

HONG KONG / JUDGMENT

LIMBU NETRA KUMAR v. YAU LEE CONSTRUCTION CO LTD AND ANOTHER

COURT

Court of First Instance

DECIDED

25 April 2007

CASE / FILE NUMBER

HCPI234/2002

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bjbj HCPI 234/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NO. 234 OF 2002

BETWEEN LIMBU NETRA KUMAR Plaintiff and YAU LEE CONSTRUCTION CO. LTD 1st Defendant
CHAN WING FAI formerly trading as 2nd Defendant WING FUNG CONSTRUCITON

Before : Hon Suffiad J in Court Dates of Hearing : 1-2 and 5-7 February 2007 Date of Judgment : 25
April 2007

JUDGMENT

AUTONUMOUT The plaintiff claims damages against both defendants for injuries sustained by him while at work at a construction site at Tseung Kwan O on 20 April 1999. AUTONUMOUT The 1st defendant is sued as the main contractor of the construction site where the accident occurred and the 2nd defendant as the employer of the plaintiff. THE ACCIDENT AUTONUMOUT The plaintiff was employed as a formwork carpenter by the 2nd defendant and began working with the 2nd defendant in January 1999. AUTONUMOUT Several weeks before the accident occurred, the plaintiff was assigned to work at the Po Lam Road Housing Development site at Tseung Kwan O (the Site). AUTONUMOUT On 20 April 1999, the plaintiff was assigned by his team leader to align the inner wall framework against the slab formwork at an angle of 90 degrees at the Site. To reach his work place, the plaintiff had to climb up a height of some 4.3 metres. As the plaintiff was climbing up the metal tubular scaffold which was used to support the roof slab of the floor directly above, the plaintiff slipped and fell some 2 metres suffering injuries to his head and back. The plaintiff slipped and fell from the metal tubular scaffold because overnight rain had made

the metal scaffold wet and slippery. AUTONUMOUT As a result of the accident, the plaintiff lost consciousness and was taken to the Accident and Emergency Department of the United Christian Hospital (). He was later transferred to the Prince of Wales Hospital because of the head injury and remained an in-patient until his discharge on 23 April 1999. AUTONUMOUT The accident was not disputed by the defendants. PLAINTIFF S CASE ON LIABILITY AUTONUMOUT The plaintiff gave evidence that at the Site he was required to climb up to a high position to carry out his work but that no ladder or other equipment to assist climbing were provided to him or his other co-workers despite their requests to their team leader, Mr Rai, Basanta. The reply from their team leader was simply that the company did not provide any ladder. AUTONUMOUT Since no ladder was provided by either the 1st or 2nd defendant, the plaintiff had no alternative but to climb up the metal tubular scaffold. The plaintiff also said that no safety belt was provided to him or his co-workers by the company. Even the safety boots and safety gloves had to be provided by the workers themselves. AUTONUMOUT The plaintiff also gave evidence that he seldom noticed any safety officer supervising safety procedures at the Site, nor had any of the workers been interrupted or warned even when they were climbing up the metal scaffold. He himself (i.e. the plaintiff) had never been warned by anyone about climbing up the metal scaffold structure, neither had he heard of any teammates being so warned. AUTONUMOUT The plaintiff called one witness, Limbu Tanka Parsad, who was the co-worker working together with the plaintiff in the formwork when the accident happened to the plaintiff. AUTONUMOUT Although this witness did not actually see the accident happening, he was the first person to see the plaintiff lying on the ground after the fall. He raised the alarm and eventually an ambulance was summoned to take the injured plaintiff to hospital. AUTONUMOUT The witness supported the plaintiff s evidence that no ladder or other climbing equipment was provided by either the 1st or 2nd defendant at the Site even though they had to climb up to a high position to work. AUTONUMOUT Apart from being provided with a safety helmet, the witness said that he was not provided with any safety belt and had to provide his own safety boots and gloves himself. AUTONUMOUT He also supported the plaintiff s evidence that he had never been warned or interrupted at the Site by any safety officer when climbing up the metal scaffold. THE DEFENCE CASE ON LIABILITY AUTONUMOUT The defendant called one witness on the issue of liability, Wong Chi, who was employed as a safety instructor by the 1st defendant at the time of the accident to the plaintiff. Mr Wong was also an assistant to the safety officer on the Site, Leung Wing Sang. AUTONUMOUT He gave evidence as to how generally safety checks were carried out each day on the Site. Mr Wong s evidence in this respect was that he made at least two rounds each day walking around the Site to ensure that safety procedure was being adhered to by the workers on the Site. The first round was usually at about 8.30 a.m. and the second round after lunch. AUTONUMOUT Apart from these rounds made by Mr Wong, his evidence was that a foreman was employed by the 1st defendant at each of the three blocks of the Site who would assist in supervising the workers to observe all necessary safety precautions. AUTONUMOUT When the accident happened, Mr Wong was at another block in the Site. He was informed of the accident by message on his walkie talkie. By the time he arrived at the scene where the accident happened, the plaintiff had already been taken to hospital by ambulance and the safety officer, Leung Wing Sang, was already there dealing with the matter. AUTONUMOUT Wong further gave evidence that there were ladders of varying

lengths available to all the workers on the Site. Some of these ladders were kept inside a storeroom with a sign outside which read Storeroom in Chinese. Ladders which were too long to be kept inside the storeroom were usually kept outside the storeroom leaning against it where all the workers could see such ladders. AUTONUMOUT Wong agreed that the metal tubular scaffold where the accident happened were a means of support for the structure of the 1st floor and were never intended to be used as a means of access by the workers climbing up such scaffold. He agreed also that all the workers should be aware of this. AUTONUMOUT Wong also gave evidence that if he found anyone not following the prescribed safety procedures at work, he would immediately stop that worker from working and written warnings would be given to the employer of the worker by the safety officer. At times a fine may even be imposed.

