#### DCPI691/2010

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 691 OF 2010

BETWEEN

CHOI YUM MAN Plaintiff

and

LAM SIU WING Defendant

(林肇榮)

also known as

(林駿榮)

##### Before: Her Honour Judge H C Wong in Court

Date of Hearing: 2 December 2011

Date of Delivery of Assessment of Damages: 2 December 2011

ASSESSMENT OF DAMAGES

1. The plaintiff claims against the defendant for damages suffered at an accident sustained while employed by the defendant as a decoration worker on 23 May 2007.
2. Service of the writ of summons and other documents on the defendant at his last known address was unsuccessful. Substituted service was effected as well as service on the last known address of the defendant. The defendant had failed to appear at any stage in these proceedings. He is absent at today’s hearing of assessment of damages.
3. Interlocutory judgment in default of notice of intention to defend was entered against the defendant on 24 January 2011.
4. On 8 January 2010, the plaintiff was awarded the sum of $31,196.67 by H H Judge Mimmie Chan in ECC1522/2008, it was an application under Cap. 282 of the Employees’ Compensation Ordinance, against the defendant employer for the same accident on 23 May 2007.
5. At today’s hearing of assessment of damages, the plaintiff, Mr Choi gave evidence on the accident, his injuries, the medical treatments received and his present condition.
6. He told the court, he was working alone at the worksite demolishing tiles on the wall with a pneumatic drill when a broken tile fell from the ceiling and cut into his right foot, injuring his right foot. He was wearing an ordinary pair of sport shoes (canvas shoes) at the time and he was not supplied with either a helmet or construction worksite boots by the employer. He called 999 for assistance when he found he was bleeding profusely from the foot. The ambulance took him to Alice Ho Miu Ling Nethersole Hospital in Tai Po for emergency treatment.
7. The medical report of the doctor at the Alice Ho Miu Ling Nethersole Hospital, appearing at page 78 of the bundle, described his injury as right foot injury with a transverse 4 cm long laceration with tendon cut over the dorsum of the right foot. The medical report from the Orthopaedics Department of the same hospital described the injury to be a 3 cm transverse laceration over the dorsum of the right foot and the action extension of the second to fourth toes was lost due to the complete rupture of the extensors of the second to fourth toes. He received a surgical repair operation and was discharged on 26 May 2007. He continued to attend follow up clinic at the hospital. His wounds healed well and the doctors found the active extension of the second to fourth toes on his right foot to be present.
8. On 19 June 2008, he was assessed by the Medical Assessment Board under section 16F of the Employees’ Compensation Ordinance, Cap. 282, to have suffered from right foot injury resulting in right toes stiffness and pain. The board assessed the sick leave period of 1 month and 1 day and the loss of earning capacity permanently caused by the injury to be 4 per cent.
9. According to the 16 April 2011 expert report of Dr Johnson Lam Chi-keung, specialist in Orthopaedics and Traumatology, the plaintiff complained to him of right foot discomfort over the dorsum of the right foot after prolonged standing for 30 minutes. He would also experience numbness and constricting feelings in the foot, which he would also experience when lifting heavy objects. He told the doctor he could walk for about 1 hour. Before the accident, he did not have such discomfort. Dr Lam reported that the plaintiff could sit and walk normally, stand and walk on tiptoes though complaining of lack of strength in the right foot, able to walk on heels and stand on 1 foot as well as squat fully. In court, he said he could not squat fully without feeling pain.
10. Dr Lam found the plaintiff’s injuries consistent with the history given by him and that he had received appropriate medical treatments. The complaint of numbness and constriction over the right foot according to Dr Lam is probable, but Dr Lam considered the overall degree of discomfort should be mild. Dr Lam reported the plaintiff was able to live independently by himself and considered the plaintiff should be able to return to his pre-accident job with reduced working capacity. The plaintiff told me in court that he would rather not return to his pre-accident employment due to the bad experience, this is understandable.
11. Dr Lam assessed the permanent impairment of the right foot injury to be 2.5 per cent and the loss of earning capacity to be 4 per cent.

Assessment of compensation

PSLA (Pain, Suffering and Loss of Amenities)

