## DCPI 1547/2012

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1547 OF 2012

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BETWEEN

LAI YIU FONG（黎耀晃） Plaintiff

and

FANCY EFFORT LIMITED

（逸明有限公司）(CR No. 1356033) Defendant

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Before : Master J Chow in Court

Date of Hearing : 7 March 2014

Date of Judgment : 31 March 2014

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ASSESSMENT OF DAMAGES

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*INTRODUCTION*

1. This is an assessment of damages hearing.
2. The plaintiff was employed by the defendant as a casual labour. He claimed damages against the defendant for injuries sustained at work on 12 August 2009.
3. The writ of summons was served on the defendant on 30 July 2012.
4. No intention to defend its claim was given by the defendant, on 3 September 2013, interlocutory judgment on liability was entered against the defendant leaving damages to be assessed.
5. In the related employee’ compensation action (DCEC 859 of 2010), the plaintiff claimed employees’ compensation against the defendant (the respondent therein). In that action, one Mr. Ng appeared for the defendant in person. The learned judge found the respondent/defendant was the plaintiff’s employer and had awarded the plaintiff compensation in sum of $63,525,73.
6. In this personal injury action, the defendant was absent in all checklist review hearings including this assessment of damages hearing. I am satisfied the plaintiff’s solicitors have duly served on the defendant all subsequent hearing documents together with notice of this assessment hearing.

*THE ACCIDENT*

1. The defendant employed the plaintiff as a casual labour on 10August 2009. The plaintiff started to work on 11 August 2009, he was injured on 12 August 2009, on his 2nd day of work.
2. During the employment, the plaintiff was working at a site in Lau Fau Shan, Yuen Long. The site was made for storage of containers with materials for recycling. Those materials were kept in very large bags with holes punched on top edges. The purpose of punching these holes was to hang the bags onto the hook on forklifts and that the bags can be carried around the site. To explain the structure, a forklift was equipped with a wooden pallet at its front for holding and carrying heavy goods around the site. A wooden pallet is a large metal plate or flat wooden frame measured around 1.5m x 1.5m x 0.3m of which heavy goods can be lifted, stored, or moved around.
3. At time of the accident, the plaintiff was asked to hang one of the large bags, containing electronic wastes, onto the hook of a forklift. In the course of doing so, another forklift near the plaintiff, which was driven by his co-worker, reversed without notice and had caused the wooden pallet pressed onto the plaintiff’s left foot. The plaintiff’s left foot was somehow further pushed forward onto another wooden pallet in the vicinity. As result, the plaintiff’s left foot was trapped between two wooden pallets (“the Accident”).
4. The plaintiff sustained lower left leg and foot injury.

*QUANTUM*

*The plaintiff’s injuries and treatments*

1. The plaintiff was sent to Tuen Mun Hospital (“TMH”) after the Accident. As reported by Dr Tsui Chi Leung of Accident & Emergency Department (“AED”) of TMH in the report dated 11 August 2010, the plaintiff was diagnosed to have suffered from tenderness, swelling and bruise over the left lower leg. X-ray of left lower leg revealed fracture of distal tibia and fibula (“the Injuries”). The plaintiff was admitted to the orthopaedic ward, and was discharged on 9 September 2009.
2. After swelling of his left leg subsided, the plaintiff was given a long cast on his left leg. Unfortunately, the long leg cast was loosened at time of receiving rehabilitation, displacement of fracture was found and a new cast has to be applied.
3. After discharge from TMH, in a follow up treatment on 8 March 2010, his fractures were found to have healed and leg pain was lessened.
4. The plaintiff received physiotherapy treatments in TMH. In the report by Ms Lai Pui Wan of the Physiotherapy Department of TMH dated 11 August 2010, the plaintiff was given non weight bearing exercise, magnetic field therapy, pressure therapy and exercise therapy. The plaintiff attended 19 sessions of physiotherapy treatments.
5. The plaintiff received 9 sessions of occupational therapy treatments in TMH.
6. The plaintiff was granted sick leave from date of Accident to 8 March 2010, for a total of 209 days.

