

HONG KONG / JUDGMENT

LO WAI SHING v. LIK SANG ENGINEERING CO LTD

COURT

Court of First Instance

DECIDED

5 November 2013

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bjbj HCPI 15/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NO 15 OF 2012

BETWEEN LO WAI SHING Plaintiff and LIK SANG ENGINEERING COMPANY LIMITED Defendant

Before: Deputy High Court Judge Hartmann in Court Dates of Hearing: 15, 16 and 21 October 2013
Date of Judgment: 5 November 2013

J U D G M E N T

Introduction

On 4 April 2010, the plaintiff, while employed as a manual labourer by the defendant company, fell off a lorry. He fell onto rocky ground, badly injuring his left kidney. The kidney had to be surgically removed. In this action, the plaintiff seeks damages for the injuries sustained by him as a result of the fall. His claim has been resisted by the defendant on the grounds of both liability and, if found liable, the measure of damages that should properly be awarded. The issue of liability: the job to be undertaken and its hazards The business of the defendant included the transportation of construction materials. On the day of the accident, the plaintiff was deployed to the warehouse of a company called VSC Steel in the Tuen Mun area. The defendant was engaged to deliver steel rods to the warehouse of VSC Steel. The steel rods were some 40 feet long. They were delivered on the back of lorries often described as flatbed trucks. As to the nature of the plaintiff's work, when a consignment of steel rods arrived at the warehouse on the back of a lorry, it was the plaintiff's job to climb onto the back of the lorry, that is, onto the flat bed portion of the

lorry, and, working with one another man, to secure bundles of the steel rods to a crane so that they could be lifted off the lorry. It is important at this early juncture to have some understanding of how the steel rods were loaded onto the back of each lorry for delivery. They were placed on each lorry so that they ran the length of it. At the front of the lorry, the rods rested on top of the driver's cab. About halfway back on the flat bed portion of the lorry a sturdy metal frame set on four legs was positioned. This frame held the steel rods off the floor of the lorry so that the rods were able to slope down from the driver's cab to the very rear of the lorry without sagging in the middle. This metal frame was not fixed to the flatbed floor of the lorry so that it was a permanent fixture. Instead it appears that it was essentially held in place by its own low centre of gravity and by the sheer weight of the steel rods that rested on it. Nevertheless, during the course of a journey, the metal frame may shift a little. Self evidently, steel rods that are some 40 feet in length are heavy and cumbersome. More than that, like bundles of giant chopsticks (semi-flexible ones), there is always the danger that they may become entangled with each other. In order to avoid such entanglement, at the time of loading fairly large wooden wedges were hammered between bundles of the steel rods to keep them apart. For the very same purpose, a limited number of these wooden wedges (about four or five) were often employed during the unloading process to prevent entanglement. However, while these wedges had an important role to play, they would often work themselves loose both during the journey and during the unloading process and fall to the floor of the lorry. At the time of unloading, these wooden wedges scattered on the flatbed floor of the lorry obviously presented a potential hazard. A second potential hazard presented itself when, after the two workmen on the back of the lorry had secured a bundle of the steel rods to the crane, those rods were then lifted by crane and moved away from the lorry to be set down. The rods could swing and turn and it was essential therefore that the two workmen on the back of the lorry be in a safe place at that time. Looking to the actions of the defendant to avoid these hazards During the course of the hearing it was not disputed by the plaintiff that, in order to avoid these two hazards, when the plaintiff had commenced his employment he had received instructions from the defendant's site foreman, Mr Fok Chi Ping. In respect of the wooden wedges, Mr Fok testified that his instructions were that the flatbed of the lorry was at all times to be kept clear of these wedges. Those few (four or five) that may be required to separate bundles of steel rods in the course of unloading work were to be stacked under the metal frame that supported the steel rods in order to prevent them sagging. All other wooden wedges were to be picked up and put to one side, the most convenient method of doing so being to throw them off the lorry onto the ground. The plaintiff accepted that he was aware of these instructions. In order to avoid being struck by the steel rods when they were being lifted off the lorry, Mr Fok testified that his clear instructions were that, before the crane started to lift, the two workmen on the lorry were to alight from the lorry, that is, to climb down from it and move a safe distance away. Again, the plaintiff accepted that he was aware of these instructions. During the course of the trial, it was asserted by the defendant that the lorries that carried the steel rods had ladders attached to their flatbed sections at each corner: two ladders at the front and two ladders at the rear. This appeared to be disputed by the plaintiff who testified that, to his knowledge, there was no ladder at the rear of the lorries, the implication being that if he was to climb down off the lorry by ladder he would have to make his way to the front of the flatbed section just behind the

