#### DCPI 423/2006

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 423 OF 2006

BETWEEN

YAN SUNG BIK YU Plaintiff

and

LIU CHING MAN Defendant

trading as WA FAI

MARBLE COMPANY

##### Coram: Deputy District Judge J. Ko in Court

Date of Hearing: 19 March 2008

Date of Judgment: 19 March 2008

## ASSESSMENT OF DAMAGES

1. This is the hearing of the assessment of the plaintiff’s damages in this action.
2. The defendant was carrying on the business of selling marble materials and products. The plaintiff was a marble installation worker and was an employee of the defendant.
3. On 15 March 2003, the plaintiff was working in the defendant’s marble factory in Yuen Long when he was instructed by the defendant to cut a piece of marble for a customer. As the plaintiff was moving a sheet of 6 feet x 3 feet marble of about 6/8-inch thick onto a trolley so as to prepare it for cutting, the corner of the marble broke. The marble fell on his left foot and the plaintiff sustained injury.
4. By this action, the plaintiff claims against the defendant for damages for personal injuries sustained and other loss and damage suffered. The defendant failed to serve a defence and interlocutory judgment was entered on 8 August 2007 with damages to be assessed.
5. The defendant is absent at this assessment. I am satisfied that the defendant has been duly notified of this hearing and I therefore proceed with the assessment in the absence of the defendant.
6. According to the revised statement of damages, the plaintiff is claiming the following heads of damages:

(a) pain, suffering and loss of amenities;

(b) pre-trial loss of earnings;

(c) loss of earning capacity;

(d) medical expenses; and

(e) travelling expenses.

(a) PSLA

1. The plaintiff was aged 41 at the time of the accident and is now 47 years old.
2. On 15 March 2003 after the accident, the plaintiff attended Dr Cheung Wai-kuen for treatment. Dr Cheung observed bruises, swelling and tenderness over the plaintiff’s left foot. X-rays showed fracture of the second metatarsal bone. The plaintiff was prescribed with analgesic. The plaintiff subsequently attended six follow-up treatments with Dr Cheung.
3. The plaintiff was referred to the Department of Orthopaedics and Traumatology at Tuen Mun Hospital because of persistent left foot pain. Physical examination by the doctor there revealed no swelling, deformity or any tender spot over the plaintiff’s left foot. X-rays showed the fracture in the left second metatarsal bone had healed with good alignment. Residual pain and stiffness in the left foot was, however, noted. The plaintiff was referred to the Department of Physiotherapy and Occupational Therapy for treatment.
4. The plaintiff attended three occupational therapy sessions at Tuen Mun Hospital commencing on 23 June 2003. At the initial assessment, the plaintiff’s left ankle and toes were noted to have nearly full range of movement and grade 5-5 muscle power. He could lift a maximum load of 57.5 pounds but complained of foot pain in walking and required adapted walking gait. At the second session, the plaintiff could lift a 40-pound object for 20 minutes but with complaint of moderate level of pain. The plaintiff attended two sessions of physiotherapy between 14 July and 28 July 2003. The plaintiff also received treatments from bonesetters.
5. A total of 220 days of sick leave was granted from 15 March to 21 October 2003. The present complaints of the plaintiff include pain in the left foot, especially after walking for a while or during bad weather, and the plaintiff needs constant rest. The plaintiff has to be mindful of his left foot injury when doing exercise and at work.
6. The plaintiff’s solicitor relies on *Wong Sam Mui*, HCA 1817/1994, 6/3/95 (Master O’Donnell), *To Ying Wa*, HCPI 441/2000, 22/1/01 (Master de Souza), *Lee Sze Wai*, DCPI 44/2001, 10/5/02 (Deputy District Judge R Yu), and *Wong Yuk Foon*, DCPI 1025/2006, 8/11/07 (HH Judge Lok)and suggests an award of $180,000.
7. In *Wong Sam Mui*, the plaintiff’s right foot was struck by iron tubes, as a result of which his foot became swollen and there were two lacerations on the dorsal of his foot. X-rays showed undisplayed fractures of the second and third metatarsal bones. The learned Master awarded $50,000 for PSLA in 1995. I agree with the learned judge in *Wong Yuk Foon* that the award in *Wong Sam Mui* is too low and is restricted to its particular facts.
8. In *To Ying Wa*, the plaintiff sustained fractures of his fourth and fifth metacarpals of the right foot as a result of traffic accident. Close reduction and K-wire fixation was carried out. The learned Master regarded the injury as moderate and awarded $200,000 for PSLA. The injury suffered by the plaintiff in this case is not as serious as that in *To Ying Wa*.
9. In *Lee Sze Wai*, the plaintiff was awarded $150,000 for a fractured second metatarsal in the left foot as well as left ankle pain. Lastly, the plaintiff in *Wong Yuk Foon* was awarded $150,000 for a fractured fifth metatarsal bone in the left foot resulting from a slip-and-fall accident with permanent residual pain.
10. The plaintiff has not engaged his own medical expert to assess his injuries for the purpose of this action. However, the assessment of the Employees’ Compensation Ordinary Assessment Board that the plaintiff is suffering from 1% permanent loss of earning capacity as a result of the injury goes some way to confirm the residual effect of the injury on the plaintiff.
11. Having regard to the injuries sustained by the plaintiff, the pain associated with such injury, the recovery process and the present complaints, I agree with the plaintiff’s solicitor that an award of $180,000 for PSLA is appropriate.

