

HONG KONG / JUDGMENT

POON YAT CHIU v. AES SCAFFOLD ENGINEERING LTD

COURT

District Court

DECIDED

21 March 2007

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DCPI223/2005

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bjbj DCPI 223/2005 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION PERSONAL INJURIES ACTION NO. 223 OF 2005

BETWEEN POON YAT CHIU Plaintiff and AES SCAFFOLD ENGINEERING LIMITED Defendant

Coram: H.H. Judge Chow Dates of Hearing: 21st to 23rd August 2006, 13th, 16th and 24th January
2007 Date of handing down Judgment: 21st March 2007

JUDGMENT

This is the Plaintiff's claim for damages for personal injuries sustained by him in an accident which occurred on 20 January 2003 outside a warehouses located at Lot 129 DD2384 A & B near Kau Nam Street, Lau Fau Shan, N.T. (the premises) due to the alleged negligence on the part of the Defendant. The accident At about 5 p.m. on 20 January 2003, the Plaintiff was the driver as well as the operator of a crane truck belonging to the Defendant. He was operating the crane on the truck by loading cargo off the truck outside the premises. There were two oil pipes (Pipe A and Pipe B) at the front end of the arm of the crane. Pipe A burst and oil gushed out. At that time he heard a loud sound boom , followed by a hissing sound, and then he saw something like a shower, as if it was a spray of insecticide. Then he saw oil dripping from the middle part of Pipe A. This middle part was torn and worn. The oil spilled onto the whole truck because of the high pressure. He immediately stopped working and withdrew the arm of the crane. He intended to leave the truck and make a report of this matter. He left the operator's seat, turned around his body, and grabbed hold of the railing. When he was about to alight from the truck he lost his balance and fell from the truck onto some objects known as monkey's head and sustained injuries. He was then sent to the Tuen Mun Hospital for treatment. When he stood up and left the crane operator's seat and turned around to alight from the truck, he was very careful in placing his step on the place where there was no oil stain, but still he stepped on some oil stain near the

seat of the operator, and suddenly he slipped down from the truck. The Defendant submits that the Plaintiff's evidence during the final lag of cross examination and re-examination is that he fell because his hand slipped from oil that was on the part of the platform of the truck that he was holding onto and balancing himself with while he was alighting from the crane operator's seat. His evidence that he fell because his hand slipped off the railing and caused him to lose balance while he was alighting from the truck is totally incredible and should not be believed for a number of reasons. It submits that this is inconsistent with his earlier evidence that his fall was caused by having stepped on the oil stain near the operator seat. It is not correct for the Defendant to submit that the Plaintiff put the blame for his slip on the place where he grabbed the railing. Under cross-examination, he was asked if he knew whether it was his foot which slipped or the place where he put his hand onto caused him to slip. He said that the place where he put his hand onto was wet and slippery, and he did not know what he stepped onto. When asked if he knew he stepped onto what thing, he answered that he only knew that he stepped onto something. It was put to him that he did not step onto oil. He said that oil gushed out. If he slipped down like that it should be oil. It was not right to say that the Plaintiff fell solely because his hand slipped off the railing. He did not say that that was the sole reason for his slipping down. He only said that the place when he put his hand onto was slippery. His evidence is to the effect that there is also a possibility that he slipped because the place of the railing where he grabbed hold of was slippery. The Defendant submits that the only reason why the Plaintiff noticed a leakage was because he heard a hissing noise. This would suggest that when the leakage first took place, the oil was not spraying, spitting or leaking towards the operator's seat and/or the railing. When the Plaintiff retracted the crane, all he saw was oil leaking down from the tubing and flooding the platform. The oil leaking from the oil piping could not have traveled all the way to the railing and caused the Plaintiff's hand to slip. In my judgment the hissing sound no doubt was the sound caused by the bursting of Pipe A which was then under high pressure. The high pressure would cause the oil to be sprayed to a certain distance. When the Plaintiff saw the oil leaking down from the tubing, that would be the stage after he had heard the boom sound and the hissing sound. Based on this subsequent stage the Defendant concluded that the oil could not have travelled all the way to the railing. This simply ignored the earlier stage when the hissing sound occurred. The high pressure must have caused the oil to be sprayed to the spot of the railing on which the Plaintiff laid his hand. On Form 2 filed by the Defendant it was stated that the Applicant slipped carelessly. Two days after the slipping incident before the Plaintiff slipped down there was the bursting of Pipe A, and oil gushed out. So the slipping down must be due to the effect of oil gushed out from Pipe A. Therefore I do find that the Plaintiff stepped on some oil stain before he slipped down. The Defendant submits that it is inherently implausible that the oil that purportedly leaked from Pipe A would have traveled all the way to the railing and caused the Plaintiff to slip and fall. It is not challenged that there was a boom sound, a sound like explosion, and then there was a spray. That boom sound must be the sound caused by the bursting of the worn-out part of Pipe A due to high pressure, and the spray was the gushing out of tiny drops of oil due to the bursting of Pipe A. What the Applicant said in this regard must be true. Having come out from Pipe A in this manner, the oil spray must have reached the place where he attempted to place his foot onto. The railing is above the place where the Plaintiff attempted to

