DCPI 229/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 229 OF 2007

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

BETWEEN

CHAN CHI SHING Plaintiff

and

CHAN SHU KUEN (in bankruptcy) 1st Defendant

WAN KEE ENGINEERING COMPANY

LIMITED (in liquidation) 2nd Defendant

EMPLOYEES’ COMPENSATION

ASSISTANCE FUND BOARD 3rd Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 7 November 2008

Last date of further written submissions: 11 November 2008

Date of judgment: 11 February 2009

**ASSESSMENT OF DAMAGES**

1. Shing (the Plaintiff) was a 45-year-old painter employed by Kuen (the 1st Defendant). On 5 February 2004, Shing fell from a height of some 4.5 metres in the course of painting the ceiling of a garage from the top of a scaffold that collapsed. The work was subcontracted by Wan Kee (the 2nd Defendant) to Kuen. Shing claimed damages for his injuries against Kuen and Wan Kee. Kuen and Wan Kee became insolvent.
2. On 5 March 2008, interlocutory judgment was entered against Kuen and Wan Kee for damages to be assessed and costs. The assessment was supposed to be heard on 3 October 2008. In mid-September 2008, the Board intervened and was joined (as the 3rd Defendant) pursuant to section 25A of the Employees Compensation Assistance Ordinance, Cap. 365. The assessment hearing was adjourned.

**INJURIES AND TREATMENT**

1. After the accident, Shing was sent to the hospital. X-ray revealed collapse and compression fracture of L4 vertebra and comminuted intra-articular fracture of calcaneum of the right ankle. Open reduction and internal fixation of the calcaneum fracture were performed. Shing was discharged 12 days later. Physiotherapy commenced in the following month. He had 20 such sessions over a period of 4 months. This was followed by 41 sessions of occupational therapy that lasted until the end of the year. In March 2005, Shing was re-admitted for the removal of the metal implants. He was followed up 11 times afterwards. Sick leave was granted until 7 April and on 5 May of 2005.

**PRESENT COMPLAINT**

1. Shing now complained about persistent right ankle pain particularly on weight bearing. He is unable to sit for more than 30 minutes or squat for more than 5 minutes. He has difficulty in balancing his body due to the pain in his right leg. He is unable to lift heavy objects.

**MEDICAL EXPERT OPINION**

1. The medical expert reports were adduced without the experts being called to give evidence. It is fair to say that the medical experts do not differ materially in their assessment.
2. Shing’s solicitors arranged him to be examined by Dr Lam Kwong Chin on 24 July 2007. In his report dated 13 August 2007, Dr Lam opined that it is extremely difficult to restore a comminuted intra-articular calcaneum fracture to a perfect alignment. Some degree of residual joint pain and limitation of movement is common. Sideward movement at the subtalar joint would be affected. One with such injury would usually have more problems with uneven ground.
3. Dr Lam opined that Shing could continue to work as a painter but his working efficiency and endurance would be much affected. He was advised to avoid working on uneven grounds in construction sites, climbing scaffoldings, climbing high ladders or lifting heavy load. He might need to take more rests.
4. Shing was examined by Dr Danny Tsoi, the expert arranged by the Board, on 13 October 2008. In his report dated 21 October 2008, Dr Tsoi considered that Shing is expected to have residual back and right heel soreness on prolonged walking and manual activities. Analgesics may be needed. He also opined that Shing may encounter right heel discomfort when walking on uneven surface for long period of time. Frequent weight lifting would also trigger back pain and should be avoided.
5. Dr Tsoi also considered that the above would adversely affect his working capacity. Like Dr Lam, he also considered that Shing is less fit to climb ladder, scaffold or working on uneven surface. Shing was also advised to avoid lifting heavy object over 50 kg.
6. Both experts considered that the treatment has been appropriate and recommended no further treatment. Dr Lam assessed that the combined impairment of the back and ankle would be 14%. He assessed the loss of earning capacity to be of the same percentage degree. Dr Tsoi’s assessment was 12% for the combined impairment and the same percentage for the loss of earning capacity. Both experts considered that the sick leave granted up to 7 April 2005 was reasonable. Dr Tsoi added that further sick leave would not be justified.