AUTONUMOUT When cross-examined on this aspect of his evidence, he said that if he saw a worker climb up the tubular metal scaffold, he would give a verbal warning to the worker. When asked whether a written record would be made of it, he answered saying that sometimes there would be a written record, depending on the degree of danger involved. AUTONUMOUT When further asked whether he would allow such a worker to carry on working, Mr Wong said that he would tell the worker to use a ladder and if the worker complied with safety procedure, he would allow him to continue working.

ASSESSMENT OF THE EVIDENCE AND FINDINGS

AUTONUMOUT On the main issue as to whether there were any ladders provided for the use of the workers at the Site, I have no difficulty in accepting the evidence of the defendants.

AUTONUMOUT The evidence of the plaintiff and his witness simply defies imagination that at a construction site in Hong Kong there are no ladders available for use. AUTONUMOUT I accept the evidence of Mr Wong that there were ladders of varying sizes for use by all the workers at the Site. AUTONUMOUT Once that finding is made that there were ladders available for use by the workers on the Site, the question must be asked as to why the plaintiff was not using a ladder at the time of the accident. AUTONUMOUT In that respect I do not doubt the evidence of the plaintiff and his witness that for several weeks before this accident occurred to the plaintiff, they were climbing up the scaffold to reach their place of work. AUTONUMOUT The only possible answer to that must have been that the workers doing the formwork, namely the plaintiff and his other co-workers found it convenient to simply climb up the metal tubular scaffold rather than to go to the storeroom which was some 20 metres away to fetch a ladder. That would appear to have been what they have been doing for those several weeks, and very likely doing it with total impunity. AUTONUMOUT I also do not accept the evidence of Mr Wong that the checking on safety procedure was as strict as what he made out to be, at least in respect of workers climbing up the tubular metal scaffold to reach their place of work. AUTONUMOUT He gave good and straightforward answers when asked about the availability of ladders and the different types or sizes of ladders available, but once when he was cross-examined about the safety checks, his answers became vague and general. AUTONUMOUT He was extremely vague as to whether any written record had been kept of those workers found climbing up the metal scaffold after he had said that he remembered warning a couple of workers not to climb up the scaffold.

AUTONUMOUT No such record has been produced in evidence. AUTONUMOUT Neither do I accept his answer that a written record would only be kept depending on the degree of danger involved. If no record was kept, there can be nothing to refer to later on in the case of a persistent

offender. AUTONUMOUT Wong's answer that it was Leung, the safety officer, who issued warning letter is again designed to evade further cross-examination since Leung was not called as a witness. I can hardly imagine that Mr Wong, being the assistant to Leung, and a safety instructor at the Site, would not know of written warnings issued under the authority of Leung.

AUTONUMOUT The fact that the plaintiff and his co-workers had been climbing up the metal scaffold for some several weeks before this accident occurred must be sufficient testimony to the fact that the safety checks in respect of workers climbing up the metal scaffold had been so lax that nothing had been done about it by the main contractor and that workers such as the plaintiff had been given almost a free hand by the main contractor to climb up the scaffold unchecked.

AUTONUMOUT It may well have been thought by all, until this accident happened, that since the metal scaffold was strong enough to support the structure of the 1st floor, it would have no difficulty supporting the extra weight of several formwork carpenters or workers such as the plaintiff. AUTONUMOUT I therefore find that although ladders of varying sizes were available at the Site, neither the plaintiff nor his co-workers saw fit to use ladders to get to their place of work, but instead chose to climb up the metal scaffold as a convenient and easy means of reaching their work place. AUTONUMOUT I also find that the 2nd defendant, being the employer of the plaintiff, and also the 1st defendant, being the main contractor at the Site, turned a blind eye to such workers climbing up the metal scaffold to reach their place of work.

LIABILITY OF DEFENDANTS
AUTONUMOUT In light of the findings above, the 1st defendant, being the main contractor at the Site, must be liable for negligence to the plaintiff. AUTONUMOUT Although I have found that ladders were made available to the workers at the Site by the 1st defendant, its duty to ensure safety on the Site does not end simply by its providing ladders for use. It is also under a duty to see to it that the workers comply with safety procedures. AUTONUMOUT The 1st defendant conceded that climbing up the metal scaffold was dangerous and that ladders should have been used for such purpose. However the 1st defendant failed to properly ensure that workers were complying with such procedure before the accident happened. To that extent the 1st defendant was negligent. AUTONUMOUT The 2nd defendant was the employer of the plaintiff. It was under an even greater duty to ensure the safety of the workers including the plaintiff. The 2nd defendant was not called as a witness, although it was also represented by the same legal team as the 1st defendant. AUTONUMOUT Not having heard from the 2nd defendant, I can only infer from the evidence which I have accepted from the plaintiff and his witness that the 2nd defendant also did not take any reasonable steps to make sure that the plaintiff and his co-workers used ladders rather than climbing up the metal tubular scaffold and in that sense the 2nd defendant was also in breach of the duty owed to the plaintiff. AUTONUMOUT For these reasons, the 2nd defendant would also be liable to the plaintiff.

