DCPI 1657/2019

[2022] HKDC 775

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1657 OF 2019

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BETWEEN

B K RAM PRASHAD Plaintiff

and

FREYSSINET HONG KONG LIMITED 1st Defendant

GAMMON CONSTRUCTION LIMITED 2nd Defendant

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

Before: Master Matthew Leung in Court

Date of Hearing: 17 May 2022

Date of Defendant’s Written Closing Submissions: 24 May 2022

Date of Plaintiff’s Written Closing Submissions: 31 May 2022

Date of Assessment of Damages: 8 August 2022

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| ASSESSMENT OF DAMAGES |

**Background**

1. This is the assessment of damages in respect of the Plaintiff’s personal injuries claim against his employer, the 1st Defendant, and the principal contractor, the 2nd Defendant. The Plaintiff was employed by the 1st Defendant as a foreman in a construction site located at Pak Mong Public Pier, Tung Chung, New Territories (“**the Site**”). On 30 May 2016, while the Plaintiff was walking along a staircase at the Site, he slipped and fell because of the instability of the staircase, thereby twisting his left foot and ankle (“**the Accident**”).
2. On 9 May 2019, the Plaintiff commenced the present proceedings against the 1st and 2nd Defendants for damages for personal injuries, loss and other damages suffered as a result of the Accident. He claimed that the Accident was caused by negligence, breach of common duty of care, breach of statutory duty and/or breach of employment contract on the part of the Defendants, their servants and/or agents.
3. By a Consent Order filed on 2 June 2021, the parties agreed that interlocutory judgment on 75% of liability be entered in favour of the Plaintiff against the 1st and 2nd Defendants with damages to be assessed.

**The Plaintiff’s injuries**

1. After the Accident, the Plaintiff was sent to the company’s doctor, Dr Or Yu Wah (“**Dr Or**”), a specialist in Orthopaedics & Traumatology, for examination and treatment. Physical examination showed that there was extensive swelling of his left lateral foot and tenderness over left distal half of fibular and lateral aspect of foot. Soft splint was applied and elbow crutches were issued. Anti-inflammatory medications and sick leaves were granted. MRI taken on 4 June 2016 showed bone contusion at anterior inferomedial aspect of the Plaintiff’s left talus, with diffused superficial subcutaneous swelling and edema most significant at dorsum of lateral aspect of mid-foot. No fracture nor dislocation was noted. He was then advised to resume weight bearing afterwards.[[1]](#footnote-1)
2. The Plaintiff attended the A&E Department of the Pok Oi Hospital (“**the Hospital**”) for treatment on 31 May 2016. He complained of left foot and ankle injury. Medical examination showed tenderness over left ankle and foot area. He was treated and discharged on the same day.[[2]](#footnote-2)
3. In the period from 7 June 2016 to 27 March 2018, the Plaintiff on various dates attended the Department of Family Medicine and Primary Health Care of Yuen Long Jockey Club Health Clinic for follow up treatment. According to the Medical Report of Dr Leung Hor Yee dated 1 May 2018, physical examination on the Plaintiff on 7 June 2016 showed tenderness over the anteriotalofibular ligament. He could walk unaided and the range of movement of the left ankle was full. Owing to the persistent pain, the Plaintiff was referred to the Department of Orthopaedics and Traumatology for further management on 14 June 2016.[[3]](#footnote-3)
4. The Plaintiff attended the Physiotherapy Department of the Hospital in the period from 17 June 2016 to 27 September 2016 for 12 sessions of physiotherapy for alleviating the pain and strengthening his left ankle. The pain over the left ankle was at the intensity of 9 out of 10. The Plaintiff was treated with ankle mobilization and strengthening exercise, conditioning exercise, ice therapy and magnetic therapy. On 27 September 2016, the Plaintiff continued to feel pain over left ankle with pain intensity of 9 out of 10.[[4]](#footnote-4)
5. On 30 June 2016, the Plaintiff started attending the Orthopaedics Department of the Hospital for consultation. Physical examination showed swelling over left ankle, and local tender spot at the anterior talofibular ligament region.[[5]](#footnote-5)
6. The Plaintiff received private MRI on 16 July 2016 which showed the following:[[6]](#footnote-6)
7. Partial tear in posterior talofibular ligament with alignment of left ankle preserved,
8. Partial tear in peroneus brevis tendon and also in its distal insertion with associated overlying inflammatory changes,
9. Bone bruise in anterior inferior border of talus,
10. Inflammatory changes in talonavicular joint with no significant bone erosion,
11. Small avulsed fracture in anterior superior border of lateral cuneiform bone with associated overlying soft tissue edema.
12. The Plaintiff attended the Occupational Therapy Department of Tuen Mun Hospital in the period from 22 September 2016 to 15 November 2016 for 8 sessions of occupational therapy treatments. He informed the occupational therapist that his work included setting up and dismantling supporting metal frames, and the job required constant standing, walking and squatting, frequent stair walking and pulling. His standing tolerance was 15 minutes and walking tolerance with clutches was 20 minutes and with left ankle pain. He failed to perform squatting. He was then admitted to work conditioning programme to optimize his physical and work capacity. In the last assessment on 15 November 2016, the Plaintiff continued to feel pain at the intensity of 5 out of 10. Standing tolerance was 15 minutes and walking tolerance was 30 minutes with crutches and with left ankle pain. He could not perform squatting nor simulation on pulling cable.[[7]](#footnote-7)
13. On 3 November 2016, the Plaintiff consulted the Prosthetic & Orthotic Department of the Hospital and was given a fitting of left aircast walker.[[8]](#footnote-8) After using the aircast walker, the swelling started to subside.
14. The Plaintiff attended private practitioner, Dr David Ip, for left foot and ankle treatment on 29 December 2017 and 16 May 2019. He also received treatment from Department of Family Medicine & Primary Health Care of Yung Fung Shee Health Centre from 11 July 2017 to 4 May 2018. The Plaintiff also attended Wellness Clinic & Pain Centre for his ankle pain in April and May 2019.
15. Sick leave certificates were issued by the treating doctors intermittently from 30 May 2016 to 29 March 2018. Further sick leave was granted from 2 to 4 May 2018, on 30 August 2018, from 26 April to 12 June 2019, and on 26 September 2019, and 25 November 2021.[[9]](#footnote-9)
16. The sick leave periods endorsed by Form 7 and 9 were up to 3 July 2017 and 25 January 2018 respectively.

