## DCPI 500/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 500 OF 2013

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##### BETWEEN

CHUNG HOI KIN Plaintiff

### and

CHOI SHUN YIN 1st Defendant

LAI HOI MAN TRADING AS 2nd Defendant

PAKLI TRANSPORT COMPANY

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Before: His Honour Judge Andrew Li

Date of Hearing: 26 September 2013

Date of handing down Assessment of Damages: 25 October 2013

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ASSESSMENT OF DAMAGES

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1. This is an assessment of damages for personal injury sustained by the plaintiff in an industrial accident that happened on 15 September 2010. On that day, while the plaintiff was working at the cargo terminal of the airport, he was run into from behind by a forklift truck driven by one of his colleagues, the 1st defendant. At the time of the accident, both the plaintiff and the 1st defendant were employed by the 2nd defendant (“the accident”).

*Background*

1. This action was first commenced in the High Court on 27 April 2012. As no notice of intention to defend had been given by the defendants, interlocutory judgment was entered against them on 25 July 2012 with damages to be assessed. Subsequently, the action was transferred to the District Court on 8 March 2013 pursuant to the Order of Master Leong in the High Court. The Revised Statement of Damages has been filed by the plaintiff on 12 March 2013. Although the defendants have been served with the paper for the assessment, it was clear that they expressed no interest in attending the assessment hearing. Hence, the assessment proceeded as scheduled.

*The Injuries*

1. As a result of the accident, the plaintiff sustained a 10 cm laceration over the postero-lateral side of his right leg. He was admitted by ambulance into the Accident & Emergency Department of the Princess Margaret Hospital (“PMH”) where an emergency operation was carried out. The operation involved 50% cut of the peroneus longus and gastrocnemius muscles of the right leg. At the same time, the right sural nerve was found to be lacerated with tissue loss which was found to be beyond repair. Repair of the torn muscles was done during the operation. The plaintiff was given a right ankle orthosis for the protection of muscle repair. He was discharged on 21 September 2010 with short leg splint. This splint was worn for about 2 to 3 months. After removed of the splint, the plaintiff used 2 crutches for walking until end of December 2010, ie some 2½ months after the accident.
2. After discharged from the hospital, the plaintiff also received follow up treatment at the Department of Orthopaedics and Traumatology of PMH until 20 April 2011. By then, he was able to walk unaided with residual weakness and numbness over his right leg. The plaintiff received 10 sessions of physiotherapy at the out-patient clinic at PMH from 11 April 2010 to 12 January 2011. Treatment given included magnetopause therapy, ultrasound therapy, ankle mobilizing and strengthening exercise and walking exercise. He was also referred to the occupational therapy out-patient service at the PMH for work capacity evaluation. He was assessed to be below his previous job demand with significant degree of limitation due to the residual symptoms and his reduced physical ability. The plaintiff was unable to attend the work rehabilitation programme offered by the Occupational Service Department of PMH due to receiving detoxification treatment for ketamine abuse. (However, I have been informed by plaintiff’s counsel at the beginning of the hearing that the plaintiff has since remaining drug free after the treatment and is now able to hold down to a rather promising job.)
3. As result of the accident, the plaintiff was granted sick leave from the date of accident, ie 15 September 2010 to 20 April 2011, a total of 218 days.
4. The plaintiff’s present complaints included episodic feeling of imbalance while walking on level ground; on and off right leg pain on rising up from continuous sitting for half an hour; right leg soreness after prolonged walking for 45 minutes, feeling of right ankle weakness; spontaneous pain over the left scar which sometimes causes transient muscle cramps, as well as sensation of pins and needles; decreased endurance in performance squatting; right leg pain after running or after strenuous activities; tightness in the posterior right leg when stretches his leg with knee extended; weakness in ankle when performing ankle movement with toes pointing downwards and upwards; and numbness felt over a localized area in the right leg beneath the oblique scar.
5. The plaintiff also complained of physiological problem which has not been verified by any independent medical evidence. They included not able to sleep well; suffer from irritable mood; depression and anxiety and cannot control his temper. He also reported that he has low self-esteem and self-image due to his reduced work capacity which was assessed to be un-matched with his previous job demand with significant degree of limitation.