drivers cab. On the evidence, I am satisfied on the probabilities that the lorries did have ladders fixed to the four corners of their flatbed sections. I am further satisfied that the plaintiff, who had prior experience in this sort of work and who had been working now for several days on these lorries, getting on and getting off, would have been aware of that fact. I am satisfied that his denial of knowledge, or wavering as to it, was tactical. The safety system in respect of the wooden wedges On the evidence, it was apparent that the risk of wooden wedges falling onto the floor of the flatbed was integral to the work of unloading the steel rods. The wedges were necessary, that much is clear. They prevented entanglement of the long steel rods which would itself have presented all sorts of dangers. Even though necessary, when they were dislodged and fell to the floor of the flatbed, it was patent that they then presented their own form of hazard. That hazard had to be avoided. Regrettably, the safety instructions given by the defendant in this regard appear to have been at best vague. Certain of the wedges had to be retained in case they were needed to prevent entanglement in the unloading process itself. But there was no storage space provided on the lorry (within easy reach) in which these wedges could be kept. According to Mr Fok, the foreman, he instructed the plaintiff, and others like him, that these wedges should be placed under the metal frame situated in or about the middle of the flatbed. While there was some space for this, the frame itself was supporting the steel rods and was not therefore easily accessible, certainly not to the extent that the wedges could be securely and safely placed. In my opinion, there was always the danger therefore that these wedges may instead be placed near or around the metal frame. Indeed, it was the plaintiff's case that he lost his balance stepping on a wedge close to that metal frame. As to the balance of the wooden wedges, the instruction was simply to clear them out of the way, the best and easiest way being to just throw them off the lorry. No provision was made for a receptacle for these objects. It seemed to be the choice of the individual worker whether to simply move them to one side (where they may be tripped over by somebody else who was on the flatbed of the lorry) or to throw them off the lorry (where again they may be tripped over by somebody else). A safe system of work involves clear and understandable instructions. In my view, it would have been easy enough to provide receptacles for holding the wooden wedges and easy enough to set out clear, chronological terms, how the wedges were to be dealt with. In this sense, I am satisfied that the system to ensure safety was inadequate. The issue of supervision What must be stressed at this early juncture is that, while the plaintiff accepted that he had received safety instructions, he denied that there was any effective supervision of the unloading operations to ensure that these safety provisions were met. It was, for all practical purposes, it is evidence that he did not see any of his co-workers complying with the safety instructions, instructions that appeared to get in the way of quick and efficient unloading. In this regard, the plaintiff said that, even though he sought to collect the wooden wedges during the course of his work, they were not as part of the general working routine of the other workers collected and put to one side in any orderly fashion. Invariably therefore the flatbeds were littered with wedges. The workers simply did their best to step around them. Equally, said the plaintiff, the instruction to climb down off the vehicles every time steel rods were being lifted by crane was honoured more in its breach than its observance. The plaintiff said that, in the few days he was working, he never saw a worker climb down off a lorry. Instead, the workers sought shelter on the lorry by moving to the front of the flatbed and

positioning themselves behind the driver's cab and under the remaining steel rods that sloped down from the roof of the cab. Mr Fok, the foreman, accepted that he had to be in a number of different places during the course of the working day and might only come out to the unloading area on three or four occasions for limited periods of time. Mr Fok accepted that there was no specified supervisory programme. Mr Chung Chi Man, the manager of the defendant, testified that most of his work was conducted in his office. However, he said that if he was in the area where the unloading was taking place, and if he saw a worker acting contrary to safety instructions, he would ensure that they stopped doing so. I am satisfied on the evidence that there was at best limited and irregular supervision to ensure compliance with the safety directions. In this regard, the plaintiff's testimony was straightforward and credible. Mr Fok, the foreman, was quite frank in his testimony: if he saw a breach of safety, he said, he would correct it but he accepted that there was no clear system of enforcement and that he was often not in the area where the unloading took place. Indeed, when the plaintiff met his accident it appears that Mr Fok was not on site at all. What has emerged from the evidence is not unique to this case. It is that the workmen, with a job to be done and time pressures to be met, were casual as to the risks. For example, why waste the time of climbing off the lorry and walking a distance away when adequate shelter can be found on the lorry itself? In the circumstances of this case, I am satisfied that it was incumbent on the defendant to take into account that, under the pressures of work - work of a potentially hazardous nature - an effective system of supervision had to be created and enforced. It was not. It is important to emphasise that I do not, even by implication, suggest that avoidance of these safety instructions was condoned or tacitly encouraged by the defendant so that the work of unloading could take place more quickly. On the evidence, I am satisfied that if the manager or the foreman had seen workers acting contrary to the safety instructions they would have taken the necessary action to rectify the situation. Nor do I say that there was no supervision. What I do say, however, is that inadequate steps were taken to supervise and therefore enforce the safety measures. Safety instructions themselves, while important and while they must of course be obeyed by workmen, cannot themselves, without more, be solely determinative of the issue of liability. In this regard, I need do no more than refer to the often cited observations of Lord Oaksey in *General Clearing Contractors limited v Christmas* [1953] AC 180 at 189: It is well-known to employers that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition. [my emphasis] It is trite, of course, that setting down a safe system of work includes putting into place an effective system of supervision. The accident itself On the day of the accident, 4 April 2010, the plaintiff was fairly new to the job. It was just his fourth day working. Several years earlier, it appears to have been about a decade, the plaintiff had been involved in the same kind of work. However, back