**Expert medical evidence**

1. It was directed by the Order dated 19 August 2020 that expert medical evidence be limited to one orthopaedic expert for each party. The experts nominated by the Plaintiff and the Defendants are Dr Ko Put Shui Peter (“**Dr Ko**”) and Dr Lam Yan Kit (“**Dr Lam**”) respectively. It was further ordered by consent that the Joint Orthopaedic Expert Reports by Dr Ko and Dr Lam be adduced without oral evidence at the assessment hearing.[[10]](#footnote-10)
2. At the joint examination, the Plaintiff complained of continuous pain over left ankle and left lateral foot region. The walking tolerance with a crutch was 15 to 20 minutes. There was burning sensation over the left sole. He found himself difficult to walk on stairs and steps. He needed a short break after managing 10 steps. There was no need for walking aid when staying indoor. But when the Plaintiff went outdoor for prolonged duration or long distance, a crutch was required. He could not wear safety shoes or leather shoes. He also found pain radiating to his calf and had the sense of tightness and fatigue.
3. Both experts agreed that the diagnosis was (i) left foot and ankle sprain injury with partial tear of the posterior talofibular ligament, partial tear of peroneus brevis tendon, bone contusion of talus; and (ii) post-traumatic inflammation in talonavicular joint, avulsion fracture of lateral cuneiform.
4. The joint examination took place more than two and a half years after the Accident and the Plaintiff still complained of significant pain. Dr Ko opined that the chance of the Plaintiff to have any further significant improvement to his condition and functional capacity was extremely remote.
5. Dr Lam considered that the Plaintiff’s current symptom was much more severe than one would have expected two and a half years after injury. He commented that continuous pain would be more common in acute fracture and severe inflammation. For the Plaintiff’s complaint of the tenderness of the whole left ankle and lateral foot, it would be unusual and cannot be explained by known pathology. Further, the Plaintiff complained that he cannot walk for long hours. However, during the assessment, there was no muscle wasting found over left calf, the ankle girth was symmetrical (i.e. no significant residual ankle swelling), and there was no significant ostenopenia noted over the left ankle. He pointed out that the medical report from the General Out-patient Clinic showed that the Plaintiff can walk unaided and the left ankle’s range was full on 7 June 2016.
6. In respect of the length of sick leave period, Dr Ko opined that the sick leave as endorsed by Form 9 up to 25 January 2018 would be appropriate while Dr Lam considered that the sick leave as endorsed by Form 7 up to 3 July 2017 would be acceptable.
7. Dr Ko was of the view that the Plaintiff would have great difficulty in resuming pre-accident job as a foreman. He would have difficulty in performing long hours of walking, standing, squatting and handling of heavy weight. Dr Lam’s view was that there was no noticeable objective functional deficit in resuming the Plaintiff’s pre-Accident job while there would be a mild reduction in working efficiency.
8. The impairment of the whole person of the Plaintiff was assessed by Dr Ko and Dr Lam as 6% and 4% respectively.

**The Plaintiff’s work after the Accident**

1. After the Accident, and from 1 October 2018 to 30 November 2018, the Plaintiff worked as a part-time school nanny van assistant for Sai Hong Kong Coach Limited, earning an hourly rate of HK$60. The Notification of Remuneration Paid to Persons other than Employees (Form 56M) for the year 2018 – 2019 showed that Sai Hong Kong Coach Limited paid a total of $30,000 to the Plaintiff in the period from 1 April 2018 to 31 March 2019.[[11]](#footnote-11) In the examination-in-chief, the Plaintiff referred me to a record card for the month of November 2018 and confirmed that he received a sum of $3,060.[[12]](#footnote-12)
2. From 20 December 2018, the Plaintiff worked in a garbage collection station, handling and operating the machine and mechanic at Sita Waste Services Limited. After working for about 15 days, the Plaintiff had pain over the left foot and ankle. He found himself difficult in prolonged walking and squatting when carrying out the duty at work. He quitted the job on 8 January 2019. The Plaintiff earned a total sum of $8,963.23 thereunder.
3. In August 2019, the Plaintiff worked as a security guard in Legend Gurkhas Services Limited earning a basic daily salary of $1,500. However, the Plaintiff alleged that he could work for 6 days only because of the ankle pain. He earned a total sum of $10,150.
4. In November 2019, he started working as a security guard in Gurkhas Group (G3S) Holding Limited. He worked from 6 to 12 hours per day, 6 days a week, and a job with CS (SS&EO) Limited. Starting from 13 January 2020, the Plaintiff worked as a part-time security guard with Perfect Security Service Limited earning a monthly sum of $16,000 but the employment was terminated on 30 January 2020 due to the ankle pain. He earned a total of $10,400. Afterwards, he worked part-time in Gurkhas Group on an on-and-off basis. From May to December 2021, he worked as a security guard for Gurkhas Group. According to the employment contract,[[13]](#footnote-13) the basic salary was $13,500 with performance bonus and attendance bonus. However, the bank statements of the Plaintiff showed that the monthly earnings from June to December 2021 ranged from $10,357.15 to $14,250. The Plaintiff has been unemployed in the year 2022. His evidence in examination-in-chief was that he has been looking for light and better job.