CONTRIBUTORY NEGLIGENCE
AUTONUMOUT Quite apart from the findings made above that ladders were provided to workers at the Site, that was a matter well known to the plaintiff since in one of his answers given to the officer of the Labour Department when this accident was investigated by them, the plaintiff said as much in that answer to the effect that he had knowledge that ladders were provided at the Site for use by workers. AUTONUMOUT Moreover, when giving his evidence from the witness box, the plaintiff also said in evidence that every morning when they were given safety briefing, they were reminded to use ladders when going up heights. AUTONUMOUT Given all the above as well

as the findings made, the only reason that one can reach for the plaintiff failing to use a ladder and thus resulting in this accident happening must be due to his trying to take a short cut for himself out of convenience, the convenience being too lazy to walk the short distance to where the ladders were stored in the storeroom and carrying one over to his place of work for his use. Instead, the plaintiff took the short cut of simply climbing up the metal tubular scaffold which was supporting the structure of the floor above. AUTONUMOUT In the circumstances, the plaintiff would be to a large extent the author of his own injuries. This case cannot be comparable to one in which the plaintiff's failure to take the proper safety precautions was due to his lack of knowledge of such safety requirements. Here the plaintiff well knew what should have been done as well as knowing that ladders were available, he however, chose not to comply with those safety procedures. AUTONUMOUT On the other hand, the failure to comply with such safety procedures were (in so far as climbing up the metal scaffold goes) largely condoned by the defendants who failed to take any proper steps to ensure that the proper procedure was adhered to. AUTONUMOUT Quite clearly the duty imposed by statute on a main contractor to ensure that safety measures are complied with in a construction site is a heavy duty. Likewise for an employer, his duty to see to it that his workers carry out their work in a safe manner is also a heavy duty. Both are therefore under a duty to supervise the workings of the workers. AUTONUMOUT Workers, on the other hand, whilst they also have a duty to take care of themselves and comply with safety procedure when working, however, they work under the supervision of their immediate employer and the general supervision of the main contractor at construction sites. AUTONUMOUT Balancing the faults of the plaintiff as against those of the defendants in this case, I find the plaintiff to be 30% contributorily negligent. QUANTUM AUTONUMOUT I turn now to deal with the issue of quantum. Injuries and treatment AUTONUMOUT After his fall, the plaintiff lost consciousness and was taken to the Accident and Emergency Department of UCH by ambulance. AUTONUMOUT At UCH, he was diagnosed to have sustained a fracture of the skull base with loss of consciousness. He was then transferred to the Prince of Wales Hospital for admission. AUTONUMOUT X-rays taken showed a linear skull fracture of the left temporal bone with no intracranial haematoma. He also suffered a compression fracture of the 9th thoracic vertebra with post-traumatic degeneration. The plaintiff was treated conservatively and was discharged some three days later on 23 April 1999. AUTONUMOUT The plaintiff was re-admitted to hospital on 22 July 1999 with persistent headaches. Repeated CT scan of the head did not show any intracranial pathology. He was discharged some five days later on 27 July 1999. AUTONUMOUT For his complaint of back pain, the plaintiff was referred to Orthopaedic Department of Prince of Wales Hospital. Initial X-ray revealed spondylolisthesis of 4th lumbar spine with minimal displacement. No lower limb neurological deficit was shown. CT scan of his spine showed bilateral pars defect at 4th and 5th lumbar joints. However, it was not possible to conclude whether the spondylolisthesis was related to the fall. AUTONUMOUT The plaintiff was also referred to the Division of Otorhinolaryngology of the same hospital for his left hearing loss. Serial pure tone audiograms demonstrated a left sided hearing loss, however, the true hearing threshold of the left ear could not be determined reliably. The right sided hearing was found to be normal. AUTONUMOUT The plaintiff was later followed up at orthopaedic and ENT clinics receiving medication and physiotherapy treatment.

AUTONUMOUT Since the latter part of 2005 and 2006, the plaintiff had been admitted to or consulted pain clinics including the Tai Po Hospital and the Alice Ho Miu Ling Nethersole Hospital at various times due to his complaint of thoracic or lower back pain. At the Multidisciplinary Pain Clinic of the Alice Ho Miu Ling Nethersole Hospital, when consulted by the plaintiff in mid-January 2006, they offered psychotherapy sessions to help the plaintiff manage his mood better, accept his pain and to adopt more self-management skills to cope with his pain when they noted the plaintiff to be low in pain acceptance. AUTONUMOUT The plaintiff was examined by experts in the field of orthopaedic, neurology and ENT instructed by the parties respectively. Orthopaedic experts AUTONUMOUT Danny Tsoi, instructed by the plaintiff, examined the plaintiff in February 2002. AUTONUMOUT In giving his opinion, Dr Tsoi identified two separate back problems which the plaintiff was suffering from. AUTONUMOUT Firstly, Dr Tsoi stated the compression fracture of the 9th thoracic vertebra was caused by the accident. The associated post-traumatic degeneration was an inevitable and common complication arising from it. Pain and stiffness was expected to last for years. The spinal cord at that region was stable and complication such as spinal cord compression or nerve root irritation and instability were not expected. The thoracic spinal injury had reached a stage of maximal medical improvement and no further treatment was required. AUTONUMOUT The second problem identified by Dr Tsoi was the slipping of the 4th lumbar vertebra on the 5th lumbar which was due mainly to the weakness of the pars and instability resulted. AUTONUMOUT X-rays which showed sclerotic edges of the pars defect suggested that the lesion was a chronic one. Moreover, in the opinion of Dr Tsoi, a 2-metre fall would highly unlikely have given rise to a bilateral pars defect. The lack of back symptoms of the plaintiff before the accident indicated that likely the pars defect and slipping were pre-existing but remained asymptomatic. The said accident triggered off the onset of symptoms. But for the accident, the grade I spondylolisthesis may have remained asymptomatic for years. It was difficult to predict the onset of symptoms had it not been for the accident. AUTONUMOUT Tsoi concluded that the compression fracture to T9 alone would not preclude the plaintiff from returning to his pre accident job as a carpenter, but that the residual upper back pain would cast certain degree of inconvenience and discomfort when performing heavy manual lifting or frequent back bending. AUTONUMOUT Theoretically the plaintiff was considered fit to resume working as a carpenter (at the time of examination) even if the uncomplicated L4-5 spondylolisthesis was considered. However, heavy manual work will hasten up the slipping process and worsening of the symptoms was anticipated. Therefore, from an orthopaedic point of view, the plaintiff would be advised to change to light duty jobs as soon as possible. Jobs without excessive load transmission through the lower back were preferred. AUTONUMOUT In March 2006, Dr Danny Tsoi gave a further medical report in which he stated that the chance of further slippage of L4-5 was not high if the plaintiff continued to perform only light duty work. AUTONUMOUT In that same report, Dr Tsoi was provided with surveillance tapes taken by private investigators engaged by the defendants. After viewing what was shown of the plaintiff on those tapes, Dr Tsoi took the view that what was seen of the plaintiff in those tapes did not contradict the complaints made by the plaintiff. I shall have more to say about those surveillance tapes and their contents later in this judgment. AUTONUMOUT In a still further report dated 10 May 2006, Dr Danny Tsoi stated however, that from the surveillance tapes it