*Medical expert evidence*

1. The plaintiff adduced his solo orthopaedic expert report prepared by Dr. Arthur Chiang dated 16 January 2011 without oral evidence. Dr. Chiang opined the Injures were consistent with the Accident. He found the plaintiff’s tibial and fibular fractures have attained satisfactory alignment. Physical examination revealed mild decrease in some movements of his left ankle, i.e. mild decrease in dorsiflexion, eversion and inversion. Mild swelling in the lower left leg and ankle was noted as a result of thickening of cortical bone.
2. Dr. Chiang came to a conclusion that the fractures were healed satisfactorily. The plaintiff has reached a stage of maximal medical improvement. No further treatment is necessary. The sick leave period is justified. Having suffered from residual stiffness of his left leg, Dr. Chiang said the plaintiff is capable of returning to his pre injury job.
3. Dr. Chiang assessed the plaintiff might have less endurance on prolonged, heavy manual work and prolonged squatting. Dr. Chiang assessed the permanent impairment of whole person of the plaintiff is 4%.

*ANALYSIS*

*Pain, sufferings and loss of amenities*

1. Dr. Chiang gave a thorough account of the plaintiff’s sufferings. His opinion tallies with the plaintiff’s evidence in his witness statement. I accept both Dr. Chiang’s opinion and the plaintiff’s evidence. The plaintiff claims $300,000 as damages under this head.
2. Mr. Leung cited two authorities:-
3. *Sukhdeep-Singh v Chow Kin Hung and Hang On Motors Co Ltd* (HCPI No 202 of 2010), DHCJ Mimmie Chan awarded the plaintiff damages on PSLA at $300,000. The plaintiff suffered fractured distal tibia and fibula of his right leg and had undergone surgery.
4. *Ma Yuet Pong v Chan Kar Wai, Pace Logistics Solutions International Ltd. and Meering Development Ltd* (HCPI No 577 of 2010)DHCJ Lok awarded the plaintiff $330,000 on PSLA. The plaintiff suffered fractured left distal tibia, fibula, left 2nd – 4th metatarsals and underwent surgery.
5. The plaintiff’s recovery is satisfactory, save and except some residual stiffness on his left ankle, he has maintained a life almost unaffected by the Accident. The plaintiff is assessed to be capable of resuming his pre injury job. I accept the two authorities cited by Mr. Leung are pointers in awarding damages in Pain, Sufferings and Loss of Amenities. The injuries of both plaintiffs are similar to the plaintiff in this action, only that they have endured extra pain in operations. Taken into account the plaintiff’s long sick leave period, time for recovery, unaffected leisure life where the plaintiff did not do sports often prior to the Accident, I find an award slightly lower than the award in *Sukhdeep-Singh* is appropriate. I award $280,000.

*Pre-trial loss of earnings and MPF*

1. The plaintiff was employed as a casual labour, he was paid $320 daily rate, it is agreed the plaintiff should work 26 days each month. His monthly earnings were decided by the learned judge in DCEC No 859 of 2010, at a rate of HK$8,320 per month. I have no reason to depart from this figure in assessment of the plaintiff’s loss of earnings.
2. The plaintiff was granted sick leave from 12 August 2009 to 8 March 2010, for a period of 209 days. Dr. Chiang stated in his expert report that the length of sick leave period was justified. I am satisfied the plaintiff should be entitled to damages over this period.
3. The plaintiff did not resume work immediately after the expiry of sick leave. He took some rest and had paid visits to Chinese bonesetters for treatments. He explained in his witness statement he was only able to return to gainful employment around April 2010.
4. In April 2010, the plaintiff attempted to work as a construction site casual worker where he was required to do heavy manual tasks. Having worked for 4 days, he found himself unable to stand the pain and discomfort in his left ankle. He left the job. He earned HK$1,600.
5. During the period from May 2010 until August 2013, the plaintiff has worked successfully as a janitor for various companies. He earned $231,924.
6. To reflect the plaintiff’s income after the expiry of sick leave, the plaintiff’s working history proved he is suitable and capable to work as a janitor with residual stiffness on his left ankle. He was able to work continuously for one company, Johnson Co Ltd（莊臣有限公司）for three substantial periods: from September 2010 to June 2011; from February 2012 to May 2012; and from July 2012 to August 2013. The plaintiff average monthly salary elevated from around $6,000 per month to around $7,500 per month.
7. I agree with Mr. Leung that the plaintiff might be unable to resume gainful employment immediately after the Accident. Residual pain, discomfort and stiffness are obvious obstacles. In that, I am prepared to allow 3 months’ income as part of the pre trial loss of earnings after expiration of sick leave. I accept the Plaintiff could have earned, on average, $7,000 monthly income after the 3 – month period.
8. The plaintiff ceased to be a janitor after August 2013, neither the plaintiff has given an explanation or further evidence of his employment after this date.
9. The plaintiff’s claim of pre-trial loss of earnings shall cover the period from the date of Accident until the date of assessment of damages, i.e. from 12 August 2009 to 7 March 2014, which is 56 months after the Accident.
10. Full award during sick leave period (12 August 2009 - 8 March 2010):-

$8,230 x 12 months x 209 days/365 days = $56,550.00.