**PAIN, SUFFERING AND LOSS OF AMENITIES (PSLA)**

1. Shing claims an amount of HK$450,000 for his PSLA. The Board offered HK$300,000.
2. Mr Tang referred to the following cases as comparables:
   * 1. *Wong Woon Hei v Sickson Construction Co Ltd & Anor*, HCPI 521/2000, 3 July 2001; and
     2. *Siu Wai Man Ada v Lee Chi Chong & Anor*, HCPI 174/1994, 9 November 1998.
3. Ms Loh referred to the following cases as comparables;
   * 1. *Chan Cheuk Ki v Poon Yu Cheung & Anor*, HCA A9146/1991, 26 October 1995;
     2. *Choy Wai Chung v Chun Wo Construction & Engineering Company Limited*, HCPI 605/1999, 16 December 2003;
     3. *Cheung Hei Kwong v Kwong Key Construction & Engineering Limited*, HCPI 1260/1999, 13 March 2003;
     4. *Hau Kit Ho v Starway International Development Limited*, DCPI 329/2002, 22 September 2003;
     5. *Yip Wai Chung v Kwong Leung Engineering Company Limited*, HCPI 162/2005, 28 November 2005;
     6. *Ma Chi Fu v Law Tit Wing & Anor* [1986] HKLY 413
     7. *Yu Kwok Shing v Color Cells Far East Ltd* [1995] HKLDY 520
     8. *Lam Mei Fung v The Incorporated Owners of Yue Tin Court*, DCPI 1237/2005, 2 April 2008
     9. *Siu Kwai Hung v National Fortune Investment Limited*, HCPI 577/1995, 27 February 1996; and
     10. *Ng Wah Chun v Cheng Wing Chung & Ors*, HCPI 164/2001, 27 September 2002.
4. Ms Loh submitted that case (5) above is similar to the present case and cases (9) and (10) above are particularly helpful.
5. I find the cases cited by Ms Loh were either noticeably less serious than the present case or contained quite peculiar facts gearing the court towards the particular conclusions.
6. The case of *Wong Woon Hei* cited by Mr Tang is similar to the present case in that it also involved a painter of a similar age falling from the platform in the course of painting the ceiling. The painter suffered fracture of the left calcaneum and received similar treatment to the ankle as Shing’s. Whilst there was no fracture to the painter’s back as in the case of Shing, that case is still clearly more serious than the combined impairment suffered by Shing.
7. I do not propose to spell out all the analysis that I have gone through. It suffices for me to say that I have considered each of these cases against the circumstances and condition of Shing. I find that an award of HK$350,000 would be an appropriate award here.

**LOSS OF EARNINGS**

**Pre-accident income**

1. Shing claims his pre-accident daily wage was HK$750. Parties differed mainly on the number of his working days per month – Shing said 26 days whereas the Board accepted a maximum of 20 days.
2. Mr Tang drew my attention to the related employees’ compensation case between Shing as the applicant and Kuen and Wan Kee as the respondents (DCEC 785/2005). According to the written judgment dated 10 October 2006, Kuen appeared in person at the trial while Wan Kee was absent. Regarding quantum, Kuen put Shing to strict proof. The learned Deputy Judge accepted Shing’s evidence and found that he worked 26 days a month immediately prior to the accident. Accordingly, compensation was assessed on the basis of monthly income of HK$750 x 26 days, i.e., HK$19,500, precisely what Shing claims in the present action.
3. There was no appeal in the employees’ compensation case. There can be no dispute that Kuen is bound by such finding. Mr Tang submitted that the Board was also bound by such finding and was not entitled to re-litigate the issue of Shing’s pre-accident income.
4. I allowed Ms Loh to cross-examine Shing on the issue but made clear that all would be subject to my ruling, as part of this judgment, on the issue estoppel point. Now for the following reasons, I agree with Mr Tang.
5. Insofar as employees’ compensation is concerned, any eligible person who is unable to recover from the employer payment of any amount of *compensation* for which the employer is liable may apply for payment of such amount from the assistance fund: see section 16 of Cap.365.
6. Likewise, any eligible person who is unable to recover from an employer payment of any amount of *damages* for which the employer is liable may apply for a relief payment of that amount from the assistance fund: see section 20A of Cap.365.
7. In view of such potential liability to satisfy the judgment or order to pay compensation or damages, Cap.365 expressly provides that the Board may apply to be joined in these proceedings under section 25A:

“If proceedings have been initiated to claim compensation or damages …… , the Board may apply to the court to be joined as a party to the proceedings as follows:

* 1. where no policy of insurance is known to be in force at the time of the accident to which the proceedings relate, the Board may apply to the court to join in the proceedings as a party in accordance with …… Order 15, rule 6 of the Rules of the District Court (Cap. 336 sub.leg. H), …… to take over the defence as if it were the employer in the proceedings if –

……

* 1. the employer is insolvent

……

(v) at any time when the employer fails to attend the hearing, leaving the claim uncontested;

(b) ……”

(underline added)

1. The Board did not intervene in the employees’ compensation case. If Shing applied for payment of the amount of compensation from the assistance fund under section 16 of Cap.365, the Board could hardly have taken any issue about the findings in that case.
2. In the present case, notwithstanding notice of Shing’s claim, and therefore the potential liability to satisfy any judgment for damages under section 20A, the Board chose not to intervene until 2 weeks prior to the original assessment hearing date.

1. If the Board may apply to be joined to take over the defence to contest the claim as if the Board were the employer in the proceedings, I fail to see how it is justified to allow the Board to re-open any issues of which the court has already made findings binding on the employer prior to such joinder.
2. During the hearing, I also drew counsel’s attention to the principles of issue estoppel in respect of re-litigation concerning a party who was not involved in the earlier action. The principles were helpfully summarised in *Nu Life International Limited v Healthy Living Products International Limited* [2008] 2 HKLRD 297 at paras.43-46. It was said that the parties in the subsequent action do not have to be the same for the rule to apply. The question is whether there is a sufficient degree of identification between the earlier litigant such that it is just to find that the decision binding on one party must be binding on the other.
3. In my view, by the provisions under section 20A, the Board upon being joined effectively stands in the shoes of the employer in the proceedings. Seeking to re-open the issue of Shing’s pre-accident income amounts to a collateral attack on the finding by the court in respect of this issue in the employees’ compensation case. The issue was common to both the compensation case and the present case. It is therefore just to find that the court’s decision on this issue binding on Kuen is also binding on the Board.
4. Lastly, even if I were to consider the evidence regarding the pre-accident income, I would have accepted Shing’s evidence that he used to work 26 days a month immediately prior to the accident, despite Ms Loh’s attempt to cast doubt on how realistic that was.
5. I find that Shing used to earn HK$(750 x 26) = HK$19,500 a month prior to the accident.

**Pre-trial loss**

1. Considering the medical expert opinion, I am satisfied that he suffered total loss of income during the sick leave period. The amount was HK$19,500 x 14 months = HK$273,000.00.
2. Immediately after the sick leave, Shing resumed work as a painter. According to Shing, during the 9 months until the end of December 2005, he earned a daily wage of HK$650-700 (or a median of HK$675) for 10-15 (or a median of 12.5) days of work a month. During the 21 months between January 2006 and September 2007, he earned a daily wage of HK$700 for 15-20 (or a median of 17.5) days of work a month. During the 13 months from October 2007 to October 2008, he earned a daily wage of HK$750 for 15-20 (also a median of 17.5) days of work a month. He worked for various employers and was paid in cash.
3. Ms Loh questioned Shing about the causation between his physical condition and the lower daily wage rate and/or the lesser working days per month than before. As to the lower daily wage rate, Shing was fair enough to say that this had to do with the market environment rather than his disability. But he was firm about the impact of his physical condition on his ability to work as many days as before. According to him, he had to take more rests. This, I find, is largely supported by the medical experts’ opinion. I do not believe that Shing exaggerated his inability to work. On the contrary, he impressed me as being keen to work. As mentioned above, he managed to and did work for more days a month on average since 2006.
4. I accept Shing’s evidence and find that he suffered loss of income as a result of managing to work for lesser days per month on average. I do not accept the calculation proposed by Ms Loh. The loss was as follows:

*From 8 April 2005 to end of December 2005*:

HK$675 x (26 – 12.5) days x 9 months = HK$82,012.50

*From January 2006 to September 2007*:

HK$700 x (26 – 17.5) days x 21 months = HK$124,950.00

*From October 2007 to October 2008*:

HK$750 x (26 – 17.5) days x 13 months = HK$82,875.00

1. The total loss of earnings up to now was:

HK$(273,000 + 82,012.50 + 124,950.00 + 82,875.00) = HK$562,837.50

**Future loss**

1. Ms Loh conceded that Shing would suffer future loss of earnings.
2. In his evidence, Shing said that probably because of the recent economic crisis, it has become “quieter” in his field in these recent months. This was not followed up during cross-examination. Nor was there any concrete evidence of the actual or likely surfacing of the effect of the economic situation on his daily wage or number of working days. I should refrain from guessing or assuming that in the future, due to the economic situation, Shing would have received a lower daily wage or worked less days a month than before or even now, even in the absence of the accident.
3. I therefore still adopt the difference in the number of working days now, namely, (26 – 17.5) days or 8.5 days, for the calculation.
4. Counsel were helpful in citing numerous authorities regarding the multiplier. Mr Tang submitted that 8 to 9 is the appropriate multiplier whereas Ms Loh submitted that the norm in the circumstances of Shing should be 4 to 6 only. In saying that 4 to 6 is the norm, Ms Loh referred me to a number of factors including Shing’s age and whether he really needs to work and to support family.
5. Shing was not well educated. Since his arrival from the Mainland in 1979, he has always been a painter. As mentioned above, Shing impressed me as being keen to work. Whilst his children are independent, he still supports his mother in the Mainland. According to him, he was not really aware of the any mandatory provident fund (MPF) contribution all these years. He would work to save for the rainy days. I accept his evidence. I agree with Mr Tang and find that 8 is the appropriate multiplier.
6. The future loss of earnings will be HK$750 x 8.5 days x 12 months x 8 = HK$612,000.00.

**Loss of MPF benefits**

1. There is claim for Shing’s loss of MPF benefits on the amount of his loss of earnings, both pre-trial and future. Shing essentially worked and still works on a casual and daily wage basis for different employers. As mentioned above, it was his evidence that all these years, he was not aware that he had any MPF contribution benefits. He could only recall having made HK$2,000 contribution years ago. Damages are compensatory and it is his burden to prove his loss rather than assumed entitlement. I am not satisfied on balance that he has discharged the burden of proving such loss. I do not allow this item of claim.

**LOSS OF EARNING CAPACITY**

1. Ms Loh’s position was that this head of claim would be agreeable only if there is no loss of earnings. As a matter of principle, I do not agree. As a matter of pleading, this was not quite the position stated in the Board’s answer. As a matter of fact, in view of the medical expert opinion and Shing’s evidence, I accept Mr Tang’s submission that Shing will suffer disadvantage in the labour market. Considering the current income level of Shing, I award the sum of HK$50,000 as claimed.

**MISCELLANEOUS SPECIAL DAMAGES**

1. The medical expenses claimed is HK$4,957. Of this, the Board disputed the sum of HK$1,200 on bone setting treatment. There was no receipt. According to Shing, it was upon his friend’s recommendation that he went to Mainland for such treatment for 4 times at HK$300 each. Yet he confessed that such treatment did not help much. I accept his evidence.
2. I think it is not unreasonable for a Chinese like Shing to resort to such treatment, notwithstanding the lack of medical advice and effect of such treatment. Shing was sensible enough to stop the treatment as this did not help. Whether the treatment was in Hong Kong or the Mainland is not material, in view of the number of times and cost of such treatment as well as the lack of claim for the incidental travelling expenses. I therefore allow the amount as claimed.
3. Travelling expenses and cost of tonic food were agreed at HK$1,870.50 and HK$5,000 respectively.