appeared that the plaintiff's back condition was better than what he, the plaintiff, described to Dr Tsoi during the examination in February

2002. Moreover, based on the plaintiff's performance shown on the surveillance tapes, the plaintiff was probably fit to resume his pre-accident job as a carpenter. AUTONUMOUT The plaintiff was re-examined once more by Dr Danny Tsoi in August
2006. After that re-examination, in his report dated 15 August 2006, Dr Tsoi stated that the plaintiff complained of deterioration of his physical condition four and a half years after the February 2002 assessment. AUTONUMOUT In the meantime, between the two examinations by Dr Tsoi, he noted that the plaintiff had sought treatment in pain clinics as well as the psychological department of Alice Ho Miu Ling Nethersole Hospital, but neither treatment could relieve the plaintiff of his low back pain. AUTONUMOUT He further noted that at this re-assessment, the plaintiff complained to him for the first time of left knee injury. He also noted a number of inappropriate symptoms and signs including :
- (i) the use of a stick to assist walking; (ii) a limping gait not detected in 2002; (iii) cogwheel type of weakness or tremour which were features of voluntary underperformance or psychological disorder; and (iv) differences in straight leg raising angle when measured in different body position. AUTONUMOUT Tsoi stated that the orthopaedic cause of the pain alleged by the plaintiff was unknown and put it down to either psychological disorder or somatic manifestation of psychiatric illness and advised assessment by psychiatrist. AUTONUMOUT Tsoi further took the view that if there was any injury with the left knee it was not caused by the accident in question. AUTONUMOUT He was further of the view that the plaintiff's injured back had long attained a stage of maximal medical improvement and no further treatment was required. AUTONUMOUT He stated yet again that the plaintiff will have on and off back pain due to the compression fracture of T9 which will be triggered by heavy weight lifting and frequent back bending, but no complication was expected to develop. AUTONUMOUT Finally, he advised the plaintiff not to resume his pre-injury job which required a lot of weight lifting and back bending, but that jobs of moderate manual demand were suitable for him. AUTONUMOUT The defendants instructed Dr Kwong Chin as their orthopaedic expert. AUTONUMOUT Lam first examined the plaintiff in November
2000. In his report dated 29 November 2000, Dr Lam was prepared to leave aside the plaintiff's complaints of residual dizziness and nausea to the neurosurgical experts, and the complaint of hearing loss to the ENT experts. Dr Lam concentrated only on the orthopaedic complaints relating to the pain in the plaintiff's back. AUTONUMOUT Firstly, he shared the view of Dr Tsoi that the plaintiff's spondylolithesis was of degenerative origin rather than caused by the trauma of the accident. AUTONUMOUT Like Dr Tsoi, Dr Lam also found no signs of neurological deficit at the lower limb. AUTONUMOUT Lam graded the spondylolithesis as grade I, just as Dr Tsoi did. Dr Lam assessed the plaintiff's impairment due to his back pain as being 5% impairment of the whole person. He went on to apportion that 5% impairment to being 2% due to the injury and 3% due to the pre-existing condition. AUTONUMOUT At that examination the plaintiff complained to Dr Lam

of left knee pain, but Dr Lam could find no abnormality on examination of the knee. AUTONUMOUT Lam took a similar view as Dr Tsoi that the plaintiff's back condition was rather stable and no treatment was required other than analgesics. AUTONUMOUT Lam further stated that even without the accident, one with spondylolisthesis or spondylolysis should avoid heavy work which requires frequent bending or lifting of heavy loads as a precaution for back injury, and that the plaintiff here should take up lighter manual work, although he could still work at a construction site but attention need be paid to the posture or the maximal weight lifting. Such precaution should have been taken even before this accident, had the pre-existing condition been known. AUTONUMOUT Lam further opined that with the pre-existing condition, the plaintiff has a higher chance of developing pain at work which would prevent him from working at an earlier time than the average worker, but it was difficult to predict when that would happen. AUTONUMOUT In a further report dated 8 July 2002, having read the first report of Dr Tsoi resulting from Dr Tsoi's examination of the plaintiff in February 2002, Dr Lam effectively agreed with all that was stated in Dr Tsoi's report and repeated the opinion given in his November 2000 report. AUTONUMOUT The only addition made to his report dated 8 July 2002 was the inclusion of a further paragraph dealing with the compression fracture to the T9 of the plaintiff. In that respect Dr Lam also agreed with the views expressed by Dr Tsoi as well as the assessment of 5% impairment to the whole person in respect of the T9 fracture. AUTONUMOUT In a yet further report by Dr Lam dated 13 December 2006, Dr Lam re-iterated all the opinion given by him previously. However, in that report he stated his only disagreement with Dr Tsoi which was that he disagreed with Dr Tsoi's views that the plaintiff would have to suffer on and off back pain due to the compression fracture of the T9. Dr Lam further expressed his view that if only the T9 fracture was considered, there is no contraindication for the plaintiff to have any manual work. I understood Dr Lam to mean by that that the T9 fracture alone should not prevent the plaintiff from returning to manual work and there was nothing to indicate otherwise. Neurological experts AUTONUMOUT Brian Choa was called for the plaintiff and Dr Edmund Woo for the defendants. AUTONUMOUT Choa examined the plaintiff in February 2002 and again in August