**Surveillance evidence**

1. The Defendants had instructed an investigator to conduct surveillance on the Plaintiff.  The Surveillance Report was produced of the surveillance on 5 occasions, namely 11 February 2019, 13 March 2019, 21 March 2019, 28 March 2019, and 20 April 2019.
2. Mr CK Wong, counsel for the Plaintiff, submits that the Plaintiff was seen using a walking stick or a crutch when he was walking on the streets on 21 and 28 March 2019. There is no evidence that the Plaintiff was aware of the surveillance at the material time. The result is consistent with the Plaintiff’s complaint that he still required walking aid when he went outdoor with prolonged duration or long distance.

**Credibility of witness**

1. The Plaintiff was testified at the assessment hearing. He adopted the Witness Statement dated 25 November 2020 as his evidence in chief and was cross-examined by Mr Cheng, counsel for the Defendants, extensively. Mr Cheng criticized that the Plaintiff was neither credible nor reliable.
2. In assessing the credibility of the Plaintiff, I bear in mind the approach as set out in ***Lee Fu Wing v Yan Paul Po Ting*** [2009] 5 HKLRD 513, at 524 namely:
3. whether the party's case is inherently plausible or implausible;
4. whether the party's case is, in a material way, contradicted by other evidence (documentary or otherwise) which is undisputed or indisputable;
5. where it is shown that a witness has been discredited over one or more matters to which he has given evidence using the above tests. This is relevant to the assessment of his overall credibility; and
6. the demeanour of the witnesses.
7. General principles were also set out by Deputy High Court Judge Eugene Fung SC in his Judgment in ***Hui Cheung Fai & Another v Daiwa Development Limited & Others*** HCA 1734/2009 (unreported, 8 April 2014):

“77. Generally speaking, contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility: Onassis v Vergottis [[1968] 2 Lloyd's Rep 403](https://launch.westlawasia.com/document/I142C4001E42811DA8FC2A0F0355337E9) at 431 (Lord Pearce) […]

78. In deciding whether to accept a witness' account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events: eg Lam Rogerio Sou Fung v Tan Soon Gin George (unreported, HCA 2576/2005, 5 May 2011) §39 (Chu J).

79. In determining a witness' credibility, I have also attached importance to the consistency of the witness' evidence with undisputed or indisputable evidence, and the internal consistency of the witness' evidence. The latter type of consistency is often tested by a comparison between the witness' oral testimony and his or her witness statement.

80. I have cautioned myself against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses (Ting Kwok Keung v Tam Dick Yuen [(2002) 5 HKCFAR 336](https://launch.westlawasia.com/document/I554CAC271D9244DDBB2E3ADE993C990A) at §§36-37 (Bokhary PJ)), or from the assessment of the witnesses' character (Esquire (Electronics) Ltd v HSBC [[2007] 3 HKLRD 439](https://launch.westlawasia.com/document/I9807BAFA9EB14ED683E6AB55D6647D91) at §135 (Stock JA)).

81. The practical approach to assessing credibility of witnesses in a case such as the present may have best been summarised by the words of Robert Goff LJ, as he then was, in The Ocean Frost [[1985] 1 Lloyd's Rep 1](https://launch.westlawasia.com/document/I6721D960E42711DA8FC2A0F0355337E9) at 57:

'Speaking from my experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'

82. Whilst these words were spoken in the context of a fraud case, I believe they are applicable to any case where a witness' credibility features prominently in the court's determination. They are particularly apposite in a case like the present where very serious allegations (akin to allegations of fraud) have been made by the Son against the defendants.

83. In approaching the evidence in this case, I have also borne in mind that the allegations made by the Son are very serious, and that the more serious the allegation sought to be proved is, the more cogent the evidence relied upon to support it must be: see Re H (Minors) [[1996] AC 563](https://launch.westlawasia.com/document/IB6172AC1E42711DA8FC2A0F0355337E9)at 586D-587F (Lord Nicholls) and ADS v Brothers [(2000) 3 HKCFAR 70](https://launch.westlawasia.com/document/IEDDDCB64E3534A2E8270E2BE2DBC74AB) at 77J-78G (Lord Hoffmann NPJ).”