*The orthopedic expert evidence*

1. According to the medical report dated 6 November 2011 written by Dr Arthur Chiang, the orthopedic expert appointed on behalf of the plaintiff, the diagnosis of deep laceration of right leg with partial cut of the proneus longus and gastrocnemius, and laceration of the sural nerve were consisted with most of injury described by the plaintiff. Dr Chiang opines that the treatments given were appropriate except that he considers the plaintiff would benefit from a longer course of physiotherapy which had not been done due to the detoxification treatment undergone by the plaintiff.
2. A significant finding of Dr Chiang in his report was that there was a 1.5 cm decrease in the circumference of the right thigh and leg as compared with the normal left side. This indicates that there was noticeable muscle wastage on the right thigh due to lack of activities.
3. In taking an overall view from the examination findings, Dr Chiang considers that the repair of cut muscle had acquired a satisfactory result. He is of the opinion that the residues are likely to be related to the residual tightness in the right gastrocnemius and the Achilles tendon, the localized adhesion of the scar to the underlying soft tissues; and the decrease in muscle bulk of the right thigh and calf. Dr Chiang is also of the opinion that “the plaintiff would likely to have a satisfactory capacity in prolonged walking and standing and in the handling of weights”. In his opinion, there would be some reduction in the endurance for continuous and prolonged heavy manual work activities, as well as unduly prolonged walking and standing. In his view, such residues would unlikely cause imbalance in walking, which might probably be mild weak feeling with prolonged manual activities. In Dr Chiang’s opinion, the plaintiff should be able to return to work in his pre-injury job with reduction efficiency.
4. The permanent impairment of the whole person for the residues after completing a recommended course of physiotherapy is assessed by Dr Chiang at 3%. Dr Chiang agrees with the assessment by the Medical Assessment Board on the loss of earning capacity at 7%.

*GENERAL AND SPECIAL DAMAGES*

*Damages for pain, suffering and loss of amenities (“PSLA”)*

1. As stated, the plaintiff’s injury consisted of 50% cut of the proneus longus muscle, 50% cut of the gastrocnemius muscle and laceration of the sural nerve with tissue loss. The laceration of the sural nerve was found to be beyond repair but the cut to the perones longus and the gastrocnemius were repaired with suturing of the wound. According to Dr Chiang, the perones longus is a muscle that originates from the upper 2/3 of the lateral aspect of the fibula of the leg. It is responsible for the eversion and contributes to plantarflexion of the foot. On the other hand, the gastrocnemius is one of the calf muscles which arise from the end of the back of the femur. The muscle fibres then end as the Achilles tendon inserts into the posterior part of the calcaneum of the ankle. It platarflexes the foot and ankle.
2. The sural nerve passes down the middle of the leg and joins with a branch of the common peroneal nerve which ends to supple the skin of the lateral side of the foot and little toe. The sural nerve is a sensory nerve and does not have motor supply to the muscles.
3. Miss Christina Lee, counsel of the plaintiff, submits that the injuries sustained by plaintiff in the accident are rather unusual and it is difficult to find cases where victims might have suffered similar injuries. She referred me to the case of *Chan Cheuk Yiu v Chan Ho Kwan* [2001] HCPI 879 of 2000 (1.6.2001; Master M Yuen) where an award of HK$145,000 was made as damages for PSLA. In that case, the victim of accident suffered a 5 cm laceration at the antero-laternal joint of right knee to the level of surface of joint. She also referred me to the case of *Li Pui Kei v Choi Kam Ming and others* [2007] DCPI 342 of 2002 (2.5.2007; Deputy Judge Wahab), where an award of HK$150,000 was made for PSLA in the case of a plaintiff who had sustained a 2 cm laceration over the back of the ankle which was found as a “50% cut of his Achilles tendon” that required surgery.
4. In my view, the plaintiff’s injuries are slightly more serious than those referred to by Miss Lee in the above two cases. Not only there were 50% cut to two different set of muscles in this case, there was also laceration of the sural nerve with tissue loss. As said, the laceration of the sural nerve, which is a Achilles nerve was found to be beyond repair.
5. Given the plaintiff’s relatively young age and active life style prior the accident, I am of the opinion that an award of HK$200,000 will be appropriate as damages for PSLA.