2006. Dr Choa gave two expert reports, one in respect of each of the examinations carried out. AUTONUMOUT In his first report dated 1 March 2002, Dr Choa stated that the plaintiff had suffered a moderate head injury from his fall in April 1999 because of the basal skull fracture leading to bleeding into his middle ear with some residual disturbance in his middle ear mechanism which led to conductive hearing loss. That handicap, however, was minimal. AUTONUMOUT The head injury was of sufficient severity to make a prolonged post concussional syndrome plausible. The plaintiff's mild cognitive impairment, headaches and dizziness and mild personality change were features of this syndrome. He had only received painkillers and no other treatment for it. He should have been offered psychological counselling. Antidepressant would help not only his emotional problems but also the chronic pain. Treatment was available from the Kwai Chung Clinic, being part of Princess Margaret Hospital. AUTONUMOUT Neurologically, Dr Choa assessed 5%

impairment of the whole person for the post concussional syndrome and 1% for the hearing loss. AUTONUMOUT The plaintiff was young and healthy and after six months of treatment should have been able to return to work. However, Dr Choa recommended the plaintiff to retrain for less demanding work in which case the loss of earnings capacity would be minimal. AUTONUMOUT In his second report dated 10 August 2006, after being appraised of the developments as to the deterioration of the plaintiff's condition particularly in 2005, and having studied the surveillance tapes, opined that the plaintiff's back pain was either due to a new event or it was feigned. AUTONUMOUT Choa further stated that the plaintiff's cognitive deficit was unequivocally feigned commenting that the score for the Mini Mental State Examination (MMSE) if it was the result of the 1999 head injury which was a one off insult, would not have led to delayed deterioration. Dr Choa also stated that the plaintiff's performance in the MMSE was in stark contrast to the fluency and alertness with which he recounted his symptoms. AUTONUMOUT From the neurological point of view, Dr Choa concluded that the plaintiff could have gone back to work in 2002 and in particular could have gone back to carpentry in the construction industry. AUTONUMOUT The defendant's expert, Dr Edmund Woo, examined the plaintiff in May 2003 and again in December 2006. AUTONUMOUT In his first report dated 5 May 2003, Dr Woo concluded that the plaintiff had suffered a moderate head injury during the accident in April 1999 which took the form of a suspected skull fracture. AUTONUMOUT Woo also found on examination that the plaintiff's complaint as to residual headache, dizziness, impaired memory, weakness in arms and low back pain to have many unusual features. Moreover, Dr Woo also found a significant degree of under performance in the motor examination. AUTONUMOUT Such discrepancies and inconsistencies led Dr Woo to conclude that the deficits complained of by the plaintiff to have been either feigned or grossly exaggerated. AUTONUMOUT Woo further expressed his views that the type of injury suffered by the plaintiff would usually recover gradually over a period of 12 to 24 months, although a mild degree of residual headache consistent with post concussional syndrome may remain. AUTONUMOUT Woo further took the view that the plaintiff should be able to resume his pre-accident job as a construction site worker, albeit with some slight restriction. AUTONUMOUT In the case of this plaintiff, he should have sufficiently recovered by April 2000, namely, one year after the accident. AUTONUMOUT In his second report dated 9 December 2006, Dr Woo re-iterated the same views that he had come to in his first report. However, at the second examination of the plaintiff in December 2006, Dr Woo found that the plaintiff also demonstrated a severe degree of global cognitive dysfunction, but which was not there during the first examination. Yet, with such a magnitude of cognitive impairment, Dr Woo found no radiological evidence of any significant parenchymal brain damage. AUTONUMOUT Woo was of the view that such delayed deterioration many years after the accident was most incompatible with traumatic brain disease. AUTONUMOUT The plaintiff also demonstrated diffuse weakness in both lower limbs. According to Dr Woo, if these were genuine, they would indicate an extensive lesion spanning from L2 down to S1 nerve root bilaterally, and yet Dr Woo could find no muscle wasting and all the deep tendon reflexes were preserved. AUTONUMOUT These

further matters added to Dr s strong suspicion that the deficits of the plaintiff were feigned or grossly exaggerated for the purpose of the examinations. AUTONUMOUT Finally, due to such exaggerations, Dr Woo revised the appropriate duration of sick leave to one of six months. ENT experts AUTONUMOUT The plaintiff was examined by Dr Kwan Ling, a specialist in Otorhinolaryngology, in January 2002 and again in January 2007, being the plaintiff s own expert. AUTONUMOUT In his first report dated 2 March 2002, Dr Chu stated that he concluded from his examination of the plaintiff that the plaintiff suffered residual left ear deafness and tinnitus as a result of his head injury, in particular the skull fracture. In his opinion, the head injury likely caused injury to either the cochlear or the cochlear nerve thus resulting in the plaintiff s hearing loss to his left ear. This hearing loss was most likely permanent and cannot be repaired by surgical means. AUTONUMOUT Chu stated that there was a discrepancy between the hearing thresholds detected by the Pure Tone Audiogram () and the Electronic Response Audiometry () which cannot be fully explained. However, as the ERA was an objective test and would not be affected by external circumstances or subjective perceptions, that threshold would be used to assess permanent disability. AUTONUMOUT Chu assessed the left hearing impairment to be 2.5% permanent impairment and the tinnitus to be a 5% impairment, thus totaling 7.5% impairment to his hearing ability which equalled a 3% impairment of the whole person. AUTONUMOUT In his second report dated 4 January 2007, Dr Chu stated that the PTA conducted on the plaintiff in December 2006 indicated an increase in the hearing loss as compared with the result of the same test conducted in 2002. There was also a discrepancy between the hearing thresholds detected by the PTA and the ERA in December