problems resulted in him taking up work as a forklift driver. Having lost his job as a forklift driver because of the liquidation of his employer, after a period of time the plaintiff was employed by the defendant company on a daily basis, that is, as a casual worker. It appears that a number of lorries were delivering construction materials to the warehouse of VSC Steel that day and that accordingly the lorry with its load of steel rods that the plaintiff was instructed to help unload had to park away from the normal unloading area on rougher ground. The plaintiff began to unload this lorry at about nine o'clock in the morning. It was his undisputed evidence, evidence which I accept, that, to secure bundles of steel rods to the crane, he worked at the rear of the lorry while his fellow worker (whose identity was not given) worked at the front of the lorry. What divided the two portions was the metal frame positioned about halfway along the flatbed. As he was responsible for the rear of the lorry, the plaintiff said that, as he worked, he made sure that any loose wooden wedges that he did not need to use himself in the unloading process were put out of harm's way. It was further the plaintiff's evidence that, because of the division of labour, he being at the rear of the flatbed and his co-worker being at the front, it was his co-worker's responsibility to clear away any loose wooden wedges on the floor of the front of the lorry, that is, the area on the side of the metal frame nearest to the driver's cab. On that morning, the plaintiff said that, having secured a batch of steel rods, he did what his co-worker did and what, to his observation, all the other workers did in order to save time; namely, he went to take shelter at the front of the flatbed under the steel rods that sloped down from the driver's cab. This meant, of course, that he had to make his way to the front of the flatbed. In order to do this, he said, it was necessary to step over the metal frame supporting the steel rods at or about the middle of the flatbed floor. It was his evidence that, on this occasion at least, there was no room to make his way around the side of the metal frame and therefore he stepped over it. The plaintiff demonstrated that the metal frame came about halfway up his thigh; high enough to present an obstacle but reasonably easily straddled by a person of his age and fitness. It was the plaintiff's evidence that, in stepping over the metal frame, he put his lead leg on a loose wooden wedge lying on the other side of the frame. The plaintiff said that, although he looked, he did not see the wedge. When, in the course of the single movement, he applied his weight to the wedge, he said, it slipped from under his foot causing him to lose his balance and to fall out of the lorry onto the rough ground. It was the plaintiff's case that his co-worker, as an agent of the defendant, had disobeyed the safety instructions in not collecting the wooden wedge and putting it in a safe place or, if he had attempted to do so, had not placed it securely under the metal frame itself but had left it rather lying next to it. An overview of the plaintiff's case as to liability On the behalf of the plaintiff, it was submitted by his counsel, Mr Erik Shum, that the defendant had failed in its duty to take reasonable care of the plaintiff's safety in two principal respects. First, the defendant had failed to ensure that the plaintiff would be reasonably safe while working on the lorry by not providing a safe system of work and ensuring that such a system was adequately supervised. It was as a result of this failure that the plaintiff tripped over a loose wooden wedge lying on the floor of the truck and fell. Second, the driver of the lorry, being an agent of the defendant, had been negligent in failing to park the lorry at a proper designated parking spot, parking instead in an area of rough ground. It was as a result of this failure that the plaintiff, when he fell, fell on ground scattered with debris and rocks, his body hitting one of the rocks. The alleged failure to

prove defendant's management of the parking area. On behalf of the defendant, it was said that the plaintiff had failed to prove that it had management of the warehouse and parking space or that it had any power to maintain or repair the area of ground where the accident took place. In my view, there is nothing to this point. The underlying principle is that the defendant had a duty that was personal and non-delegable to take reasonable care of the plaintiff's safety whether the place where the plaintiff was employed was occupied by it or by a third party; in the present case that third party being VSC Steel. In this regard, see *Wilson v Tyneside Window Cleaning Company* [1958] 2 QB 110 per Parker LJ: but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men or, as Lord Herschell said in the well-known passage in *Smith v Baker & Sons* 1891 AC 325, 326 to take reasonable care so as to carry out his operation as not to subject those employed by him to unnecessary risk. That general duty applies in the circumstances of every case; but the governing words reasonable care limit the extent of the duty in the circumstances of each case. Accordingly, the duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party. It is accepted that the defendant may not have had any power to maintain or repair the rough area of ground where the plaintiff fell. That, however, misses the point. On the evidence, it is clear that the defendant had the power to supervise the lorries bringing the steel rods when they arrived for unloading. It would have been an easy enough matter for an employee of the defendant to ensure that the unloading only took place when a space in the designated unloading area became vacant. This was not done: again, in my view, a material lack of supervision. Nor can any point be made of the fact that the driver of the lorry was not employed by the defendant but by another company. When the driver of the lorry chose to park on rough ground rather than to wait for a designated area to become vacant he was at the time acting in the interests of and for the direct benefit of the defendant. As such, the defendant was liable for that driver's negligent acts: see *Morgans v Launchbury and Others* [1973] AC 127. Climbing off the lorry would have avoided the accident. Central to the defendant's case on liability was the submission that, if the plaintiff had climbed off the truck as he had been instructed, there would have been no accident. There were two built-in ladders at the rear of the flatbed, one on either side. Accordingly, if the plaintiff had followed instructions and climbed down from the lorry, there was no need for him to make his way to the front of the flatbed, straddling the metal frame. On his own admission, when he met his accident, the plaintiff was making his way to a place of safety. He knew he had to do that. To that extent, he was obeying the safety instructions given to him by the foreman. Instead of climbing off the vehicle, however, which could easily have been done from the rear of the flatbed where he was working, he chose to make his way forward in order to take shelter with his co-worker behind the driver's cab. To do this, he had to climb over the metal frame situated in the centre of the flatbed and make his way along the length of the flatbed. Climbing over the metal frame presented its own hazards. This was not because the metal frame itself was dangerous but simply because the exercise of climbing over it presented its own dangers. On behalf of the plaintiff, it was submitted that this was irrelevant to the present case. It was irrelevant, it was suggested, because, if there were wooden wedges scattered on the flatbed of the lorry, walking any distance at all on the flatbed presented a hazard. In short, whichever way he chose to go, whether to make his way to the front of the flatbed or to