*Loss of pre-trial earnings*

1. At the time of the accident, the plaintiff worked as a freight packing worker. He claims that he was paid HK$12,000 a month and promised a free meal each day. He worked 26 days a month and the free meal is valued at HK$30 per day. However, save for the first month while he was working for the 2nd defendant when such free meal was provided, the free meal was withdrawn after he was relocated to work at the cargo terminal at the airport. Nonetheless, the plaintiff claims an average earnings at the time of accident at HK$12,312, which included the meal allowance. This estimated earning is different from the average earnings declared by the 2nd defendant under the Form 2 at HK$11,000.
2. For the period from 14 February 2012 to 8 November 2012, the plaintiff was able to find work at the Tai Hing Catering Group (太興飲食集團) as a packing worker. He earned a total of HK$93,243 from 11 February 2012 to 31 March 2013. From 10 December 2012 onwards, the plaintiff has changed his employment with Tai Hing from that of a full-time basis to part-time basis so that he could have more time to rest due to the pain experienced by him associated with heavy work. The hourly rate was at HK$35 per hour when he first shifted to the part-time work which was subsequent revised to HK$40 an hour on 16 December 2012.
3. From around 15 August 2013, the plaintiff started to undergo training as a transponder operator at Terminal 9 of the Tsing Yi Container Terminal. This is essentially a sedentary work which does not involve any manual labourer in moving of heavy objects, which was required both in his pre-accident job and the job with Tai Hing.
4. When giving evidence, the plaintiff told the court that the training went well and he expects that he will be offered the job of a transponder operator from about mid-October 2013 onwards. Upon successful completion of training and passing all the necessary tests, which the plaintiff is confident that he will able to do, he will be paid HK$778 per day or at HK$20,228 a month. During the one month training period (which the plaintiff was undergoing at the time of the hearing), he was being paid HK$340 a day. In other words, he will be earning more than what he was earning at the time of the accident once he completes his training. Hence, there will be no more claim for future loss of earnings.
5. Having heard the plaintiff when he gave evidence during the hearing, I am satisfied that he is essentially an honest and reliable witness. He seems to have managed to get rid of his drug addiction and has been able to hold down to some secure employment. I accept his evidence when he told the court that it was due to the residual syndrome in his right leg that had prevented him from working with Tai Hing. I am not surprised that he had to change his employment with Tai Hing as it involved moving of heavy packages of around 20 to 30 kg per pack throughout the day. I also accept that his change of employment from that of full-time to part-time basis with Tai Hing was also due to the pain experienced by him resulted from the accident. Fortunately, the plaintiff is able to find the present employment with the container terminal company working a transponder operator. I consider this job suits him well. Credit must be given to this young man for trying his best to mitigate his loss, despite of the injuries sustained.
6. In the absence of any evidence from the defendants, I further accept that he was earning an average of HK$12,312 per month at the time of the accident, including the meal allowance. I also accept what he told the court in regard to his earnings while he was employed by Tai Hing.
7. In the above circumstances, I am prepared to allow the following amount in terms of pre-trial loss of earnings:-
8. Total loss from 15 September 2010

to 13 February 2012

(HK$12,312 x 12) ÷ 365 days

x 517 days HK$209,270

(ii) Partial loss from 14 February 2012

to 14 August 2013

(HK$12,312 x 17) – [(HK$8,949 x 9)