1. On the question of credibility of the Plaintiff, the first issue is whether it is believable that the Plaintiff could not resume working in construction sites because of his alleged inability to wear safety shoes due to the left ankle pain. Mr Cheng attacks the Plaintiff’s credibility by saying that:
2. Instead of explaining why he was unable to wear safety shoes due to the left ankle pain, the Plaintiff’s oral evidence was that the safety shoes were simply too “heavy” and leather shoes were very “tight”.
3. The Plaintiff did not give any direct answer to the suggestion by Mr Cheng that he could choose a new pair of shoes with looser fit.
4. The Plaintiff did not explain why he could not choose to wear waterproof gumboots, which were lighter in weight, instead of leather safety shoes.
5. Mr Wong argues that four photos were produced of the Plaintiff’s bare foot which supported that swelling could still be noted around the Plaintiff’s left ankle at the time when the photos were taken.[[14]](#footnote-14) Having considered the photos, I am of the view that they were not of good quality to enable the Court to determine whether the Plaintiff’s left ankle was swelling to such an extent that he could not wear safety shoes or leather shoes in construction sites. I also accept Mr Cheng’s argument that the photos could not show a progression of symptoms through time. Nor could I find any medical expert’s opinion to the effect that there was abnormal swelling in the Plaintiff’s left foot. No weight should be attached to the four photos.
6. Having considered all the evidence and the demeanour of the Plaintiff, I agree with Mr Cheng that the Plaintiff’s evidence on his ability to wear safety shoes casts a great doubt on his credibility as follows:
7. Whilst the Plaintiff stated in the Witness Statement that he could not resume working as a foreman in construction site as he could no longer wear safety boots due to his ankle pain[[15]](#footnote-15), the Plaintiff explained in cross examination that the safety shoes were “heavy” and leather shoes were “tight”. No other explanation was offered by the Plaintiff in his oral evidence as to why he could not wear safety shoes after the Accident. I consider that what the Plaintiff said is a matter of comfort instead of genuine practical difficulty. Whilst the Plaintiff might find the safety shoes not as comfortable as they were before the Accident, I fail to see if there is any real difficulty precluding the Plaintiff from wearing the safety shoes in order to work in construction sites.
8. I agree with Mr Cheng that if the leather shoes were too tight for the Plaintiff’s foot after the Accident, there is no reason why the Plaintiff could not choose another pair with looser fit. Mr Cheng had put such question to the Plaintiff during cross examination but the Plaintiff did not provide any direct answer.
9. During cross examination, the Plaintiff told the Court the first time that apart from the safety shoes the Plaintiff had mentioned in the Witness Statement, there were waterproof gumboots which were lighter in weight, and both safety shoes and waterproof gumboots could be used in construction sites. The Plaintiff did not explain why he could not wear this kind of gumboots in construction sites. As I see it, the Plaintiff could either choose to wear leather safety shoes with looser fit or to have waterproof gumboots if he really wants to return to construction sites for work. The alleged safety shoes problem is not a genuine one.
10. Furthermore, the Plaintiff’s evidence is either inconsistent with documentary evidence or internally inconsistent in the following ways:
11. The Plaintiff confirmed during cross examination that up to the date of the assessment hearing, the degree of residual pain would be 9-10/10 without medication and 6-7/10 with medication. But his evidence was inconsistent with medical records. According to the Physiotherapy Report dated 2 April 2020, the Plaintiff complained of pain over left ankle with intensity of 9 out of 10 on 17 June 2016.[[16]](#footnote-16) On 27 September 2016, while he was complaining of the same level of pain, the active range of movement of left ankle improved significantly. He was reported to have an overall improvement of 70%.[[17]](#footnote-17) On 15 November 2016, when the Plaintiff attended occupational therapy treatment, he complained of left ankle pain in NPRS 5/10.[[18]](#footnote-18) Despite the improvements over the past few years, it is inconceivable that the ankle pain suffered by the Plaintiff at the time of the assessment hearing would be as serious as what he experienced at the time of the Accident.
12. In cross examination, the Plaintiff said that he needed painkillers everyday. In fact, there was no objective medical finding to support the Plaintiff’s allegation that he required painkillers everyday. It was the Plaintiff himself who informed the experts that he was on painkillers “on necessary basis. In the past 1 month, twice a week.”[[19]](#footnote-19) In paragraph 31 of his own Witness Statement, the Plaintiff stated that he needed to take painkillers “on necessary basis”, not everyday.
13. During cross examination, the Plaintiff confirmed that he had not stopped using crutches given by Dr Or since the Accident. However, the Plaintiff later revealed that he did not bring the crutches during job interview or even at work when he was doing security job at the BOC Tower. Moreover, the Plaintiff informed the experts in the Joint Examination on 21 March 2019 that “while indoor, no need for walking aid, but going outdoor if prolonged duration or long distance, he needs a crutch since the alleged accident.”[[20]](#footnote-20) What the Plaintiff informed the experts of the seriousness of his problems was less serious than his evidence during cross examination at the hearing. I also agree with Mr Cheng that given the serious residual pain as depicted by the Plaintiff during cross examination, it is difficult to imagine how he could work as a security guard for 8-9 hours a day without crutches.
14. Having considered all the evidence and the demeanour of the Plaintiff, I am not satisfied that the Plaintiff is a credible and honest witness. I observed that in his oral evidence, the Plaintiff had no problem in understanding all the cross examination questions and could respond promptly. I consider that the Plaintiff has exaggerated the severity and seriousness of his injury.  I do find him to be deliberately vague and evasive in certain answers to the cross examination.  The Plaintiff’s evidence should be treated with caution. The assessment of damages should be made on the basis of the undisputed facts and the contemporaneous medical reports and records.

