintiff. I just remember in the mid of March 2005, the Plaintiff took leave for a couple of days, and at the meeting immediately after his leave, the assistant manager told us that because the Plaintiff has not been totally recovered, he did not have to handle heavy objects but only had to do light duties such as switching off the air-conditioning, TV, water heater, etc. Other colleagues should do the re-racking the barbells / dumbbells. AUTONUMOUT Before adopting his witness statement as his evidence chief, Chan said in his evidence that he had made a mistake in paragraph 10 of his

witness statement due to the fact that the plaintiff had also been granted sick leave before mid March 2005 and that what was said in paragraph 10 of his witness statement as to the assistant manager telling them about the plaintiff being exempted from heavy duty was said by the assistant manager in December 2004. AUTONUMOUT With that amendment to paragraph 10 of his witness statement, Chan adopted his witness statement as his evidence. AUTONUMOUT In cross examination when asked about the error in paragraph 10 of his witness statement, Chan said that it was about three weeks to one month ago that he found the error in his witness statement. AUTONUMOUT I have no hesitation in disbelieving both Lau and Chan on this issue, in particular on the fact that they had both made such a similar mistake in their witness statement. That would be far too much of a coincidence. AUTONUMOUT I therefore do not accept that the plaintiff had been told in December 2004 or at any other time before the 2nd Accident that he was exempted from heavy duties such as re racking bells by the defendant or anyone at the defendant s fitness centre. AUTONUMOUT I also do not believe Lau when he said in evidence that the plaintiff told him on the phone on 14 March 2005 of only two days sick leave being granted to him by Dr Ko. There was no good reason for the plaintiff not to have told Lau of the four days of sick leave given him by Dr Ko. AUTONUMOUT I therefore accept the plaintiff s evidence that it was Lau who on 15 March told the plaintiff to return to work on 16 March because the fitness centre was short-handed. AUTONUMOUT From the evidence of Lau it was clear that at the very latest, Lau knew of the certificate of light duties from Dr Ko by 17 March. AUTONUMOUT With that knowledge nothing was done by the defendant to ensure that the plaintiff was only assigned to light work. AUTONUMOUT The failure of the defendant to assign the plaintiff to light duties, I find, was one of the causes of the 2nd Accident, albeit that it may not be the sole cause. AUTONUMOUT The defendant, as the employer of the plaintiff, was under a duty to the plaintiff to ensure that the plaintiff was not assigned work for which he was unfit thereby giving rise to a risk of danger or injury to the plaintiff. AUTONUMOUT This, the defendant failed to do and was therefore in breach of their duty to the plaintiff. AUTONUMOUT I therefore find the defendant liable to the plaintiff for the 2nd Accident. Contributory negligence AUTONUMOUT Insofar as contributory negligence goes, it was submitted by the defendant that the plaintiff was himself fully aware of the certificate of light duty from Dr Ko which he handed over to the defendant together with the sick leave certificate also from Dr Ko. AUTONUMOUT The plaintiff must also know of his own back condition and should not therefore have attempted to re rack such a heavy dumbbell of 90 lbs himself. In so doing the plaintiff was himself contributory negligent in that he failed to take care of his own safety or well being with such knowledge of his own condition. AUTONUMOUT I accept that submission of the defendant. AUTONUMOUT In assessing and quantifying the amount of that contributory negligence of the plaintiff, I take into account the fact that the defendant admits to having received that certificate for light duty one day prior to the 2nd Accident but took no action to put the plaintiff on light duty. AUTONUMOUT In the absence of any directive from the defendant, although the plaintiff ought to have known of his condition and ability, the fact that he continued to perform re racking of the dumbbells and barbells, although amounting to contributory negligence, the amount of his blameworthiness cannot be put on an equal footing with that of the defendant, since the primary duty was upon the defendant as an employer to reasonably ensure the safety of the plaintiff. AUTONUMOUT I