1. Mr Yip, counsel for the plaintiff asked for the sum of $300,000 for the plaintiff’s pain and suffering and loss of amenities. He referred me to the case of Wong Ming Kwan v Wing Ming Electrical Company Limited and another HCPI 760/2003, a judgment of the Hon. Suffiad J on 30 June 2005, where he awarded $350,000 to the victim for his right leg laceration with complete cut of right anterior tibial artery, deep peroneal nerve, anterior tibial tendon, extensor hallucis longus tendon and extensor digitorum longus tendon. He was assessed to have suffered from 7 per cent permanent impairment of the whole person.
2. I was also referred to the case of To Ying Wa v Cargo-Land (Warehouse) Development Limited HCPI441/2000, an assessment of damages by Master de Souza. The 22 year old plaintiff received close reduction and K-wire fixation on his right fourth and fifth metacarpals and was put in a cast for 1 month. He received 2½ months sick leave by the doctor. He was assessed to suffer from 1 per cent permanent disability. The award for PSLA was $200,000.
3. In the case of Imtiaz Perviz v Senibo Development Limited and another HCPI 437/2005, it is a judgment of Deputy Judge Gill on 21 August 2007. The 18 year old stevedoring slinger suffered a fracture to his right tibia and compartment syndrome. He received an emergency operation to stablize his fractured tibia and a second operation which lasted 24 hours to remove the external fixator, debridement and skin grafting at the fracture site. He was hospitalised for 10 days and attended 30 sessions of physiotherapy. He returned to the surgical ward for removal of the implants. He used crutches for 1 year after which he made a good recovery. He was awarded under PSLA $250,000.
4. Based on the aforesaid authorities, I consider an award under PSLA, the sum of $120,000 to be appropriate. I do not consider the plaintiff’s injury was in the serious category under the case of Lee Ting-lam.

Pre-trial loss of earnings

1. The plaintiff had returned to work in July 2007, less than 2 months after the accident in spite of his discomfort and he was able to persist in his return to full employment. Thus, he had been seeking various forms of employment since July 2007 and did not cease working. For the last 4 years, he was working for the same meter company as a maintenance repair worker. It is commendable that the plaintiff should persist in returning to full employment.
2. I accept his pre-trial earnings was $8,000 per month for his daily pay was $400 even though the defendant had paid him only $350 per day for the work he was engaged in at the time of the accident. I found the plaintiff to be a honest person and is trustworthy. He is now asking for only 20 days in a month at a daily wage of $400 in his previous employment before the accident. I accept $8,000 per month is a fair figure of his pre-accident income.
3. I also agree with Mr Yip’s submission that he would have earned more today as a decoration worker, for wages for such work had increased in the last 2 years. I accept the $500 per day basis suggested by Mr Yip to be a reasonable sum in today’s working market and I further accept the median pre-trial income suggested by Mr Yip of $9,000 a month. I am satisfied that there is a difference in the annual bonus he was paid during his last 4 years working with the same employer. Taking into account his average mean income to be a minor issue even though he had not produced pay slips or bank statement evidence to support the salary he was receiving for 1 year and 3 months of his 4 years’ employment before the trial.
4. I accept that his salary since working for the meter company from October 2011 is $8,000 a month and the average over the 4 years after the accident was $7,423 a month. The plaintiff’s pre-trial loss of earnings is $97,830 based on the following:
5. Between 25 May 2007 to 30 September 2007

($9,000 x 4.16 months) - $9,360 - $9,100 = $18,980 ($9,360 and $9,100 were the wages he earned after sick leave in July and August 2007 and September).

1. From 1 October 2007, he has been employed with the same meter company and the average income is:

($9,000 - $7,423) x 50 months = $78,850.

The MPF of 5 per cent of $97,830 is $4,891.

Post-trial earning and MPF

1. I accept the multiplier of 6 suggested by Mr Yip for the plaintiff. I found it fair and I adopt it. The calculation is therefore: ($10,000 - $8,000) x 12 x 6 = $144,000.

The MPF of 5 per cent of $144,000 is $7,200.

Loss of earning capacity

1. I am not prepared to make an award of $100,000 as suggested by Mr Yip for the plaintiff’s loss of earning capacity. The reason is he has been able to return to the workforce immediately after the sick leave. Obviously, because the plaintiff was a diligent person and wanted to return to the workforce as soon as possible. I have taken into account his loss of future earnings and adopted a multiplier of 6, which I think would reflect the position of his employment. For the last 4 years, he has been working for the same employer who has been steadily giving him a salary increase and an annual bonus for his work. Therefore, the sudden loss of employment would probably be unlikely, but I would allow a sum equal to 2 months’ earnings for his re-training for alternative employment should he lose his present job in the next 6 years or so. Therefore, I make an award of $20,000.

Medical and other expenses

1. The sum of medical expenses, travelling expenses and tonic foods amounted to $4,000. This I find to be reasonable and I allow it.

Summary

1. PSLA $120,000.00

Pre-trial loss of earnings and MPF $102,721.00

Post-trial loss of earnings and MPF $151,200.00

Loss of earning capacity $20,000.00

Medical and other expenses $4,000.00

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Total: $397,921.00

Less: Employees’ compensation award $31,196.67

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Total: $366,724.33

Interest

1. I award 2 per cent interest for general damages of PSLA from the date of the writ to the date of judgment. Special damages interest at half judgment rate from the date of accident to the date of judgment, thereafter at judgment rate.

Costs

1. Costs to be borne by the defendant to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with Legal Aid regulations.

# (H C Wong)

# District Court Judge

Mr Yip Chi-hong, Timmy, instructed by Ambrose Ng & Co., assigned by the Director of Legal Aid, for the Plaintiff

Defendant, in person, absent