place his foot onto, but below Pipe A, and is closer to Pipe A than the place where the Plaintiff attempted to place his foot onto. Therefore if oil reached the place where he attempted to place his foot onto, it must have also reached the railing where he tried to grab hold of. I therefore reject the Defendant's submission. The Defendant submits that if the Plaintiff's hand had come into contact with oil while he was descending, the natural response must have been for him to maintain a stronger grip over the railing and not taking his hand off the railing as contended. In my judgment, when the Plaintiff's hand came into contact with oil, how could he maintain a stronger grip over the railing? It must be borne in mind that the oil is slippery and this would make any gripping on the railing impossible. That is why the Plaintiff slipped down from the truck, apart from his stepping onto some oil stain. The Defendant submits that it is more probable than not that the Plaintiff alighted from the truck facing outwards and he slipped because of the way he alighted from the truck and not because of stepping onto or coming into contact with oil. The way the Plaintiff alighted from the truck as described by the Defendant is very unnatural for a driver to alight from the truck. The Plaintiff at first made a mistake in relying on the 2nd photo of p. 379 of the Trial Bundle in describing how he alighted from the truck. Later on he corrected himself and said that the 2nd photo to p. 380 was the more accurate photo. The Defendant submits that if the Plaintiff had maintained the version of relying on p. 379 of the Trial Bundle, the Defendant would have submitted that the Plaintiff must have been facing outwards when he alighted from the truck. That was clearly a dangerous manner and it was the reason why the Plaintiff slipped and fell. When the Plaintiff realized that that was what his evidence which he had inferred he changed his evidence. This submission is ungrounded. There is simply no evidence to show that the Plaintiff had so realized as suggested by the Defendant. Contributory negligence The Defendant submits that the accident was caused partly if not wholly by the negligence of the Plaintiff not to having notified the Defendant of the defective Pipe A and the need to repair the same in a timely manner. In the Statement of Claim the Plaintiff pleaded that he had informed the superior of the warehouse, Chan Lun Shing (Chan), before the accident about the problems in relation to the two oil pipes: there was leaking of oil in Pipe B, and there was wear and tear in Pipe A. The Defendant submits that the Plaintiff's evidence that he had reported that Pipe A was worn and torn should not be believed; in an early part of his evidence the Plaintiff said that he had informed the Defendant about the defective Pipe A some two weeks before the accident, but later on he told the Court that he had only told Chan about the leaking Pipe B and the defective Pipe A one week before the accident. According to the Plaintiff, not only had Chan told him that the Defendant was not willing to change Pipe A, Chan had also told him that if he wanted to change Pipe A, he would have to pay for it himself. The Plaintiff thought it would cost him some \$500 odd \$800 . The Defendant submits that this was a recent invention by the Plaintiff. If what he said were true he would not have forgotten to put that part of his evidence into his witness statement. During cross examination the Plaintiff stated that he had only informed Chan about the defective pipelines the same day when he signed the fax at 368, and not days before. He asserted that he had notified the Defendant the defects in writing by handing over a Form 1 which stated one oil hose leaking and one defective , which he wrote on the same day he signed on the fax at p. 368 of the Trial Bundle after inspecting the truck in the morning. It is not disputed that the Plaintiff signed on the fax on p. 368 of the Trial Bundle. According to Mr.