therefore find the plaintiff's contributory negligence to be 20% in this case. Quantum Injuries and treatment AUTONUMOUT After the 1st Accident, the plaintiff experienced numbness and tightness over his low back. Despite that, he was still able to attend work the following day, i.e. 29 July. It was only at night on 29 July, due to increase in his low back pain that the plaintiff attended the A&E Dept of KWH seeking medical treatment. AUTONUMOUT At KWH he was diagnosed as suffering from low back sprain. X ray showed no fracture. He was discharged after treatment. He was given medication and put on physiotherapy treatment and was given 14 days sick leave. He attended nine sessions of physiotherapy from 2 September to 4 November 2004. He defaulted further physiotherapy. AUTONUMOUT After the 2nd Accident on 18 March 2005, the plaintiff was in so much pain that he could not move but had to sit down on a sofa at the lift lobby of the gymnasium where he worked while other summoned for an ambulance. He was then taken to the A&E Dept of KWH by ambulance. AUTONUMOUT At the A&E Dept of KWH, X ray of the spine again showed no fracture. Clinical diagnosis of back sprain was made and he was treated conservatively with painkillers. Sick leave was initially given to him for six days but he was not admitted into hospital. He was referred to out patient clinic and orthopaedics specialist clinic for follow up. AUTONUMOUT The plaintiff attended out patient clinic in April

2005. There radiographs showed diminished disc space at L5S1 level. AUTONUMOUT Examination showed tenderness at lower lumbar spine. There was decreased range of motion of lumbosacral spine as well as diminished right leg power and sensation. AUTONUMOUT He was treated with rest, physiotherapy, medication and advised swimming exercise. Clinically his condition was compatible with prolapsed disc with right sciatica. AUTONUMOUT The plaintiff also attended the orthopaedics specialist clinic of KWH in June 2005 whose findings and diagnosis was no different from that of the out patient clinic. AUTONUMOUT Totally he attended a further 19 sessions of physiotherapy from 18 May to 6 October 2005. AUTONUMOUT He continued to attend the out patient follow up in August, September and November 2005 and MRI was arranged to be carried out in February 2006. Evidence from medical experts AUTONUMOUT The plaintiff was examined by Dr David Cheng (Cheng), an orthopaedic expert instructed by the defendant, in September 2005. AUTONUMOUT After the examination, Dr Cheng arranged for MRI to be taken of the plaintiff which was done on 1 December 2005. The MRI films together with the report of the radiologist Dr Hector Ma () was supplied to Dr Cheng. AUTONUMOUT After viewing the MRI films and radiologist report, Dr Cheng gave his expert medical report dated 12 December 2005, which is summarized as follows AUTONUMOUT The plaintiff's complaint to Dr Cheng was of constant back pain with fluctuating intensity which disturbs his sleep limiting same to only a few hours each night. There is also paraesthesia of both legs down from the thigh to the calves, sometimes to the toes. His walking tolerance being 20 minutes and he cannot lift anything more than 10 lbs or so. The plaintiff also complains of stiffness of the back, bending causes pain and paraesthesia as well as the inability to squat. AUTONUMOUT Radiological examination by Dr Cheng showed that the lumbar spine was straight, there was reduction of lumbar lordosis which suggested muscle spasm. However the disc spaces were found to be normal and there was

no evidence of bony injury. AUTONUMOUT Having viewed the MRI films and radiologist report, Dr Cheng agreed with the radiologist that protruded disc was identified at L4/5 with no sign of compression of adjacent nerve root, hence no sign of radiculopathy. There were no other signs of traumatic injury. AUTONUMOUT In his opinion, Dr Cheng stated that the disc protrusion was probably a sign of disc degeneration. AUTONUMOUT Cheng further opined that the plaintiff's complaint of back pain and paraesthesia of the legs stemmed from the degenerated L4/5 disc, there being hardly any other pathology. AUTONUMOUT The prognosis was good, apart from the soft tissue sprain there was no other pathology and surgery was not indicated. Dr Cheng opined that there was a high likelihood that the symptoms would settle to a bearable level. AUTONUMOUT He assessed a 5% impairment of the whole person. AUTONUMOUT Kuen (), the expert instructed by the plaintiff, examined the plaintiff in July 2006 and gave a written expert report dated 18 July 2006. AUTONUMOUT The plaintiff's complaint at the time of the examination was persistent low back pain; numbness in both legs, more severe in the left; cannot put on shoes or socks by himself because of the symptoms; and since the end of 2005, numbness occasionally involving his right face, right half of body and right upper limb. AUTONUMOUT s examination of the plaintiff's back showed no swelling or deformity and no muscle spasm but tenderness over the whole lumbar spine and upper sacrum paraspinal muscles. AUTONUMOUT Radiological examination of the lumbrosacral spine revealed no evidence of fracture or dislocation. The discs spaces and lordotic curvature were preserved. AUTONUMOUT Lau agreed with the doctors from KWH as to their diagnosis of prolapsed intervertebral disc in the case of the plaintiff. AUTONUMOUT Lau also took into account the MRI performed at the behest of Dr Cheng as well as the radiologist report of Dr Ma. AUTONUMOUT Lau opined that the posterolateral disc protrusion may be due to :

(a) protrusion of the disc subsequent to degenerative change; and

(b) trauma as a result of either or both accidents on top of the degenerated L4/5 disc.