2006. The result of the latter was similar to that of the ERA conducted in 2002. AUTONUMOUT This further development, however, did not cause Dr Chu to depart from his earlier opinion and assessment stated in his first report and he maintained and adopted same in his second report. AUTONUMOUT The plaintiff was also examined by Dr Sing, the defendants expert in Otorhinolaryngology, in December 2006. AUTONUMOUT Lo also came to the conclusion that the hearing loss and tinnitus of the plaintiff was related to his head injury suffered in the accident on 20 April 1999. AUTONUMOUT However, Dr Lo took the view that the deterioration in the plaintiff s hearing loss between 2002 (when the plaintiff was first examined by Dr Chu) and when the plaintiff was examined by him in December 2006 should be unrelated to the accident. AUTONUMOUT As for the discrepancy between the result of the PTA and the ERA both in 2002 and in 2006, Dr Lo put that down to a possibility of the plaintiff exaggerating his hearing loss. He further stated that the result of the objective test (i.e. the ERA) should be used for the assessment. AUTONUMOUT Lo went on to say that the ERA in 2002 suggested a left hearing loss of 30 to 35 dB which was mild, and in Hong Kong any loss less than 40 dB was considered insignificant. Dr Lo therefore assessed only the tinnitus as being a 2% permanent disability to the whole person. AUTONUMOUT Both Dr Chu and Dr Lo were of the view that the ENT disabilities of the plaintiff should not prevent the plaintiff from resuming his pre-accident job as a carpenter. Assessment of the expert evidence and findings AUTONUMOUT In so far as the

orthopaedic experts are concerned, they both accept that the plaintiff had a fracture to his T9 as well as a pre-existing degenerative condition resulting in the spondylolithesis. AUTONUMOUT The main difference between them came out when they were giving evidence in the court. AUTONUMOUT Whereas Dr Tsoi was of the view that had it not been for the accident and if the plaintiff, with his pre-existing condition, continued in life without doing heavy manual work, that pre-existing condition would still have developed back pain for him in his later years, between 40 and 50. But that if the plaintiff had continued with heavy manual work, of which formwork carpentry was one type, he would likely have developed back pain even before reaching 40. AUTONUMOUT On the other hand, Dr Lam said in his evidence-in-chief that in this case of the plaintiff, the plaintiff would likely have developed back symptoms between 30 and 35 ; but in cross-examination slightly changed that to even before 30 years AUTONUMOUT There is also no dispute between them that in the present total condition the plaintiff is in, in particular his spondylolisthesis, it would not be advisable for the plaintiff to return to heavy manual work. AUTONUMOUT It would appear therefore that the one area of difference between them would really be their estimate as to when the plaintiff's pre-existing degeneration would become problematic for the plaintiff had it not been for the accident, assuming that the plaintiff had continued in his pre-accident work. AUTONUMOUT In respect of this issue, there are some slight inconsistencies in the views expressed by Dr Lam. In his first report dated 29 November 2000, he stated that it would be hard to say when the pre-existing condition of the plaintiff would become symptomatic had it not been for the accident. AUTONUMOUT In his evidence-in-chief, he opined that the plaintiff would likely develop back pain between age 30 to 35 and in cross-examination said even before age AUTONUMOUT Quite apart from this inconsistency, the general tone of Dr's approach strays beyond the evidential confines which delineates that which is appropriate for an expert witness. In so doing, Dr Lam gave the impression that he was more an advocate for the defendants. AUTONUMOUT Lam strongly advocated that it was not the accident but the pre-existing degenerative condition of the plaintiff which prevented him from returning to his pre-accident work. He elaborated on this by saying that the accident temporarily increased the plaintiff's pain in his L4/5. He further explained the term temporarily by saying that since the plaintiff had a pre-existing defect in his spine, the accident merely caused him to suffer pain in that area, but did not affect the status of that pre-existing defect. He would therefore expect such pain to be a temporary one only. AUTONUMOUT Moreover, in his medical report, Dr Lam, when giving his assessment as to the period of reasonable sick leave for the plaintiff, stated that In general, for a back injury without significant structural damage, a sick leave of 3 to 6 months should be adequate. [emphasis provided] AUTONUMOUT Causation and apportionments as to what should be attributed to the accident or not are matters for the courts to conclude or assess and not for the expert. Experts should not draw conclusions as to matters of causation and apportionments since they may or may not be applying the same standards that court have to apply. In any event, it is never for an expert to usurp the functions of the courts. AUTONUMOUT In so far as the sick leave was concerned, I would have expected Dr Lam to have assessed what was the