Kuo Chih Ming, the Defendant's director, the contents of the fax were not filled out by the Plaintiff. They were written by the younger son of Chan. The Plaintiff only put down his signature on the fax. According to the Plaintiff, when he signed on the fax there were no details on the document. The details were subsequently added to the document. On p. 368, it was stated that there was leakage of oil from a pipe of the crane. Therefore the Plaintiff must have inspected Pipe B. This was done because he had to comply with the duty imposed on him. Pipe B and Pipe A were physically close to each other. If the Plaintiff had inspected Pipe B, he must also have inspected Pipe A, in order to discharge his duty. There is simply no reason why he only inspected Pipe B, and ignored Pipe A, the 2 oil pipes being very close to each other. If he had inspected Pipe A he must have discovered the defect that there was wear and tear in that pipe. If he had made a report about defective Pipe B, he must have made a report about defective Pipe A in order for the defect to be rectified. It is simply inconceivable that he made a report about Pipe B, but ignored Pipe A. Chan did not testify to refute the Plaintiff's evidence. Despite the difference about the time the Plaintiff made the report about the defective Pipe A to Chan, I find that the Plaintiff must have informed Chan the defect of Pipe A. Accordingly the Defendant's submission that the Plaintiff was contributory negligent must fail. I find that the Defendant failed to provide a safe place for him to work in, thereby causing him to sustain injuries. It must be fully liable to compensate for his injuries. On 14 September 2003, the Plaintiff had an MRI examination, and he was found to have a disc bulging at the L4/L5 level of his lower spine. In his medical report dated 14 December 2005, Dr. Lee Po Chin, the Defendant's medical expert, commented:-

3. Degenerative changes in the MRI are normally characterized by signal changes. Posterior facet joint hypertrophy is also an evidence of degenerative changes. Degeneration changes in the MRI are common at Mr. Poon's age especially the persons whose lumbar spine have degenerative changes in the MRI can remain asymptomatic but are more liable to develop pain either spontaneously or upon any injury. Degeneration is likely to deteriorate. However, the co-relation between degree of degeneration and onset of pain has never been established. The degenerative changes in Mr. Poon's case are likely to be pre-existing.
4. Mild prolapse L4/5 is commonly found at Mr. Poon's age. It was said that persons of Mr. Poon's age at least 30-40% as a mild prolapse disc. A bulge disc is even commoner. The Defendant suggests that the Plaintiff would have a bulging disc regardless of the accident. Relying on the case of *Chan Kam Hoi v. Dragages Travaux Publics* [1998] 4 HKC 523 the Defendant submits that there should be a substantial discount of, say, 45% towards any PSLA, loss of pre-trial earnings, loss of earning capacity and loss of future earnings that this Court may award in favour of the Plaintiff. The Defendant relies on the following passages in the judgment passed by Deputy Judge Woolley in *Chan Kam Hoi*:- When considering the effect of a pre-existing condition on an award of damages there are three possible scenarios. The first is where the plaintiff was almost certain to have gone through life unaffected by the condition. The second is where there is a strong possibility that some other event or natural progression of a condition would have brought about the plaintiff's present state. The third is where this would certainly have occurred at some stage in any event. In the first, the defendant would be liable for all damages caused. In the second it would be necessary to