AUTONUMOUT Although there was uncertainty as to the cause of the disc protrusion, but since the plaintiff was problem free with his low back, in Dr's opinion, the accident should be the cause of the persistent pain in his low back. AUTONUMOUT Lau also stated in his report that there were objective signs during the examination that the plaintiff was exaggerating his symptoms and signs, albeit not necessarily suggesting that he was malingering. AUTONUMOUT The absence of muscle spasm over his low back and the preservation of the lordotic curvature of the lumbar spine as shown in the X rays suggest that the condition of the plaintiff's low back should have improved. AUTONUMOUT The plaintiff's condition has reached maximal medical improvement and no further treatment is required. The prognosis is fair. AUTONUMOUT Lau assessed the plaintiff to have suffered 7% impairment of the whole person for his back injury. Dr Lau considered the plaintiff unsuitable to continue in his pre-injury job but should take up lighter duties. AUTONUMOUT The period of sick leave granted was appropriate. AUTONUMOUT There was a further medical report from the defendant's expert, Dr Cheng, dated 3 January 2007 for him to respond to the opinion expressed by Dr Lau. AUTONUMOUT In that report, Dr Cheng

affirmed his earlier views expressed in his previous medical report. Pleadings in respect of damages AUTONUMOUT Coming to deal with the assessment of the damages under the various heads, it should be noted at once that the defendant did not in its Answer to the Revised Statement of Damages plead any positive case on damages under any of the heads that damages had been claimed by the plaintiff. AUTONUMOUT The defendant merely put the plaintiff to strict proof of the damages claimed by the plaintiff under each head.

AUTONUMOUT In line with such pleading, the defendant had not adduced any evidence to support any positive case on the various heads of damages claimed by the plaintiff.

AUTONUMOUT It is therefore on such basis that damages under the various heads will be assessed. Pain suffering and loss of amenities AUTONUMOUT Counsel for the plaintiff has referred me to the following local awards for PSLA in cases of back injuries and back pain :

- (a) Lai Wah Wai, HCPI 422/1995;
- (b) Lai Ching, HCPI 1192/1996;
- (c) Ho Chi Ming, HCPI 1204/1996;
- (d) Yeung Tai Hung, HCPI 686/2004; and
- (e) Iau Kau Ih, HCPI 130/2001. AUTONUMOUT In the first four cases cited, the award for PSLA was \$300,000. That in the last case cited was \$400,000. AUTONUMOUT Using these awards as guidelines, it was submitted by counsel for the plaintiff that the award in the present case should be \$300,000. AUTONUMOUT The amount claimed for PSLA by the plaintiff was pleaded in the Revised Statement of Damages to be \$280,000. AUTONUMOUT Giving effect to my finding above, that the defendant was not liable to the plaintiff for the 1st Accident, but only for the 2nd Accident, and in line with what has been pleaded in the Revised Statement of Damages, I assess the amount for PSLA in the present case to be \$280,000. Loss of earning (pre-trial) AUTONUMOUT The plaintiff's pre accident earnings was \$11,800 per month. AUTONUMOUT After the 2nd Accident, the plaintiff was given sick leave intermittently up to 23 May 2006. For present purposes that sick leave can be considered as being continuous up to that date. AUTONUMOUT For that sick leave period, full loss of earnings comes to \$166,816. AUTONUMOUT His employment contract with the defendant expired in September 2005 and was not renewed. AUTONUMOUT After his sick leave had expired, the plaintiff took up various employments. In July 2006 he worked at Maxim s and was paid \$6,500. From mid August 2006 to mid-April 2007 he worked for eight months at The Autumn Leave Restaurant earning \$4,000 per month. From mid-April 2007 he worked at the Jockey Club earning \$5,040. AUTONUMOUT The partial loss of earnings for the 16 months from the expiry of sick leave to judgment comes to :

- (a) $(\$11,800 \times 16) (\$6,500 + \$32,000 + \$25,200) = \$125,100.$
- (b) The loss of earnings for the pre trial period therefore comes to \$291,916.