reasonable sick leave for this plaintiff in the total condition that he was actually in and without making any apportionment by qualifying it with the words without significant structural damage . AUTONUMOUT If any apportionment is to be made, that is to be done by the courts in its assessment of the damages applying such guidelines or approaches laid down for the courts to follow. AUTONUMOUT I have therefore no hesitation in accepting the evidence of Dr Tsoi where his opinion differs with that of Dr Lam. AUTONUMOUT As for the neurologists, I have no difficulty in accepting both the evidence of Dr Choa and Dr Woo that there had been a great deal of exaggeration on the part of this plaintiff, both as to his alleged cognitive deficits as well as the complaint made as to his lower limbs. In this respect I also find that there was little or no neurological deficit or impairment suffered by the plaintiff resulting from his accident in April 1999. AUTONUMOUT Such exaggeration I find to be particularly pronounced when comparing his overall condition as seen from the surveillance video taken by the defendants as against the complaints made by him, in particular those complaints of deterioration in his condition since 2005. AUTONUMOUT I accept from the medical evidence and from all the experts that his condition could not have deteriorated in the way alleged by the plaintiff so long after the accident, when the surveillance tapes showed him to have been in a much better physical condition in 2001 and 2002. AUTONUMOUT As for the ENT experts, the real differences between Dr Chu and Dr Lo was really one of degree as to the permanent disability suffered by the plaintiff. They were both agreed that the plaintiff did suffer a mild hearing loss in his left ear and also from tinnitus both directly resulting from his head injury sustained in the accident. AUTONUMOUT The only other area I need to deal with relating to Dr Chu and Dr s evidence was whether a loss of hearing below 40 dB should be regarded as insignificant. AUTONUMOUT In that respect I accept the evidence of Dr Chu since it was conceded by Dr Lo that such a benchmark of 40 dB was adopted by the Medical Assessment Board for the purpose of assessing loss of earnings capacity in relation to Employee s Compensation Claims (). Assessment of loss of earnings capacity is quite irrelevant to proceedings for common law damages and I can therefore safely exclude such benchmark set by the Medical Assessment Board. AUTONUMOUT I therefore find that the plaintiff did have a mild hearing loss in his left ear resulting from the accident. AUTONUMOUT As for the plaintiff s own evidence relating to his condition and complaints, I have little doubt after hearing all the medical evidence that there has been a great deal of exaggeration on the part of the plaintiff, so much so that I am hesitant to accept any of his complaints or condition which is not supported by the medical evidence adduced. Pain suffering and loss of amenities AUTONUMOUT Given the condition the plaintiff was in after the accident as stated above, both as to the fracture of the T9 as well as the spondylolisthesis and also his hearing loss, an appropriate award for pain suffering and loss of amenities would normally be in the region of \$400,000. AUTONUMOUT However, because the spondylolisthesis was caused by the existing degenerative condition and bone defect of the plaintiff, albeit triggered off by the accident, there would need to be a discount of the above figure to take into account that pre-existing degenerative condition. AUTONUMOUT Having accepted the opinion expressed by Dr Tsoi that had this accident not happened, the plaintiff would likely

have developed back pain from that pre-existing degenerative condition before 40 years of age had he continued in his pre-accident work as a formwork carpenter, and taking note of the fact that the plaintiff was only 23 years old at the time of the accident, I would discount the figure of \$400,000 by 30 % to give \$280,000. AUTONUMOUT Accordingly, I would assess the award for pain suffering and loss of amenities to be \$280,000 Pre-trial loss of earnings AUTONUMOUT The primary submission by the defendants was that the plaintiff was not able to return to his pre-accident job not because of the accident, but due to his pre-existing condition. That submission was based on the fact that both Dr Tsoi and Dr Lam gave evidence that had the plaintiff gone to them for examination before he met with the accident, they would both have advised the plaintiff that his bone defect was such that he was not fit to continue with the kind of heavy manual labour such as his pre-accident job. AUTONUMOUT I do not accept that submission for two reasons. AUTONUMOUT The first reason being that it was based not on advice actually given to the plaintiff, but on the advice which both Dr Tsoi and Dr Lam would have given (but not actually given) to the plaintiff had he gone to them before the accident. AUTONUMOUT Secondly, having accepted the evidence and opinion of Dr Tsoi, it was the evidence of Dr Tsoi that the accident triggered off the pre-existing condition of the plaintiff which resulted in his spondylolisthesis and the resultant pain. Therefore, the accident was very much so the cause of his inability to return to his pre-accident job, albeit that his pre-existing condition also had a part to play in it. AUTONUMOUT There is no dispute that the plaintiff's pre-accident monthly earnings came to \$20,800 per month. However, there was evidence that during the pre-trial period work for formwork carpenter was more scarce than before the accident. No doubt because of this evidence, counsel for the plaintiff was prepared to adopt \$16,000 (suggested by the defendants) as being the multiplicand to be applied for the calculation of pre-trial loss of earnings during the pre-trial period after expiry of the sick leave period. AUTONUMOUT The plaintiff was given one year of sick leave. For that one year of sick leave, the loss of earnings would be total and would come to $\$20,800 \times 12$ which gives \$249,600. AUTONUMOUT After the sick leave period, there still remains 84 months of the pre-trial period. During these 84 months, the plaintiff would only be entitled to partial loss since the medical evidence indicate quite clearly that the plaintiff would be able to return to work, albeit not heavy manual work. AUTONUMOUT Counsel for the plaintiff did suggest in his closing submission a deduction of \$7,500 to calculate the notional earnings on the basis that the plaintiff would be able to earn that amount as a security guard. That would appear about right. AUTONUMOUT On that basis, the partial loss of earnings for those 84 months would be assessed as $(\$16,000 - \$7,500) \times 84$ giving \$714,000. AUTONUMOUT Total pre-trial loss of earnings comes to : $\$249,600 + \$714,000 = \$963,600$. AUTONUMOUT There was a further submission by the defendants that there should be a 70% discount in respect of the pre-trial loss of earnings to reflect the pre-existing condition of the plaintiff. AUTONUMOUT In this respect, the words of Mortimer VP in the case of *Chan Kam Hoi v. Dragages et Travaux Publics* [1998] 4 HKC 523 at 529 are pertinent Where a pre-existing condition is likely to lead to disability and loss in the absence of the injury for which the plaintiff is entitled to recover, the usual method of assessing the recoverable