**PSLA**

1. In the Plaintiff’s Opening Submissions dated 15 February 2022, Mr Wong relied on the following cases on PSLA: namely, ***Lau Che Ping v Hoi Kong Ironwares Godown Co. Ltd*** [1988] 2 HKLR 650; ***Ma Yuet Pong v Chan Kar Wai and others,*** HCPI 577/2010 (unreported, 3 October 2012); ***Lee Bon Yet William v Uncle Management Ltd,*** HCPI 1006/2003 (unreported, 16 September 2005); ***So Sup Ng v Chung Po Moon Catole and another,*** HCPI 662 and 658/2012 (unreported, 21 July 2014); and ***Lam Kwai Yip v Yuen Yun Kui,*** HCA 12617/1994 (unreported, 17 January 1997). The injuries suffered by the plaintiffs in the above cases were far more serious than that what was sustained by the Plaintiff in the present case. I agree with Mr Cheng that those cases are not genuine comparable.
2. At the assessment hearing, Mr Wong indicated that the Plaintiff’s claim for PSLA would be revised from $450,000 to $300,000. The following cases were relied upon in the Closing Submissions.
3. In ***Lau Kin Wai Danny v Chan Wai Sang and Li Ah Man t/a Kin Sang Engineering Co.,*** HCPI 1007/2000 (unreported, 6 February 2002), the plaintiff lost balance and fell to the ground as a result of the water and sand gushing at him when water pipes burst in the course of dismantling. The plaintiff felt pain in his right leg and foot and he had a small abrasion over his left frontal head. Impairment of the whole person was assessed at 2%. PSLA was awarded at $150,000 [equivalent to $222,296 in the year 2020].
4. In ***Chan Mok Yau v 黃吉利*** [2018] HKCFI 1084, the plaintiff injured his right ankle when he fell as he was descending a ladder. He lost consciousness for a short while. The ladder handed on his right foot. Examination revealed tenderness over his right ankle and right foot. He had a swollen right ankle and bruises over his right toes. His right ankle x-ray showed a bimalleolar fracture. He was hospitalized for 2 days and had to walk with crutches for 6 weeks. Impairment of the while person was assessed at 4%. PSLA was awarded at $250,000 [equivalent to $259,831 in the year 2020].
5. Mr Cheng submitted that damages for PSLA should be around $150,000. The following cases were cited.
6. In ***Cheung Mau Fa v Regent Construction Co Ltd*** [2018] HKDC 332, the plaintiff fell from height and sustained soft tissue injury to her right ankle with decreased range of motion. She experienced pain on plantarflexion and dorsiflexion but x-ray did not reveal any fracture or dislocation of the foot. She was also found to have suffered mild adjustment disorder with mixed anxiety and depressed mood. PSLA was assessed at $150,000.
7. In ***Tsang Yee Man v Chanel Hong Kong Limited***, HCPI 918/2015 (unreported, 23 June 2017), the plaintiff fell from a broken folding chair in the stock room sustaining pain and swelling of her left foot, ankle and heel. She was also found to have suffered from adjustment disorder with depressed mood. PSLA was awarded at $150,000.
8. In ***Chiu Man Chi v Motorola Asia Pacific Limited***, HCPI 150/2011 (unreported, 16 March 2016), the plaintiff fell as she was descending from the catwalk of a T-shaped stage in the function room of a hotel. She hit her back, landed on her buttocks and her back, and continued to slide on the edge of the stairs and hit the back of her head. There was no significant bony injury, no significant tendon inflammatory or ligamentous injury shown in both ankles. Nerve conduction tests of both upper limbs and lower limbs were normal. The Court assessed the damages for the minor soft tissue contusion and sprain injury to the plaintiff’s neck, back and ankles in the sum of $150,000.
9. Having considered the Plaintiff’s injuries and disabilities, and the effect of his injuries on loss of amenities in his work and daily activities, I consider that the injuries suffered by the Plaintiff in the present case are more serious than those suffered by the plaintiffs in the cases cited by Mr Cheng on behalf of the Defendants. I assess that the damages for PSLA should be $250,000.