alight from the rear, the plaintiff faced the same hazards. I have difficulty accepting the plaintiff's submission in this regard. First, and importantly, the rear of the flatbed was the plaintiff's area of work, his responsibility. In this regard, the plaintiff said that, on the day of the accident, he was acting to keep his area of the flatbed free of wedges. In short, he was not ignoring entirely the safety instruction. Second, there is no evidence that on this particular occasion the rear of the flatbed was littered with wedges. They may all have been cleared away, there may have been one or two only presenting no obstacle to an orderly alighting from the lorry at the rear by using either of the two ladders. In summary, there is no evidence at all that if the plaintiff had climbed down from the lorry at the rear instead of attempting to make his way forward by climbing over the metal frame he would have encountered the same hazard with the same probable result. The first alleged breach leading to the plaintiff slipping on a wooden wedge For the reasons that I have set out, I am satisfied that, in respect of the hazard presented by wooden wedges being found on the floor of the flatbed during unloading, the defendant failed to provide an appropriate system of work and, more importantly, failed properly to ensure that the system was adequately supervised. In this latter respect, as counsel for the plaintiff emphasised during the course of the hearing, it is not sufficient for a defendant to discharge its duty by simply mouthing safety rules and regulations or putting them into place without at the same time taking reasonable steps to ensure their compliance. In the circumstances, I accept the submission made by counsel for the plaintiff that there is a causal connection between the defendant's failure and the circumstances which led to the plaintiff slipping and falling from the lorry. The second alleged breach leading to the plaintiff falling onto stony ground On the evidence, nothing contradicts the assertion that the driver of the lorry parked on rough ground rather than waiting for a designated unloading spot. In other circumstances, nothing by way of negligent conduct may have turned on the fact that this was done. But it is to be remembered that in the present case the unloading of the lorry was to be conducted by two workers who had to climb up onto the flatbed of the lorry. The wooden boarding around the edge of the flatbed was very low, apparently only about a foot high, and no real protection therefore if one of the workers slipped or lost his balance. Indeed, in the present case it provided no protection. The work of unloading was heavy, physical work in which it would have been easy enough to slip or lose balance. It must therefore have been apparent that where the unloading took place was of some consequence in looking to the safety of those who had to toil on the flatbed of the vehicle. As I have said earlier, it would have been easy enough for an employee of the defendant to give instructions that the downloading was not to take place until the vehicle was in a designated unloading spot. This however was not done. In my view, there was a degree of negligence therefore on the part both of the driver and, independently, of the defendant. The issue of contributory negligence On the behalf of the plaintiff, it was submitted that no contributory negligence had been demonstrated, the burden of proof being on the defendant. I do not agree that no contributory negligence has been proved. In the present case, the evidence has demonstrated the following. The plaintiff knew of and understood the safety instruction that he should get off the lorry when the batches of steel rods were being lifted. The fact that he was seeking shelter at the time when he met his accident is proof of the fact that he understood the necessity of the instruction. However, instead of alighting from the vehicle, which I am satisfied he could have done quite safely by taking one of the ladders at the rear of the