loss is to take account of the risks by an appropriate assessment of general damages. The pre-trial loss of earnings may also be reduced if the risks during the years concerned are sufficiently high. [emphasis added] AUTONUMOUT In the present case, Dr Tsoi's opinion was that back pain would develop even before 40 if the plaintiff had continued in his pre-accident work. Although Dr Tsoi was not asked in evidence and did not say how long before 40, that statement of his cannot be taken in isolation but must be read together with his opinion that if the plaintiff did not engage in heavy work, it was likely he would develop back pain between 40 and 45, but if he did continue in heavy manual work (of which formwork carpenter is such), Dr Tsoi would have expected back pain to develop even before 40. AUTONUMOUT I read that to mean that if the plaintiff continued with his heavy work, back pain would likely develop before 40 to 45 years of age. AUTONUMOUT The plaintiff was 23 at the time of the accident and was 31 years old at the time of the assessment. Therefore, the pre-trial period in this case relates to a time when the plaintiff was well before 40 years old. AUTONUMOUT In the circumstances, particularly taking account of the age of the plaintiff at the time of the assessment, I do not consider there to be much risk of the plaintiff developing back symptoms or back pain from his pre-existing condition during the pre-trial period even if he had continued in the type of heavy work he was doing before the accident if this accident had not happened. AUTONUMOUT Accordingly, I am not prepared to discount the figure for pre-trial loss of earnings in the way suggested by the defendant or at all. AUTONUMOUT From the above figure of \$963,600 will need to be deducted the total amount of actual earnings (doing various jobs at different times during the pre-trial period) made by the plaintiff which is admitted by the plaintiff to be \$208,316. That gives \$755,284. AUTONUMOUT To that will be added a further 5% to take account of the loss of MPF giving a final figure of \$793,048 which is the amount I have assessed under this head of claim. Loss of future earnings AUTONUMOUT There is no dispute that the proper approach in calculating loss of future earnings where the plaintiff suffered a pre-existing condition is a reduced multiplier. AUTONUMOUT The dispute between the parties in so far as the multiplier is concerned is how much the multiplier should be discounted in this case. AUTONUMOUT The plaintiff suggests a reduced multiplier of 8 while the defendants submit that a reduced multiplier of 1.5 would be sufficient. AUTONUMOUT My own view of the matter differs from both their submissions. AUTONUMOUT The plaintiff was aged 31 years at the time of the assessment (trial) in this matter. Engaged in his pre-accident work of a formwork carpenter which was undoubtedly heavy manual work, it would be likely for a normal person doing such kind of heavy work to expect a working life not to go beyond 55 to 60 years of age. AUTONUMOUT Therefore, in a normal case, a multiplier of 14 or 15 may well be appropriate. AUTONUMOUT In the present case, however, the medical evidence from Dr Tsoi suggested that this plaintiff, if he had continued in this type of heavy manual work without this accident happening, he would likely have developed back pain or back symptoms before he reached 40 years. AUTONUMOUT In the light of that evidence as to the likely time the plaintiff's pre-existing condition would have limited his work life, I take the view that the appropriate reduced multiplier to be adopted would be one of 6. AUTONUMOUT As for the multiplicand I shall

adopt the same multiplicand as for pre-trial partial loss of earnings, namely \$8,500. AUTONUMOUT That therefore comes to $\$8,500 \times 12 \times 6$ giving \$612,000. Adding a further 5% to take account of loss of MPF gives \$642,600 which will be the amount assessed under this head. Loss of earnings capacity AUTONUMOUT Given the resultant disabilities of the plaintiff, there will be some risks of him being at a disadvantage in the labour market. AUTONUMOUT That risk is not great since the orthopaedic evidence indicates that the risk of further deterioration in his condition of spondylolisthesis is minimized if the plaintiff will not undertake heavy manual work. AUTONUMOUT A lump sum award of \$50,000 under this head would be appropriate. Special damages AUTONUMOUT Special damages, made up mainly of medical and travelling expenses, have been agreed at totally \$43,089 between the parties and will accordingly be awarded. Interests AUTONUMOUT The defendants submitted that interests should be awarded for a reduced period by reason of the gross delay by the plaintiff in bringing this matter to trial. AUTONUMOUT It cannot be disputed that the plaintiff had changed his solicitors on four separate occasions and had applied to vacate the trial dates for this matter on four separate occasions. These had greatly added to the trial of this matter being held 7 years and 10 months after the accident. The case was first set down for trial at the end of 2003. AUTONUMOUT I accept that there was some severe delay brought about by the plaintiff. AUTONUMOUT Interests will be awarded on general damages for PSLA at 2% p.a. from the date of the writ up to the end of 2003. AUTONUMOUT Interests on special damages and pre-trial loss of earnings at 5.467% (being half judgment rate) from the date of the accident up to the end of 2003. Summary of awards assessed AUTONUMOUT PSLA \$280,000 Pre-trial loss of earnings 793,048 Future loss of earnings 642,600 Loss of earnings capacity 50,000 Special damages 43,089 Interests on PSLA 9,800 Interests on specials and pre-trials 199,171

Sub-total: \$2,017,708 AUTONUMOUT Deduction for contributory negligence and ECC payment. AUTONUMOUT The above sub-total figure will need to be reduced by 30% to give effect to the contributory negligence of the plaintiff himself as found by me. AUTONUMOUT After the 30% reduction it will give a figure of \$1,412,395.00. AUTONUMOUT This figure will further need to be deducted from it the sum of \$392,000 already received by the plaintiff by way of ECC payment. AUTONUMOUT The final figure therefore comes to \$1,020,395.00.

CONCLUSION

AUTONUMOUT There will therefore be judgment for the plaintiff in the sum of \$1,020,395.00. COSTS AUTONUMOUT There will be a costs order nisi that the defendants do pay the plaintiff his costs of this action to be taxed if not agreed. AUTONUMOUT The plaintiff's own costs to be taxed in accordance with Legal Aid Regulations. (A.R. Suffiad) Judge of the Court of First Instance High Court Mr Neal Clough, instructed by Messrs Henry H.C. Wong & Co., for the Plaintiff Mr Chan Chi Hung, SC, leading Mr Matthew Tse, instructed by Messrs Deacons, for the 1st and 2nd Defendants

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