**SUMMARY**

1. In summary, the award will be:

PSLA HK$ 350,000.00

Loss of earnings

Pre-trial HK$ 562,837.50

Future HK$ 612,000.00

Loss of earning capacity HK$ 50,000.00

Miscellaneous special damages HK$ 11,827.50

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

TOTAL: HK$1,586,665.00

LESS: employees’ compensation HK$ 345,367.00

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

TOTAL: HK$1,241,298.00

1. Pursuant to section 34(2) of the District Court Ordinance, I cannot award damages exceeding this court’s monetary jurisdiction. I therefore award HK$1,000,000.

**INTEREST**

1. Interest on general damages (PSLA) runs at 2% per annum from the date of writ to today. Interest on special damages (loss of earnings and miscellaneous special damages) runs at half judgment rate from the date of accident to today, deducting the interest on the employees’ compensation received by Shing, according to counsel, in June 2008 and in the sum of 63,338.72 (HK$408,705.72 – 345,367.00).

**COSTS**

1. No order shall be made against the Board for payment in the present action. This is clearly the effect of section 20A of Cap.365: see also *Chen XiuMei v Li Siu Wo & Anor*, CACV 26/2007, 14 April 2008 (in the context of construing section 16). However, there was somehow the issue of whether the Board is liable to pay Shing’s costs of the assessment. I say ‘somehow’ because Ms Loh actually conceded that the Board should pay costs of the assessment hearing to Shing whilst Mr Tang expressed doubt as to the basis for such concession.
2. As Mr Tang noticed, the costs incurred by the claimant for common law damages and that for employees’ compensation are treated differently under sections 20B and 23 of Cap.365. Essentially, the Board is only responsible for making relief payment in the amount of the *damages* pursuant to an application under section 20A. Section 20B(3) makes it clear that such relief payment shall not include any costs arising from the claim.
3. However, Ms Loh referred to *Lau Tuen Ping v Law Wai Kwong & Anor*, HCPI 1221/2000, 15 April 2003 in which she was involved as counsel. There the Master considered that for the assessment proceedings, the question of costs between the plaintiff and the Board as a party is within the discretion of the court under section 52A of the High Court Ordinance (which is equivalent to section 53 of the District Court Ordinance). He therefore ordered costs of the assessment against the Board.
4. However tempted I feel, I do not propose, as I was not asked, to decide this point. Of course, Mr Tang had to no reason to insist. Therefore I shall order as Ms Loh conceded.

**CONCLUSION**

1. The conclusion is that Kuen and Wan Kee shall pay damages in the sum of HK$1,000,000. Interest to today as mentioned in paragraph 50 above. Thereafter interest shall run at the judgment rate until full payment. The costs that Kuen and Wan Kee has been ordered to pay shall be that of this action including these assessment proceedings. The Board shall pay Shing’s costs of the assessment hearing. Costs shall be taxed if not agreed. For the avoidance of doubt, I certify the engagement of counsel. Shing’s own costs shall be subject to legal aid taxation. Parties have 14 days to make an appointment to argue costs or else this costs order shall become absolute.

**REMARK**

1. From the outset, Shing was claiming an amount of damages, net of the known employees’ compensation award, which materially exceeds the monetary jurisdiction of this court. This was clear from the original statement of damages. Nevertheless, Shing managed to obtain interlocutory judgment. The amount claimed was only slightly reduced in the revised statement of damages. There was no pleading or record of the court’s consideration of whether Shing abandoned any claim in excess of the monetary jurisdiction pursuant to section 34(1) of the District Court Ordinance. I cannot undo the judgment either. This is not desirable.
2. I appreciate the situation where the quantification of the claim may be difficult especially when the employees’ compensation claim is still pending and therefore whether and, if yes, how much compensation would be awarded and to be deducted is unknown. However it is the duty of the parties to review the situation constantly and to draw the court’s attention to the realistic amount claimed whenever ascertained. The court could then consider whether there is any jurisdiction issue or whether the plaintiff will put on record of his or her position pursuant to section 34(1).

Simon Leung

District Judge

Mr Ronald Tang, counsel assigned by the Director of Legal Aid for the Plaintiff

The 1st Defendant, in person, absent

The 2nd Defendant, in person, absent

Ms Phyllis Loh instructed by Messrs P C Woo & Co for the 3rd Defendant