assess the degree of the possibility in deciding what reduction is appropriate, as in assessing the effect of other vicissitudes of life. In the third, clearly an allowance has been made, the extent of which depends on the evidence as to when the precipitating event would have occurred. . The evidence is that it is certain that the plaintiff would have suffered a deterioration in his condition in any event, and that it is likely that this would have cost him to give up his pre-accident occupation by the time he was 55. I consider in these circumstances an appropriate discount to be 45%. The Defendant also relies on the following passage of the judgment of the Court of Appeal in Chan Kam Hoi which can be found at p. 529 of the judgment:- 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. When calculating the damages for future loss of earnings, a reduced multiplier is usually the most accurate way of giving effect to the findings on the medical evidence. This is particularly so when a plaintiff's working life is likely to be limited by a pre-existing condition as in this case. Dr. Lee Po Chin did not make a finding that the disc bulging was caused by the accident. He simply says that mild prolapse L4/5 is commonly found at persons of Mr. Poon's age. In saying that he was merely making a general observation; he was not addressing the issue as to whether or not the bulging disc was caused by the accident. He did not say anything to connect the disc bulging with the accident. Therefore this general remark is not applicable to the specific situation of the Plaintiff. If the Defendant says that the disc bulging is a pre-existing condition on the Applicant, it has the burden to prove it on the balance of probabilities to the court's satisfaction. Its reliance on the medical report of Dr. Lee in this respect is simply insufficient. The Plaintiff began driving heavy vehicle since 1995

1996. He did not have any accident in the past like the one in question. Throughout the years he climbed up and down the truck without difficulty. He led an active social life and he was highly sportive. If the disc bulging is a pre-existing condition of his spine it had no impact on his occupational and living function, and such pre-existing condition should not have any discounting effecting on the amount of damages to be awarded in this case. Pain, suffering and loss of amenities (PSLA) When the accident happened the Applicant fell from a height of about 4 feet to the ground. His body hit the monkey head by the side of the truck. Then he was sent to the Tuen Mun Hospital. Medical examination conducted on him showed that there were tenderness and superficial abrasion over right buttock, right shin and left hand. He was given 4 days sick leave and was discharged. In the joint medical report, Dr. Au Ka Kau and Dr. Lee Po Chin made the following comments:-
8. Comments We had evaluated Mr. Poon jointly on 24th January 2005. our orthopaedic opinions are:- 8.1 Mr. Poon sustained lower back injury in an alleged fall-from-height accident during work on 20th January 2003. As a result he developed lower back pain. 8.2 Mr. Poon's complaint of back pain is compatible with the injury he sustained during the captioned accident. 8.3 Dr. Au opines that Mr. Poon's persistent back pain is compatible with

the injury Mr. Poon sustained. Dr. Lee opines that there is lack of objective findings to support Mr. Poon had significant back pain at the time of examination. The Plaintiff was diagnosed to be suffering from adjustment disorder by Dr. K.M. Cheng of Castle Peak Hospital. In his report dated 29 November 2005 he said:-