flatbed (the presence of which he was well aware), the plaintiff chose instead to make his way forward along the flatbed even though it meant skirting along the edge of the bundles of steel rods and stepping over the metal frame. In doing so, the plaintiff must have understood that he was disobeying safety instructions. I am satisfied that the plaintiff took this route, instead of climbing down from the vehicle, primarily for his own convenience. As he saw it at the time, it was easier. The fact that the safety instructions were invariably ignored by his co-workers is a factor but, as I have said earlier, there is no evidence that the defendant condoned or turned a blind eye to the practice because it may have led to quicker unloading. Nor, in my view, can the fact that the plaintiff did not see the wooden wedge which caused him to slip be taken as completely exonerating him. As Mr Victor Gidwani, counsel for the defendant, said, the plaintiff was not carrying anything nor was his attention distracted by other work processes. It was still relatively early in the day when he would be expected to be fresh and alert. There was no suggestion that the light was bad. He was stepping over a barrier, not an insignificant one, and should therefore have taken care as to where he was placing his foot. In the pleadings, mention was made of the metal frame having some sort of mesh which presumably obscured site of any object lying on the flatbed floor on the other side of the frame. Although no mention appears to have been made of this during the trial itself, I should mention that, on studying the relevant photograph, I have been unable to see the presence of any such mesh. Indeed, on a study of the photograph (although it does not show the metal frame in its entirety) it seems to me that site of a wooden wedge would have been reasonably apparent to anybody stepping over the frame provided they were doing so with reasonable care. In summary, I am satisfied on the probabilities that the plaintiff's failure to see the wooden wedge clearly contributed to the accident. While therefore I am satisfied that there was contributory negligence on the part of the plaintiff, looking to the evidence as a whole, I am not satisfied that it was anything like the 50% submitted by Mr Gidwani. In looking to the percentage, I take into account the point made by Mr Shum, plaintiff's counsel, that plaintiff cannot be blamed for the seriousness of the injury he sustained. The seriousness of the injury was caused by the fact that the plaintiff fell onto rocky ground. The fault for that, as I have earlier outlined, lies entirely at the door of the defendant. In the circumstances, I am of the view that the plaintiff's share of responsibility should be set at 25%. The medical evidence related to the plaintiff's injury It appears that when he fell the plaintiff was knocked unconscious. He was taken to the Tuen Mun Hospital. A CT scan revealed severe trauma to the left kidney. The same day (4 April 2010), the plaintiff underwent surgery, namely, a left nephrectomy : the removal of the left kidney. Following the operation, the plaintiff underwent physiotherapy in order to improve his mobilization. He was discharged from hospital on 16 April 2010. In the months that followed the plaintiff complained of pain in the area of his wound, pain killers being prescribed. In addition to the physical trauma, the medical evidence reveals that the plaintiff underwent psychological trauma. In March 2011, some 11 months after the accident, a psychiatric assessment diagnosed suspected post-traumatic stress disorder, the indicators being poor sleep and appetite, depressed mood and flashbacks of the accident. The plaintiff also complained of anxiety attacks when he saw lorries similar to the one from which he had fallen or when he had to walk past construction sites. The plaintiff was prescribed medication for depression. In September 2011, a medical report recorded that, with the

assistance of medication, the symptoms of depression had improved. The plaintiff's mood was more stable and he had recovered his appetite. The prognosis was optimistic. Regrettably, in March 2012, apparently having given up his medication, the plaintiff was found to be in relapse. Suitable options were discussed with the plaintiff. In the pleadings, the plaintiff complained of a loss of libido. It does not appear that the plaintiff was under psychiatric treatment at the time of trial. No evidence was put before me indicating that the plaintiff was still suffering from depression and, if so, the degree of that depression, the nature of the treatment being prescribed and the plaintiff's prognosis. In order to prepare the plaintiff to return to work, in the latter part of 2010 the plaintiff began a regime of work hardening and assessment. The plaintiff continued to complain of pain in the area of his surgical wound when given simulated tasks. In the last assessment before trial, the plaintiff showed mild limitation in the active range of motion of his trunk. He was able to perform repetitive crouching and bending for 10 minutes with two breaks and tolerated an exercise of pulling a wire with six pounds resistance for the same period of 10 minutes. The plaintiff reported walking tolerance of 90 minutes. However, he continued to experience pain in the area of his surgical wound when performing simulated tasks. On 29 April 2011, the plaintiff was examined by Professor Lai Kar Neng and Dr F.K. Li for the purposes of conducting an independent assessment of the plaintiff's physical well-being. As to the plaintiff's history, it was recorded that the plaintiff, who was in his mid-30s (37) at the time of the accident, had previously enjoyed good health. Since the accident, however, he had feelings of lethargy and needed to wake up at night to pass urine (nocturia). It was noted, however, that there was no blood-staining nor evidence of frothy urine. While the plaintiff complained that his surgical wound was painful to the touch, his body movements were found to be full, there being no evidence of muscle weakness. After the loss of one kidney, it is not uncommon for a person to suffer hypertension. On examination, the plaintiff's blood pressure was 140/90 on both arms, this being described as elevated. The doctors reported: After the surgery, [the plaintiff] recovered quickly. He, however, noticed nocturia of more than eight times per night. He also complained of pain and numbness on the left side of his abdomen, especially during coughing. Furthermore, [the plaintiff] noticed a lack of energy after the accident. The renal function of the patient was normal and the clearance function of the remaining right kidney was comparable to individuals with two intact kidneys. This could be due to hypertrophy of the right kidney compensating for the loss of renal function after the left nephrectomy. The doctors were satisfied that the plaintiff's complaints of discomfort and pain were genuine, the persistent pain in the left loin being neuropathic in nature due to the irritation of nerve endings that had been cut during the operation for the removal of the left kidney. In this regard, the doctors noted, of course, that the pain threshold differs between individuals. Following on from this last observation, the doctors recorded that there could be a somatic element accounting for part of his pain. As I understand it, somatic describes a psychological disorder characterised by symptoms that suggest a form of physical injury that cannot be explained by general medical diagnosis. The doctors were agreed that the plaintiff's permanent impairment of the whole person should be set at 30%. They were further agreed that the percentage loss of earning capacity should also be set at 30%, there being a mild degree of proteinuria (an excess of serum proteins in the urine) and hypertension detected. The doctors went on in some detail to explain how they had arrived at a 30%