1. 3 months’ full award after expiration of sick leave period (9 March 2010 - 7 June 2010 ):-

$8,230 x 3 months = $24,690.00.

1. For the period from 7 June 2010 until 7 March 2014:-

($8,230 - $7,000) x 46 months = $56,580.00.

1. ($56,550 + $24,690 + $56,580) = $137,820.00.
2. For pre trial loss of MPF should be $137,820.00 x 5% = $6,891.00.
3. The award for Pre Assessment Loss of Earnings should be $144,711.00.

*Post trial loss of earnings and MPF*

1. The plaintiff was born on 6 March 1966, he is now 48 years of age. Mr. Leung submitted, it is expected the plaintiff will continue to earn on average, $7,000 per month after the assessment hearing and he claims Post Assessment Loss of Earnings as pleaded in the Revised Statement of Damages.
2. I do not agree. I give full weight to the comments of Dr. Chiang, having assessed the plaintiff to have suffered from residual discomfort and stiffness on his left ankle, he had unequivocally stated the plaintiff is able to resume his pre injury job. There is no evidence before me that there are other circumstance renders the plaintiff unable to work as a casual labour.
3. For this reason, I do not find the plaintiff could substantiate his claim on Post Assessment Loss of Earnings. I disallow damages under this head.

*Loss of earning capacity*

1. Nevertheless, I am of the view that the plaintiff’s work performance would be affected by his residual symptoms. Although the plaintiff managed to a secure job as a janitor, his working ability was limited by the residual discomfort and stiffness on his left ankle. I accept he would be disadvantaged or handicapped in the labour market. I award he plaintiff damages on loss of earning capacity in sum of 6 months’ pre trial salary, ie ($8,230 x 6 months) $49,380.00.

*SPECIAL DAMAGES*

*Medical expenses*

1. The plaintiff incurred various medical expenses after the Accident. I adopt the sum of $4,770.00 assessed in DCEC 859 of 2010 as the damages for medical expenses.

*Travelling expenses*

1. The plaintiff attended various medical treatments (including follow up at the orthopaedic clinic, physiotherapy, occupational therapy, as well as a Chinese bonesetter treatments) on diver dates. Immediately after the Accident, he travelled by taxi to TMH; as he has recovered gradually, he was able to travel on public transport. The taxi fees of a round trip for each follow up treatment was around $80 to $100, whereas the expenses of public transport thereafter was $10. I could not criticize the plaintiff’s claim of $3,000.00 being travelling expenses, which is fair and reasonable. I so award $3,000.00.

*Tonic food*

1. The plaintiff took a kind of Chinese herbal food supplement（健步虎潛丸）to strengthen his lower limb. I accept this is reasonable and an award of $3,000.00 should be made.
2. The total award of special damages should be ($4,770.00 + $3,000.00 + $3,000.00) $10,770.00.

*Employees compensation*

1. In DCEC 859 of 2010, the plaintiff was awarded employees’ compensation in sum of $63,525.73. I shall give credit to this sum.

*SUMMARY ON QUANTUM*

1. The summary of damages are as follows:-
2. Pain, Suffering and Loss of Amenities $280,000.00
3. Pre Assessment Loss of Earnings $144,711.00
4. Loss of Earning Capacity $49,380.00
5. Special Damages $10,770.00

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1. Less Employees Compensation &

periodic payment $63,525.73

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Total **$421,335.27**

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*INTEREST & COSTS*

44.  I award interest on general damages at 2% per annum from the date of the service of the Writ of Summons on the Defendant to the date of this judgment and interest on special damages at half judgment rate from the date of the Accident to the date of this judgment.  Both general and special damages will carry interest at the judgment rate from the date of judgment until payment.

1. I make a costs order *nisi* that the costs of this action, including the hearing on assessment of damages, be payable by the defendant to the plaintiff, taxed if not agreed. The plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations. The cost order nisi shall be made absolute after 14 days from the date hereof.

( J Chow )

District Court Master

Mr Kenneth Wai Ming, Leung, of Kenneth W Leung & Co, for the plaintiff.

The defendant in person and absent.