2. Mr. Poon did not have past or family history of mental illness. He was referred by Department of Orthopaedics and Traumatology, Tuen Mun Hospital, for poor sleep since his injury in January 2003. He presented with poor sleep secondary to his chronic back pain, depressed and anxious mood, as well as easy irritability. He was treated as adjustment disorder. Pharmacological and psychological treatments were offered. He showed partial improvement of mood and sleep symptoms after treatment, despite his chronic pain. To sum up, Mr. Poon suffered from adjustment disorder, with a differential diagnosis of dysthymia. His chronic pain and associated impairment acted as a perpetuating factor for his psychiatric problem. In psychiatric aspect, he was unlikely to have permanent disability. In his letter dated 2 June 2005, Dr. K.M. Cheng said that the Applicant was unfit to drive:- This memo is to certify that Mr. Poon suffers from adjustment disorder secondary to his back pain. His pain is chronic and affecting his mood, attention and sleep. However, he is keen to resume his job but it is unlikely for him to drive in the near future. Professor Peter Lee, the Defendant's psychiatric expert, made the following conclusions in his report after interviewing the Plaintiff:-
58. Mr. Poon's score of 33, taken at face value, is compatible with the typical scores of individuals with a severe depressive condition. He endorsed multiple depressive symptoms from a list of a moderate to intense degree in areas of sleep: delayed onset and frequent waking; mood: sad mood, irritability, and periodic anxiety feelings; appetite: eats less as well as eats more than usual; concentration and decision making: feels indecisive, unable to make decisions, poor focus, outlook on self: feel inferior with low self esteem; diffidence: feeling insecure and lacks trust in own abilities; outlook on future: largely pessimistic about the future; pleasure/enjoyment: feels little pleasure from usual activities; sexual interest: has little desire for sex; somatic complaints: extensive and persistent pains and physical malaise; panic/phobic symptoms: has occasional panic episodes but not able to describe clearly; and interpersonal sensitivity: avoids social interactions.
61. The Beck Anxiety Scale is a commonly used clinical inventory for assessment of anxiety symptoms. Mr. Poon's score of 24, taken at face value, indicates that his anxiety level and anxiety related symptomatology in his daily life is of a moderate degree. He indicated being bothered by a host of anxiety related symptoms of a moderate to even severe degree including: intense numbness and pains, hot flushes, instability sensations, inability to relax or feel relax, apprehensive of impending catastrophic happenings, racing heart, fearfulness, intense insecurity feelings, terrors, difficulty breathing, sense of suffocation, sweating, sense of loss of control, and faintness sensations.

68. In sum, I feel that Mr. Poon suffers from an adjustment disorder of a mild intensity which is complicated not only by his alleged constant and unremitting pains resulting from his injury, but also by a host of long-standing and pre-existing personal difficulties. This report shows that Professor Peter Lee agreed with Dr. K.M. Cheng's assessment that the Plaintiff suffered from a mild adjustment disorder. Before the accident, the Plaintiff was a cheerful, happy and positive-thinking person, leading a very active social life. Further, he did not suffer from any bad psychological impact as a result of his divorce which took place several years back. Therefore it must be due to the accident that the adjustment disorder was caused. The Plaintiff refers to the case of *Yeung Sze Hoi v. New Trade Good Food Centre Limited* HCPI 568/2004, in which the Plaintiff suffered back injuries. Examination on him showed that there was a prolapsed disc at the level of L3/L4 of the spine. He suffered from persistent pain. That led to his depression and suicidal tendency, and psychiatrist report indicated that the claimant suffered from adjustment disorder with prolonged depressive reaction. The judge awarded \$250,000 for PSLA. In *Li Fat Tsang v. Aquality Engineering Co. Ltd.* inutes without feeling any back pain. He had insomnia and problem in having sex as a result of the back pain. MRI report showed that there was disc bulging at the level of L5/S1 of the spine. The Court award \$300,000 to him under PSLA. In *Tam Kwok Man v. The Kowloon Motor Bus Company (1933) Limited*, HCPI 755/2001, the Plaintiff worked as a bus regulator. On 12 September 1996 when he was attending to a driver and handed him a schedule, the wheeled office chair on which he was sitting, lost one of its wheels, collapsed, and deposited the Plaintiff on the floor. He landed on his buttocks and the upper part of his back hit against the door-sill of the kiosk. As a result of the accident, the Plaintiff suffered from back injury and developed major depressive order. Taking into account the fact that the accident was one of the causes of the Plaintiff developing major depressive disorder and his back pain, the Court awarded him \$150,000 for PSLA. In *Ashok G.C. v. Kam Kee Construction Works Limited and Anor*, HCPI 491/2004, the Plaintiff suffered injuries around his lower back and was hospitalized on 2 occasions. He suffered from 5 7% whole person impairment. At trial he was still receiving out-patient treatment. He was awarded \$180,000 for PSLA. In his witness statement, the Plaintiff complained that:- I especially cannot sit or stand for too long. After about 15 20 minutes, my lower back waist and bottom will feel pins and needles pain and stiffness. Then I will have to stand up immediately to move around for about 15 minutes. But in court he could sit for intervals longer than 20 minutes. In my view his alleged back pain is not as serious as revealed in his witness statement. But I do accept the finding made by Dr. Au Kar Kau that the Plaintiff suffered from back pain, which is compatible with his injuries. Taking into account all the cases mentioned above, in my judgment, an amount of \$180,000 should be awarded to him for PSLA. Pre-trial loss of earnings inclusive of MPF Under cross-examination the Plaintiff agreed that the highest amount of wages he could earn was \$10,525 on his best month, and \$9,605 on his worst month. So the Defendant contends that his average monthly income was \$10,065 [(\$10,525 + \$9,605) 2]. Under cross-examination the Defendant's witness pointed out that at present its drivers earned at least 10% more than what they did in 2002. So the Plaintiff should have been able to earn more. In the Answer to revised statement of damages dated 23 November