impairment of the whole person with an equal percentage loss of earning capacity. Put simply, the doctors were of the opinion that, having lost his left kidney, there were indications that the plaintiff's remaining kidney was overworking in order to compensate. This created a physiological status of hyperperfusion syndrome which increased the risk of hypertension, proteinuria and segmental glomerulosclerosis. The doctors observed that the existing condition of nocturia was an early sign of a chronic kidney disease, namely, the inability to concentrate urine. In summary, although, as the doctors both observed. The medical literature was limited, the plaintiff's condition suggested the risk of long-term complications arising from the removal of his left kidney. I pause to observe that, in this latter regard, defence counsel submitted that there was no persuasive evidence, the burden being on the plaintiff, of on-going deterioration of kidney function. The report of the two doctors had been given in June 2011, more than two years prior to trial. There had, however, been no follow-up examination by a urologist or nephrologist and no evidence therefore of whether or not the plaintiff's condition was stable or showed signs of further deterioration. I accept that this is the case. On my reading of the report of the two doctors, both clearly experts in the field, they have acknowledged that the literature as to the consequences of losing one kidney is not exhaustive. They have therefore looked to the risk of the known consequences, taking into account certain indicators which increased the risk, for example, the identification of nocturia. By way of a postscript, during the course of the trial I asked the plaintiff if he had been subject to regular checks as recommended by the two doctors, that is, monitoring of the plaintiff's blood pressure, renal function and urine protein. The plaintiff appeared to indicate that he had not been informed that he should subject himself to such monitoring. I took it therefore that he had not. As to the plaintiff's future employment, the doctors were of the opinion that the plaintiff was not able to return to his previous job because of persistent wound pain and lack of energy. They noted, however, that these symptoms could not be fully explained by the fact that the plaintiff now had just one kidney. The doctors agreed that an alternative form of employment which the plaintiff may consider was that of a security guard. Pain, suffering and loss of amenities While the plaintiff made a quick recovery from his physical injury, that is, the loss of a kidney, it is apparent that within a relatively short period of time he became subject to a number of consequential impairments. In the long term, the most profound of these, it seems to me, is the risk, already presaged by nocturia and an elevated blood pressure, of a degeneration of the functioning of his single remaining kidney, that degeneration affecting his general health. High blood pressure, it is well known, raises the risk of heart attacks and strokes. I do not think that it is speculative to say that, having regard to the plaintiff's state of health at the time of his examination by the doctors, such risk of degeneration may have an effect on his anticipated life span. As I have said earlier, although the medical literature on the subject is not exhaustive, it is not uncommon for men who have lost one kidney to suffer such degeneration, more especially when indicators such as nocturia and hypertension are present at a relatively early stage after the loss. Nocturia itself - in the plaintiff's case demonstrated by the need to get up as many as eight times each night to pass urine - is a condition which, in a man of advanced years may be taken as part of the ageing process, but which in a man in his late 30s is understandably distressing. In the early days after his operation it is evident that the plaintiff suffered a degree of pain in the area of his operation, that pain coming from the healing of the

wound and being neuropathic in nature. Even if at the time of his examination by the two doctors there were no physical manifestations to explain its continuance, it is not suggested that the pain is other than genuine. The two doctors have suggested that it may be somatic: a recognised condition and one that must be directly consequential upon the plaintiff's accident. While the plaintiff's psychological health at the time of trial may not have been defined, it is apparent that, following on from the trauma of the accident and the loss of his kidney, the plaintiff went through a period of depression. That depression was marked by poor sleep and poor appetite, anxiety, depressed moods and lethargy. In addition, the plaintiff complained of a loss of libido. In short, the depression marked a general deterioration of the plaintiff's ability to enjoy life and look forward to the future. In order to arrive at an equitable figure for pain, suffering and loss of amenities, I was referred to a number of cases by counsel. While none were directly on point (or were authorities of some vintage), they did act as a guide to an appropriate figure. In my judgment, that figure is a sum of \$450,000. Pre-trial loss of earnings Assessing the plaintiff's pre-trial earnings presents difficulties. Those difficulties arise out of the fact that the plaintiff had only just commenced working for the defendant at the time of the accident and was working on a casual basis only. As I have indicated early, the plaintiff's employment history shows that he had originally worked as a hook assistant