+ (HK$7,545 x 8)] HK$68,403

(iii) Partial loss from 15 August 2013

to 14 October 2013

(HK$12,312 x 2) – (HK$340 x 26) x 2 HK$6,944

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HK$284,617

1. On top of the above figure, a 5% for loss of the mandatory provident fund should be added at HK$14,230.85 (HK$284,617 x 5%).
2. The total pre-trial loss of earnings in my view should therefore be at HK$298,847.85 (HK$284,617 + HK$14,230.85). I shall award the above sum accordingly by way of pre-trial loss of earnings in this case.

*Loss of future earnings*

1. As said, once he completes his training as a transponder operator at the Tsing Yi Container Terminal, he will be earning more than in his pre-accident job. Hence, there will be no award for any loss of earnings from the date when he completes his training with this new job from middle of October 2013 onwards. Accordingly, no award for the future loss of earnings will be made in this case.

*Loss of earning capacity*

1. I agree with Miss Lee’s submissions that the plaintiff will suffer a disadvantage in the open labour market as a result of the injuries sustained by him in the accident. Prior to the present employment, he had always been doing jobs involving with heavy manual labour. It is fortunate that his is able to find a sedentary job which pays him better than his pre-accident jobs at the moment. However, there is no guarantee that he may able to hold down to this job in the long term. This is consistent with Dr Chiang’s opinion that although the plaintiff may be considered to be able to return to his pre-injury work, some reduced efficiency is expected, even though this may improve with the suggested course of physiotherapy. Further, the plaintiff will have to take time off to undergo the further course of physiotherapy suggested by Dr Chiang in his report. All this will result in the fact that he will not be able to compete with other able bodies in the open labour market.
2. In my judgment, a sum equivalent to around 6 months of his earnings at the time of accident will be appropriate to reflect such disadvantage and handicap in the labour market. Hence, I shall award a sum of HK$75,000 (HK$12,312 x 6 = HK$73,872, round up to HK$75,000) as loss of earning capacity in this case.

*Others special damages*

1. For other special damages, I agree with Miss Lee’s submission that both the transportation fee (including taxi fee) and the claim for tonic food at HK$2,240 and HK$5,000 respectively are reasonable in the circumstances in this case.
2. Therefore, I shall award a total sum of HK$7,240 as special damages in this case.

*Future medical and travelling expenses*

1. I consider it is reasonable for the plaintiff to follow the advice of Dr Chiang to seek a further course of physiotherapy for treating his residual problems in his right leg. 15 to 20 sessions of treatment are suggested by Dr Chiang and each session of treatment in the private sector is estimated to cost around HK$500. The plaintiff’s claims a total HK$11,000 for such further medical treatment and travelling expenses. In my view, they are reasonable. I shall award such sum in full.

*Summary of award*

1. In summary, I shall award the following sums to the plaintiff in this case:-
   1. Pain suffering and loss of amenities HK$200,000
   2. Pre-trial of loss of earning and MPF HK$298,848
   3. Loss of future earnings Nil
   4. Other special damages HK$7,240
   5. Loss of earning capacity HK$75,000
   6. Future medical and travelling expenses HK$11,000

\_\_\_\_\_\_\_\_ HK$592,088

1. On top of the above figure, there will be interest on general damages from the date of issue of writ to the date of judgment at 2%. Further, there will interest on the loss of earnings and other special damages at half of the judgment rate from the date of accident to date of judgment.
2. The plaintiff is also entitled to the costs of the action, including the costs of the assessment with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.
3. Lastly, I would like to thank counsel for her very able assistance rendered to the court.

( Andrew S Y Li )

District Judge

Miss Christina Lee, instructed by Patrick Mak & Tse assigned by Director of Legal Aid for the plaintiff

1st and 2nd defendant, in person being absent