2005, the Defendant says that it will adopt the only full month of earnings in December 2002, i.e. \$10,525 as the Plaintiff's pre-accident monthly earning (p. 69 of Trial Bundle). I will adopt this figure for the purpose of making award for the Plaintiff. The Plaintiff was granted a total of 962 days of sick leave. The Defendant submits that:- the sick leave certificates were not issued by reason of injuries sustained from the accident; and/or they should not have been issued or that the Plaintiff was clearly fit to attend work during those periods. Dr. Lee Po Chin's opinion was that based on the clinical notes of the Department of Orthopaedic Traumatology and his examination of the Plaintiff's injuries, the Plaintiff should not have been given more than 9 months sick leave, i.e. not beyond 20 October 2003. The Defendant submits that alternatively, as early as 2 January 2004, the Plaintiff has been certified as having reached maximum medical improvement by the Department of Orthopaedic & Traumatology. This suggests that any further treatment would not have improved the Plaintiff's situation from the orthopaedic point of view. There is simply no reason why the Plaintiff was not able to return to work there and then. Relying on Dr. Lee Po Chin's opinion, the Defendant submits that the Plaintiff was by 2 January 2004 recovered from any temporary incapacity and fit to return to work, and all sick leave certificates issued to extend the Plaintiff's right absent from work beyond 2 January 2004 ought to be disregarded in computing the Plaintiff's loss of pre-trial earnings. The Defendant also submits that there is ample evidence to show that both mentally and physically, since 8 September 2005, the Plaintiff is more than capable of returning to his original occupation. The doctors were clearly aware of the Plaintiff's pre-accident occupation. The joint medical report was compiled on 17 February 2005, based on the medical examination conducted on the Applicant on 24 January 2005. Both Dr. Au and Dr. Lee opine that the Plaintiff is fit to return to his pre-accident job. The Certificate of Review of Assessment issued by the Employees Compensation (Ordinary Assessment) Board reveals that the Board regards the period of absence from duty from 20.1.2003 to 18.1.2005 necessary as a result of the injury. Both Castle Peak Hospital and Tuen Mun Hospital gave the Plaintiff sick leave after 1 January 2005, until the beginning of September 2005. Although the doctors were aware of the Plaintiff's pre-accident occupation, but there is no evidence to show that they took into account the additional amount of force he has to use to operate a heavy goods vehicle or a crane lorry as opposed to a private car. The Plaintiff had offered to the Defendant to resume his duties but his doctors told him that he would not be fit to drive and he should take up lighter duties. The Defendant told him that if he still had sick leave, he should continue his period of absence until the sick leave was over. After the sick leave had expired he was dismissed. Thereafter he tried to work as a driver of 5.5 ton goods vehicle during the period after 8 September 2005. But this job required him to press on the clutch with considerable force. When doing so he felt pain. So he gave up the employment after working for 3 days. Then he found a job as a part-time messenger at Briefing Consulting Company from April 2006 he worked full-time. In this employment he has to drive a private car with automatic transmission. So there is no need to engage the clutch. Furthermore he only has to drive once or twice each month. So he manages to do this job. I am satisfied that the Plaintiff has taken reasonable steps to mitigate his own loss. The pre-trial loss of earning for the 962 (and