- the work that he was doing at the time of the accident - but had been forced to give up that work because of back troubles. He had then taken up work as a forklift driver, being employed on a permanent basis. The records reveal that between 2006 and 2009 his monthly salary as a forklift driver increased from \$9,868 to \$10,843. It appears that the plaintiff had to give up his job as a forklift driver in or about 2009 because his employer went into liquidation. There is no record of the plaintiff's earnings from 2009 to 2010. When the plaintiff took up employment with the defendant in April 2010, he was paid \$630 a day. This, however, was on the basis that he was a casual worker only. Put simply, the amount of work available would determine whether he worked for one day only in a month or for 26 days, the latter figure constituting effectively every workday. On behalf of the plaintiff, it was submitted that, if the defendant had no work on offer, the plaintiff was able to work for other employers in the same area of business or a similar area, earning, so it was asserted, a similar amount per day. Indeed, the plaintiff, either with the defendant or with other employers, would be able to work 26 days per month, thereby earning a monthly sum of \$16,380 (\$630 x 26). In this regard, counsel for the plaintiff submitted that it could not be disputed that there are many transportation companies in Hong Kong requiring casual workers to perform loading and unloading work. In short, so it must follow, such work is always plentiful. I am aware of no evidence to this effect but, even if I am inclined to accept it on the basis that it is essentially self-evident, it seems to me that I must recognise two things, first, that casual work of this kind is highly unlikely to be available every day of every month on an indefinite basis and, second, that the plaintiff is equally unlikely to be able to arrange his affairs so that he is able to take advantage of that work every day of every month. In my view, the obvious realities that apply to working as a labourer on a casual basis in a market which over any extended period of time has its ups and downs must tell against the

submission made on behalf of the plaintiff that it is reasonable to proceed on the basis that, if it was not for the accident, he would have been able to work indefinitely (effectively for the balance of his working life) as a casual labourer earning a minimum of \$630 per day for 26 days in each and every month. In my view, there is more force in the contention made by counsel for the defendant that, in the period before trial, the plaintiff could not realistically have expected to work 26 days each and every month as a casual labourer. Counsel suggested that - averaged out - a realistic number of days in each month would be no more than 15, this making for a monthly income as a casual labourer of \$9,450. While I accept the basic logic of this contention, in my opinion setting the figure at no more than 15 days in each month is too low. I would set the figure at 22 days. This makes allowance for a number of matters - the logistical difficulties of ensuring that, when necessary, new work is available every day, the need to take occasional days off for personal reasons and the like - but also makes allowance for the fact that, on the evidence, at the time of his accident the plaintiff was fit and well and willing to work. Doing the best I can therefore in an uncertain scenario, I am satisfied that I meet the justice of the matter by calculating the plaintiff's pre-trial earning capacity at a sum of \$13,860 a month (\$630 x 22). On behalf of the defendant it is accepted that the plaintiff is entitled to a loss of income for the first year after his accident; time for sick leave, general recuperation and time to look for suitable employment. On the figure that I have set out, this 12 month loss of earnings would amount to a sum of \$166,320. The evidence indicates that in the pre-trial period, that is, from 4 April 2010 to 15 October 2013, the plaintiff's work record is as follows: He commenced work as a clerk at a container terminal on 12 October 2011 earning \$9,000 per month, this employment lasting until 31 January 2012 (a period of approximately 3.5 months). According to the plaintiff, although the work was sedentary in nature, and although some 18 months had passed since the accident, the discomfort from his injury made it impossible to continue. He commenced work as a security guard at a car park in the Tuen Mun area on 8 October 2012 earning \$7,161 per month. According to the plaintiff, the discomfort from his injury made it impossible to work the long hours that were required. He commenced work as a security guard at a theatre in the Yuen Long area on 15 February 2013, his contract specifying that he should earn \$6,944 per month. He has remained in this employment at the time of trial. On behalf of the plaintiff, it was submitted that, despite the plaintiff's best endeavours, this was the only employment that he was able to secure in the pre-trial period and that accordingly he should be entitled to receive the income that he would have been able to earn if it was not for the accident a sum of \$13,860 per month - for the full pre-trial period. This has been disputed by the defendant. It is said that, having had a full year to recover, the defendant should reasonably have been able to obtain work on a full-time basis as a forklift driver, an occupation familiar to him and an occupation that, even starting afresh, would have earned him \$10,000 per month. It was the plaintiff's reply in evidence that he had not looked for work as a forklift driver because he had discovered from colleagues that the demands of the work had changed. Forklift drivers used to be accompanied by an attendant who would attend to any necessary heavy work such as lifting or moving boxes. Now however forklift drivers were expected to do that work themselves. Arduous labour of that kind, said the