- (c) Adding on the loss of MPF of 5% to this figure gives \$306,512. Future loss of earnings
- AUTONUMOUT In respect of the claim for future loss of earnings, I accept the opinion of Dr Lau that the plaintiff will not be able to return to his pre accident job but will be suitable for lighter duties. AUTONUMOUT I will adopt his pre-accident earnings of \$11,800 per month to calculate the multiplicand for the purpose of assessing the plaintiff's future loss of earnings. AUTONUMOUT Giving effect to the medical evidence that the plaintiff will be suitable to take up some light work, which has already been shown by the various employments taken up by him during the pre-trial period, I find that the plaintiff, in his injured condition, will still be able to take up employment in the future which would pay a salary in the region of \$7,000. AUTONUMOUT During the pre trial period, it has been shown that the plaintiff was able to earn \$6,500, albeit for only one month, working with Maxim s. AUTONUMOUT Since market conditions are on the rise, it should not be difficult for the plaintiff to find alternative work suitable to his condition paying \$7,000 per month. AUTONUMOUT The loss of earnings therefore will be \$4,800 per month. AUTONUMOUT As for the multiplier, counsel for the plaintiff has suggested a multiplier of 15 in view of the age of the plaintiff being 31 at the time of trial. AUTONUMOUT In so suggesting, counsel for the plaintiff has not taken into consideration the nature of the work that the plaintiff was doing before the accident. Given the evidence in this case as well as the medical evidence that the plaintiff can only take on lighter duties, it would appear that all the evidence point in the direction that his pre accident work was considered to be heavier type of work. That being the case, one could not reasonably expect a person to be engaged in such work until the normal retirement age for most people. AUTONUMOUT Giving allowances for that, I would adopt a multiplier of 12 in the present case to reflect on the nature of the plaintiff's pre accident work. AUTONUMOUT The loss of future earnings therefore comes to $\$4,800 \times 12 \times 12$ giving \$691,200. Adding on a further 5% to take account of loss of MPF, it would come to \$725,760. Loss of earnings capacity AUTONUMOUT The plaintiff claims \$100,000 for loss of earnings capacity. AUTONUMOUT Given the medical evidence in this case, there will be a real risk that the plaintiff will suffer a handicap in the labour market in future and that if he loses his job, it will be that much more difficult for him to find alternative employment due to his disability. AUTONUMOUT It would therefore appear likely that the plaintiff will suffer a loss of earnings capacity. AUTONUMOUT I am however not persuaded that the amount as claimed is a reasonable given all the circumstances of this case. AUTONUMOUT Instead I take the view that \$60,000 will be reasonably sufficient to compensate the plaintiff under this head of claim and I assess that to be the damages for loss of earnings capacity. Other special damages AUTONUMOUT The plaintiff claims medical expenses in the total amount of \$5,040. The claim for medical expenses are supported by receipts and will be allowed. AUTONUMOUT There is also a claim for \$1,000 being transportation expenses. That amount, although not supported by receipts, appears reasonable enough and will be allowed in full. AUTONUMOUT Total special damages therefore comes to \$6,040. Interest AUTONUMOUT Interest will be awarded for PSLA at 2% p.a. from date of Writ. AUTONUMOUT Interest on pre trial loss of earnings and other special damages at 3.375% (being half judgment rate) from the date of the 2nd Accident. Summary of assessment AUTONUMOUT PSLA \$280,000

Loss of earnings (pre-trial) 306,512 Loss of earnings (future) 725,760 Loss of earnings capacity 60,000 Other special damages 6,040 Interest on PSLA 9,333 Interest on all special damages 41,437

Sub-total \$1,429,082

Reduction for contributory negligence AUTONUMOUT The above sub-total figure will have to be reduced by 20% to take account of the contributory negligence found. AUTONUMOUT That will give \$1,143,256.60. Deduction of ECC compensation AUTONUMOUT There will need to be deducted the amount of ECC compensation already received by the plaintiff in the amount of \$221,737.50. AUTONUMOUT After such deduction the figure comes to \$921,528.10.

Conclusion

AUTONUMOUT There will be judgment for the plaintiff in the sum of \$921,528.10. Costs AUTONUMOUT There will be a costs order nisi that the defendant do pay the plaintiff s costs of the action to be taxed on High Court scale if not agreed. AUTONUMOUT The plaintiff s own costs will be taxed in accordance with Legal Aid Regulations. (A.R. Suffiad) Judge of the Court of First Instance, High Court Mr Tim Kwok, instructed by Messrs Alan Wong & Co., for the Plaintiff Mr K.C. Chan, instructed by Messrs Clyde & Co., for the Defendant PAGE - PAGE A B C D E F G 1udk 1udk &`#\$ o}3 jY)B +L>b 4[LOx~ W`km0 @6rN |Z)@H o}3 W`km 4[LO & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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