not 976) days of sick leave, coupled with the loss of the benefit of Mandatory Provident Fund, for the sick leave period is \$354,376.75 ($\$10,525 \times 962/30 \times 1.05$). The pre-trial loss of earnings from 8 September 2005 to trial (i.e. 2 August 2006) is \$70,275 [$(\$10,525 - \$3,500) \times 7 + (\$10,525 - \$5,250) \times 4$]. The total loss of pre-trial earnings including 5% MPF up to the date of trial (21 August 2006) is \$424,651.75 ($\$354,376.75 + \$70,275$). Future loss of earnings The Plaintiff was born on 13 June 1963. So he is now 42 years old. If not for the accident, he could have worked up to the age of 60. The appropriate multiplier, for the purpose of calculating future loss of earnings is 11. He said that another reason for him not to resume driving crane truck is that was afraid that the pain at his back might endanger other road users. When pressed hard on the clutch of a crane truck that action would result in a great discomfort which in turn would increase the possibility of traffic accident if he was unable to control crane truck. I accept that this is a valid reason for him not to resume driving crane truck. He is fit to do the present job which requires driving a private car with automatic transmission once or twice per month. But from this kind of light work he is earning less than what he earned before the accident. Therefore he should be awarded damage for the future loss of earnings. He is earning \$5,250 per month. He suffers a loss of \$5,275 ($\$10,525 - \$5,250$) per month. The appropriate multiplier to be applied is 11. The loss under this head (together with loss of Mandatory Provident Fund) is \$731,115 ($\$5,275 \times 12 \times 11 \times 1.05$). Loss of earning capacity The Defendant contends that the Plaintiff has not suffered from any loss of earning capacity as a result of the accident. If there is any loss of earning capacity, it was occasioned by the Plaintiff's failure to seek employment soon after his injuries. It further submits that there is uncontested evidence from Dr. Li Po Chin that suggests that the Plaintiff suffers from degenerative changes at his lower back and is therefore likely to deteriorate in the coming future regardless of the injuries sustained in the accident. If the Plaintiff suffers from any disadvantage in the labour market, the disadvantage would have been caused by the degenerative condition, regardless of the accident. There is no evidence to show how his degenerative changes at his lower back, if there is deterioration, would affect his earning capacity. The reality is, the pain at his lower back was caused by the incident, and when he operated a heavy truck, he had to apply force to the clutch, and the pain at his back caused him problem in doing so. He still has the back pain. So he suffers a handicap in the labour market when competing with other healthy workers. Therefore he suffers a loss of earning capacity. Under this head, I grant him \$52,500 ($\$5,250 \times 10$). Special damages The Defendant does not dispute the amount claimed, namely, \$13,389, under this head of damages. I therefore grant him an award of \$13,389. Future medical expenses The Plaintiff claims \$21,500 under this head. Professor Peter Lee stated in his report that the Plaintiff should attend 5 sessions of psychotherapy. The average cost of which is \$1,500 per session, if provided in the private sector. The Plaintiff should attend such sessions of psychotherapy in hospitals run by the Hospital Authority. There is no need for him to seek help from private doctors. I therefore would not make any award under this head. The total award to be granted to the Plaintiff is as follows:- Pain, suffering and loss of amenities \$180,000.00 Pre-trial loss of earning inclusive of MPF \$424,651.75 Future loss of earnings inclusive of MPF \$731,115.00 Loss of earning capacity \$52,500.00 Future medical expenses nil Special

\$1,401,655.75 Less: Employees compensation received \$407,840.00

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