plaintiff, was beyond him now. As for work as a clerk - work which he had been able to obtain apparently in October 2011 - the plaintiff said that he did not have the academic qualifications. After a year off work recovering from both his physical and psychological trauma, the plaintiff clearly bore the burden of taking reasonable steps to obtain employment. In this regard, it is to be observed that the joint medical expert report specified four months only as a reasonable period of sick leave. Did the plaintiff take reasonable steps in all the circumstances? The joint expert medical report presented in June 2011 accepts that the plaintiff's complaints of on-going physical discomfort cannot be dismissed as false. To a limited degree, even though the report was compiled more than two years before trial, it supports the plaintiff's evidence that he no longer has the capacity to endure work that requires anything more than relatively minimal physical exertion. That being said, as counsel for the defendant emphasized, if the plaintiff continued to labour under such disability, both physical and psychological, surely some updated report should have been put before the court. As to the plaintiff's evidence, when he attempted to explain how it was that he had only been able to obtain such meagre and humble employment, he impressed me strongly as a person who had given up on trying to obtain anything in the way of employment other than the bare minimum, that is, work that put the very least demands on him. Hence his current work as a security guard on a wage that is relatively modest even for that form of employment. Was the plaintiff's utter passivity a product only of his psychological difficulties arising from his accident or did it reveal a calculated attempt, at least in material measure, to denigrate his own earning capacity in order to boost the damages due to him? I am satisfied that, in this regard at the least, there was a material measure of tactical calculation on the part of the plaintiff. In light of that finding, doing the best I can, I am satisfied that, after a year of recuperation, the plaintiff was capable of obtaining employment, albeit of a relatively sedentary nature, that would earn him at least \$9,000 per month. By way of a yardstick, I take into account the fact that the plaintiff was able to obtain work as a clerk at a container terminal in October 2011 earning that amount. As I have said earlier, on behalf of the defendant, it was submitted that it would surely have been relatively easy for the plaintiff to obtain work again as a forklift driver, such employment bringing in about \$10,000 per month. In this regard, while I cannot say I was entirely convinced by the plaintiff's evidence that the nature of the job had changed, no matter who the employer, I was in no position to reject it. It would have been easy enough, if the plaintiff was not being accurate, for the defendant to demonstrate that not all forklift driving jobs had undergone the metamorphosis described by him. However, no attempt was made to do so. For the reasons given, I am satisfied that the justice of the matter is met if the plaintiff's pre-trial loss of earnings are calculated as follows: From 4 April 2010 to 3 April 2011, this being the conceded period for recuperation and for finding suitable new employment, the plaintiff suffered a monthly loss of income of \$13,860. This was a total of \$166,320 for the 12 month period. The appropriate contribution towards MPF for this period would have been \$8,316. From 4 April 2011 to 15 October 2013 (a period of 30.4 months), the plaintiff was reasonably capable of earning \$9,000 per month. His loss therefore (being \$13,860 - \$9,000 x 30.4) amounted to \$147,744. The appropriate contribution towards MPF for

this period would have been \$7,387.20. Accordingly, the plaintiff's loss of pre-trial earnings amounted to \$329,767.2. Future loss of earnings At the time of trial the plaintiff was 40 years old. But for the accident, I am satisfied that he would have been able to earn \$13,860 as a casual labourer experienced as a hook fastener for the balance of his working life. On behalf of the plaintiff it was submitted that he would have been able to work until the age of 65. On behalf of the defendant, it was submitted that it was unrealistic to expect a hook fastener to work until that age and that an appropriate retirement age would be 60. In this respect, I was urged to take into account the plaintiff's earlier back problems which forced him to give up this particular kind of work earlier in his working life. The probabilities, in my opinion, suggest that the rigours of work would require a hook fastener to retire at 60, especially a man liable to back problems. Following the guidance provided in *Chan Pak Ting v Chan Chi Kuen* [2013] 1 HKLRD 634, I am satisfied that a multiplier of 15.5 is appropriate (on a rate of return of 2.5% through until a pension age of 60). In the result, the lump sum award for future loss of earnings (\$13,860 - \$9,000 x 12 x 15.5) is \$903,960. The appropriate contribution towards MPF is \$45,198. Loss of earning capacity This award has been agreed and \$80,000, a figure that I accept as being appropriate. Medical and travelling expenses Again, it has been agreed that an appropriate figure to meet these expenses is \$10,391. Employees Compensation It is not disputed that credit must be given in this regard in the sum of \$447,334. The summary table By way of summary, therefore, the amount due to the plaintiff is made up as follows: pain, suffering and loss of amenities \$450,000.00 pre-trial loss of earnings (including MPF) \$329,767.20 future loss of earnings (including MPF) \$949,158.00 loss of earning capacity \$80,000.00 medical and travelling expenses \$10,391.00 sub-total \$1,819,316.20 less 25% for contributory negligence \$454,829.05 balance \$1,364,487.20 less Employees Compensation \$447,334.00 Total award \$917,153.20 Interest Interest is awarded on the award of general damages at 2% per annum from the date of writ to the date of judgment and interest at half the current judgment rate for special damages from the date of the accident to the date of payment. Costs There will be an order nisi that the defendant to pay the plaintiff his costs of the action to be taxed if not agreed. It is further directed that, if applicable in this case, the plaintiff's own costs be taxed pursuant to the Legal Aid Regulations. (M.J. Hartmann) Deputy High Court Judge Mr Erik Shum, instructed by Kenneth Lam, for the plaintiff Mr Victor Gidwani, instructed by Cheng, Yeung & Co, for the defendant

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