**Pre-trial loss of earnings and MPF**

1. It has been agreed between the parties that the Plaintiff’s pre-Accident monthly earnings were $28,978.88.
2. In assessing the pre-trial loss of earnings, the first issue will be the appropriate length of sick leave. In this case, sick leave certificates were issued by the treating doctors intermittently from 30 May 2016 to 29 March 2018 (with further sick leave on certain dates in the years 2018, 2019 and 2021).
3. The joint examination took place on 21 March 2019. In the Joint Report, Dr Ko opined that the sick leave period endorsed by Form 9 up to 25 January 2018 would be appropriate and reasonable. He pointed out that the opinion was also supported by the fact that the Plaintiff still had persistent symptoms at his follow up in the Hospital by March 2018. Mr Wong submits that sick leave up to 25 January 2018 (i.e. 20 months) should be reasonable and appropriate.
4. Dr Lam considered that the sick leave up to 3 July 2017 as endorsed by Form 7 would be acceptable. Further sick leave does not carry significant therapeutic value and not recommended. Mr. Cheng argues that sick leave up to 13.5 months should be sufficient.
5. In determining the reasonable length of sick leave period, the court is not bound by the sick leave certificates.  Ultimately, the question should be determined after taking into account all the evidence: see ***Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd***[[2008] 5 HKLRD 210](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=139341&QS=%26%2340%3BTam%2BFu%2BYip%2BFip%26%2341%3B&TP=JU#_ftn3). Further, in ***Choy Wai Chung v Chun Wo Construction & Engineering Co Ltd***., CACV 172/2004 (unreported, 15 July 2005), Rogers VP observed that “the judge cannot be bound by the mere issue of sick leave certificates: the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiff.”
6. I have also borne in mind that it is not the purpose of granting sick leave in order to enable an injured person to get rid of residual pain completely. In ***Pak Siu Hin Simon v J. V. Fitness Ltd***, HCPI 574/2014 (unreported, 15 May 2017) at §77, Madam Justice Au-Yeung said that “the fact that the plaintiff suffered pain did not mean that he would be entitled to sick leave. People may suffer pain for all sorts of reason and that would not prevent them from discharging their duties in full.  Employees do not go to work only when they are 100% fit and efficient.” Further, in ***Chan Sze Yuen v Tin Wo Engineering Co Ltd***, HCPI 427/2008 (unreported, 5 February 2016), Master Leong commented at §17 that “we do not go to work only when we are 100% fit and efficient. I cannot imagine that, for example, any professional football player only play matches when he is perfectly fit. Any professional (or even amateur) athletes are likely to be affected all through their careers by various old and new injuries, pains or aches due to training etc.”
7. In considering whether sick leave should be up to July 2017 or January 2018, I have considered the following medical evidence:
8. The Medical Report made by Dr Or dated 22 December 2016 showed that when he attended follow up consultation on 22 December 2016, he still walked with 2 elbow crutches and a static ankle brace, his ankle was stiff with dorsiflexion 20 degrees less than his right side. His left calf was wasted. Tenderness was present over his tibialis posterior tendon, peroneal tendon and anterior talofibular ligament region. Sick leave was granted to the Plaintiff from 30 May 2016 to 26 January 2017, and Dr Or commented that the Plaintiff’s condition has reached maximal medical improvement and was fit to attend medical assessment board.[[21]](#footnote-21)
9. The Medical Report made by Dr Hong Sze Nga of Madam Yung Fung Shee Health Centre dated 4 May 2018 showed that the Plaintiff attended follow up consultation on 11 July 2017 for left ankle sprain and examination showed that he walked with 1 crutch and tenderness over lateral side of left ankle with decreased range of motion shown.[[22]](#footnote-22)
10. The Medical Report made by Dr Chan Yat Fai dated 8 June 2018 showed that the private MRI on 16 July 2016 revealed partial tear of the posterior talofibular ligament and a small avulsion fracture of the lateral cuneiform bone. The last follow up consultation of Pok Oi Hospital took place on 22 March 2018, during which, the Plaintiff still complained of residual left ankle pain.[[23]](#footnote-23)
11. The Medical Report made by Dr Leung Hor Yee dated 1 May 2018 showed that the Plaintiff attended Yuen Long Jockey Club General Out Patient Clinic from 7 June 2016 to 27 March 2018.[[24]](#footnote-24)
12. In the Form 7 dated 17 July 2017, the Plaintiff was assessed to have left foot and ankle sprain resulting in left foot and left ankle residual pain and loss of earning capacity was assessed at 2%. Sick leave was granted up to 3 July 2017.[[25]](#footnote-25)
13. In the Form 9 dated 15 February 2018, the Plaintiff was assessed to have left foot and ankle sprain resulting in left foot pain and left ankle posterior talofibular ligament partial tear and pain. Loss of earning capacity was assessed at 5.5%. Sick leave was granted up to 25 January 2018.[[26]](#footnote-26)
14. Having considered all the circumstances and the medical reports, I am unable to conclude that further sick leave beyond 3 July 2017 as endorsed by Form 7 did not carry significant therapeutic value as opined by Dr Lam. In particular, the Plaintiff attended follow up consultation on 11 July 2017 for left ankle sprain and examination still showed tenderness over lateral side of left ankle with decreased range of motion. The above reports also showed that the Plaintiff had been receiving medical treatment and consultation up to March 2018.
15. In the circumstances, I accept Dr Ko’s opinion that sick leave up to 25 January 2018 as endorsed by Form 9 would be acceptable. Accordingly, the loss of earning during the sick leave period should be:

$28,978.88 x 20 months x 1.05 = $608,556.48

1. The next issue is whether the Plaintiff can resume the pre-Accident job. The Plaintiff’s case is that he cannot resume working as a foreman in construction sites as he can no longer wear safety shoes due to his ankle pain, and he needs a crutch when he goes outdoor with prolonged duration or long distance.
2. The Plaintiff’s work with the 1st Defendant was terminated on 18 July 2019. Mr Wong argues that the termination showed that the Plaintiff was unable to resume his pre-Accident job as a foreman. I do not think that this is necessarily the case. Most of the sick leave certificates of the Plaintiff were granted by Yuen Long Jockey Club Health Centre and Madam Yung Fung Shee Health Centre. According to the Schedule of Sick Leave Certificates, the last certificates issued by Yuen Long Jockey Club Health Centre and Madam Yung Fung Shee Health Centre covered the sick leave period up to 29 March 2018 and 4 May 2018 respectively.[[27]](#footnote-27) There is however no evidence that the Plaintiff had attempted to return to work in construction sites thereafter. It is further noted that from 26 January 2018 to 30 November 2018, the Plaintiff worked as a part-time school nanny van assistant instead. From 20 December 2018 to the date he quitted the job on 8 January 2019, the Plaintiff worked in a garbage collection station. There is no evidence to explain why the Plaintiff and the 1st Defendant chose to terminate the work of the Plaintiff in July 2019.
3. Mr Wong draws my attention to the Occupational Report dated 24 April 2020[[28]](#footnote-28) which showed that in the final assessment on 15 November 2016, the active range of motion over left ankle was 10 degrees in dorsi-flexion and 40 degrees in plantar-fexion and limited in inversion and eversion. The muscle power over left ankle was graded 4/5. The Plaintiff failed to perform squatting. His reported standing tolerance was 15 minutes and walking tolerance was 30 minutes with crutches and with left ankle pain. He failed to perform simulation on pulling cable. He was ranked as not matching with job demand. I note that the Occupational Report recorded the assessment on the Plaintiff as at 15 November 2016 while the Plaintiff received further treatment and there was further development and improvement on the Plaintiff’s left ankle. It would be more appropriate to consider subsequent medical and expert reports in order to determine whether the Plaintiff could resume pre-accident job.
4. Mr Wong invites the Court to adopt Dr Ko’s opinion that the Plaintiff would have great difficulty in resumption of his pre-Accident job as a foreman while Mr Cheng submits that Dr Lam’s opinion should be preferred. Dr Lam opined that the injury would not prevent the Plaintiff from resuming his pre-Accident job but there would be a certain degree of residual pain and impaired exercise tolerance would be expected.
5. Having considered all the circumstances, I prefer Dr Lam’s evidence to that of Dr Ko on the following reasons:
6. Dr Ko considered that the Plaintiff still complained of residual pain, swelling, stiffness and weakness in his left lateral ankle and foot. Because of that, Dr Ko opined that the Plaintiff may need to consider changing to other jobs in other positions in construction with less strenuous activities and requirement of heavy exertion or work in other places. Dr Ko had never explained in the report why, as at the joint examination, the Plaintiff still experienced such pain and stiffness more than two years after the Accident. Pain and stiffness could be subjective and such evidence must be treated with care and caution. I accept Mr Cheng’s submission that Dr Ko simply accepted the Plaintiff’s subjective complaints as true and accurate without considering whether the subjective pain could be supported by any objective medical findings.
7. While Dr Or observed that there was muscle wasting back in December 2016, there was no such finding in the Joint Report as at the date of the joint examination. Dr Lam pointed out in the Joint Report that during the assessment, there was no muscle wasting found over left calf, the ankle girth was symmetrical (i.e. no significant residual ankle swelling), and there was no significant ostenopenia noted over the left ankle.
8. Dr Lam considered in the Joint report that the Plaintiff’s current symptom was much more severe than one would have expected to have experienced two and a half years after injury. He commented that continuous pain would be more common in acute fracture and severe inflammation. For the Plaintiff’s complaint of the tenderness of the whole left ankle and lateral foot, it would be unusual and cannot be explained by known pathology. In this connection, Dr Ko did not have any substantive medical finding to counter Dr Lam’s opinion
9. I consider that the Dr Lam’s opinion was more objective and was supported by medical findings.
10. Further, it is noted in the Joint Examination that the Plaintiff was able to sit for 45 minutes and was able to get up from his chair without support. X-ray of both ankles revealed no significant body or soft tissue abnormality. I agree that there was no objective sign to support the Plaintiff’s complaints regarding his allegedly impaired left foot function. There was no noticeable objective functional deficit found as opined by Dr Lam.
11. Moreover, it was the Plaintiff’s case as set out in paragraph 49 of his Witness Statement that he could not resume working as a foreman in the construction site because he could no longer wear safety boots due to ankle pain. However, as mentioned above, the Plaintiff said in cross examination that the safety shoes were too “heavy” and leather shoes were very “tight”. He did not give any direct answer as to why he could not choose a new pair of shoes with looser fit. Nor could he explain why he could not choose waterproof gumboots which were lighter in weight. I have already ruled against the Plaintiff on the issue of credibility. I also reject his allegation that he could not resume working as a foreman in construction site because he could not wear safety shoes.
12. When being asked whether the Plaintiff had attempted to look for job in construction site after the Accident, the Plaintiff simply said “how can I try. They know what kind of person I am. They will put me in a difficult position”. The explanation put forward by the Plaintiff is not reasonable. I agree with Mr Cheng’s submissions that the Plaintiff had never tried to look for job in construction sites after the Accident. The Plaintiff has failed to mitigate his loss.
13. In view of my findings as above, the Plaintiff should be able to resume pre-Accident work as a foreman in construction site. The Plaintiff should not be entitled to any loss of earning after the sick leave period and future loss of earning.

**Loss of earning capacity**

1. The Plaintiff claims damages for loss of earning capacity of $100,000 being around 6 months of the Plaintiff’s post-accident notional income, while Mr Cheng argues that $50,000 should be more than sufficient.
2. The guiding principle for making an award for loss of earning capacity was stated in ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 WLR 132 at 141:-

“Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether there is a “substantial” risk or is it a “speculative” or “fanciful” risk … If the court comes to the conclusion that there is no “substantial” or “real” risk of the plaintiff losing his present job during the rest of his working life, no damages will be recoverable under this head.”