(b) Pre-trial Loss of Earnings

1. The defendant was present at the trial of the related employee’s compensation proceeding and the learned Judge there found that the plaintiff’s average monthly earnings for the year immediately before the accident was $11,932.29. The plaintiff has adopted this finding in this action.
2. Sick leave was granted from 15 March 2003 to 21 October 2003, totalling 220 days. The plaintiff’s loss of earnings including MPF for this period is therefore $91,878.63.
3. According to the plaintiff, the defendant refused to hire him back after the sick leave period. The plaintiff tried to look for gainful employment but was unable to find any until after Chinese New Year in 2004. He was not able to resume working as a marble worker because of his injury and the fact that many marble factories had moved back to the Mainland. Given his educational background, he ended up working as a casual worker in construction sites. There is nothing to cast doubt on the plaintiff’s case. The loss of earnings for the period from the end of the sick leave period to February 2004 is $43,015.90.
4. As I have noted above, the plaintiff’s has been working as a casual worker in construction sites since about February 2004. On average, he earns about $10,400 per month. Again, there is nothing to cast doubt on the plaintiff’s case. The loss of earnings from February to this assessment is $78,836.32.
5. Total pre-trial loss of earnings therefore comes to $213,731.

(c) Loss of Earning Capacity

1. An award for loss of earning capacity is intended to cover risks that at some future date during the plaintiff’s working life he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market.
2. The fact that the plaintiff was not able to hold down a job for about three months after the sick leave period is evidence of the plaintiff’s disadvantage in the labour market. The plaintiff claims $80,000 under this head. This is roughly equivalent to about seven months of income. I consider such claim reasonable.

(d) Medical Expenses

1. The plaintiff is claiming $10,020 for medical expenses in this action. No award was made for paid medical expenses in the related employee’s compensation proceeding. Receipts have been produced to confirm such expenditure. The claim under this head is therefore allowed in full.

(e) Travelling Expenses

1. The plaintiff is claiming $800 for travelling expenses. No receipt is kept for this expenditure. According to the plaintiff, he took taxis and public transportation to attend treatments. I find the amount reasonable enough. Having regard to the number of treatments attended, this claim is also allowed in full.
2. In conclusion, the quantum of the plaintiff’s claim is assessed as follows:

PSLA $180,000

Pre-trial loss of earnings $213,731

Loss of earning capacity $80,000

Medical expenses $10,020

Travelling expenses $800

Less: Award in DCEC 930 of 2003 -$78,594

##### Total $405,957

1. Interest will be awarded at 2% per annum on damages for PSLA from the date of the writ. Interest on other special damages will be awarded at half the judgment rate from the date of the incident. The plaintiff’s solicitors are directed to calculate the amount of interest to be included in the judgment.
2. Costs normally follows the event. I order the defendant to pay the plaintiff’s costs of this assessment, to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

# J Ko

# Deputy District Judge

Mr Bilan Mak, of B Mak & Co., for the Plaintiff

Defendant, in person, absent