1. The Plaintiff was aged 46 at the time of the Accident and has attained 51 at the time of the assessment hearing. In view of the nature of the Plaintiff’s present job, I accept that the Plaintiff do have real risk of losing his present job and will suffer a disadvantage in the labour market.
2. The Plaintiff is unemployed since January 2022. The last job was his employment with Gurkhas Group as a security earning a basic salary of $13,500 plus other bonus.[[29]](#footnote-29) Having considered the nature of the Plaintiff’s current employment, his age and physical condition, I agree with Mr Wong that a sum of $100,000, representing about 7.5 months of his salary as a security guard, should be sufficient.

**Special damages**

1. The parties agreed that the amount of special damages should be $22,000.

**Summary**

1. The Plaintiff’s damages should be assessed as follows:

|  |  |  |
| --- | --- | --- |
| (a) | PSLA | $250,000 |
| (b) | Pre-trial loss of earnings | $608,556.48 |
| (c) | Loss of earning capacity | $100,000 |
| (d) | Special damages | $22,000 |
|  | **Sub-total** | **$980,556.48** |
|  | Less: 25% | ($245,139.12) |
|  | Less: employees’ compensation | ($646,558.51) |
|  | **Total:** | **$88,858.85** |
|  |  |  |

**Interest and costs**

1. Interest will be awarded at 2% per annum on damages for PSLA from the date of service of the writ. Interest on other pre-trial loss and special damages will be awarded at half the judgment rate from the date of the Accident. The Plaintiff's solicitors are directed to calculate the amount of interest to be included in the judgment.
2. I also make a costs order *nisi* against the Defendant in favour of the Plaintiff for the assessment of damages proceedings including all costs previously reserved in relation to the assessment of damages, if any.  The above order *nisi* shall become absolute after 14 days from the date hereof unless any party applies to vary them within this 14 days’ period. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
3. It remains for me to thank Mr Wong and Mr Cheng for the helpful assistance they have rendered to the court.

(Matthew Leung)

Master of the District Court

Mr Wong Chi Kwong, instructed by Messrs Chan & Chan, assigned by the Director of Legal Aid, for the Plaintiff

Mr Alfred Cheng, instructed by Messrs Clyde and Co., for the 1st and 2nd Defendants

1. See Medical Report of Dr Or Yu Wah dated 22 December 2016 [Bundle C94]. [↑](#footnote-ref-1)
2. See Medical Report of the A&E Department of Pok Oi Hospital dated 7 August 2018 [Bundle C98]. [↑](#footnote-ref-2)
3. See Medical Report of the Department of Family Medicine & Primary Health Care of Yuen Long Jockey Club Health Centre dated 1 May 2018 [C95]. [↑](#footnote-ref-3)
4. See the Physiotherapy Report of Pok Oi Hospital dated 2 April 2020 [Bundle C102-103]. [↑](#footnote-ref-4)
5. See the Medical Report of Dr Chan Yat Fai of the Department of Orthopaedics & Traumatology dated 8 June 201 [Bundle C97]. [↑](#footnote-ref-5)
6. See the MRI Report dated 16 July 216 [Bundle C92-93]. [↑](#footnote-ref-6)
7. See the Occupational Therapy Report dated 24 April 2020 [Bundle C104-105]. [↑](#footnote-ref-7)
8. See the Medical Report of the Department of Prosthetic & Orthotic of Pok Oi Hospital dated 25 March 2020. [↑](#footnote-ref-8)
9. See the Schedule of Sick Leave Certificates [Bundle E324-327]. [↑](#footnote-ref-9)
10. See the Joint Medical Report and the two Supplemental Medical Reports prepared by Dr Ko and Dr Lam dated 7 May 2019, 21 July 2020 and 5 October 2020 respectively [Bundle D106-127]. [↑](#footnote-ref-10)
11. See the Notification of Remuneration Paid to Persons other than Employees (Form 56M) for the year 2018 – 2019 [Bundle E171]. [↑](#footnote-ref-11)
12. See the record card [Bundle E147]. [↑](#footnote-ref-12)
13. See the Employment Contract with Standard-Gurkhas (G3S) Security Service Ltd [E189 - 192-1] [↑](#footnote-ref-13)
14. Bundle E196-199. [↑](#footnote-ref-14)
15. See Witness Statement of the Plaintiff at §49 [Bundle B86] [↑](#footnote-ref-15)
16. Bundle C102. [↑](#footnote-ref-16)
17. Bundle C103. [↑](#footnote-ref-17)
18. See the Occupational Therapy Report §5 [Bundle C104]. [↑](#footnote-ref-18)
19. See the Joint Report §7.6 [Bundle C110]. [↑](#footnote-ref-19)
20. See the Joint Report §7.2 [Bundle D110]. [↑](#footnote-ref-20)
21. Bundle C94 [↑](#footnote-ref-21)
22. Bundle C96. [↑](#footnote-ref-22)
23. Bundle C97. [↑](#footnote-ref-23)
24. Bundle C95. [↑](#footnote-ref-24)
25. Bundle E138. [↑](#footnote-ref-25)
26. Bundle E145. [↑](#footnote-ref-26)
27. Bundle E327. [↑](#footnote-ref-27)
28. Bundle C104-105. [↑](#footnote-ref-28)
29. Bundle E189 – 192-1. [↑](#footnote-ref-29)