**DCPI 1838/2015**

**[2018] HKDC 582**

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.1838 OF 2015

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###### BETWEEN

CHENG SAI KAM Plaintiff

and

TUTTI LIMITED (IN LIQUIDATION) Defendant

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Before: District Court Master S. H. Lee in Court

Date of Hearing: 7 May 2018

Date of Handing Down Assessment of Damages: 25 May 2018

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**ASSESSMENT OF DAMAGES**

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1. On 10 Sept 2012, in assisting a co-worker in fixing a glass door in the course of his employment with the defendant company, the plaintiff’s left foot was cut by one glass door which fell and broke into pieces (**the Accident**).
2. On 18 Aug 2015, the plaintiff commenced these proceedings against the defendant to recover damages for personal injuries he sustained in the Accident.
3. The defendant company has been put to liquidation. But, on 2 Mar 2016, leave was given by Master Lai of High Court in HCCW 74/2015 to the plaintiff to proceed with these proceedings against the defendant notwithstanding the winding up order dated 6 May 2015 made against the defendant.
4. On 12 Aug 2016, the defendant having failed to comply with an unless order of court to file and serve its Defence, interlocutory judgment on liability was entered against the defendant leaving damages to be assessed. The said assessment of damages (**AOD**) now comes before me for hearing.
5. The plaintiff is represented before me by Mr Damy I. K. Lou (**Mr Lou**) of Messrs. Edward Lau, Wong & Lou on the assignment of the Director of Legal Aid.
6. The defendant is unrepresented and absent before me. I am however satisfied on the affirmations of service before me that the Notice of Appointment for AOD, the assessment bundle, plaintiff’s written opening and list of authorities had all been served on defendant’s liquidators. I therefore proceeded with the hearing in the absence of the defendant as suggested by Mr Lou.
7. By my order dated 6 Oct 2017, the defendant was required to file its list of documents and witness statement as to quantum by certain deadlines, failing which it shall be barred from adducing documentary evidence, or calling witness of quantum, at AOD hearing.
8. By the same order, I further allowed the orthopedic report dated 8 Sept 2017 (**the report**) prepared Dr Wong Chin Hong (**Dr Wong**) instructed by the plaintiff’s solicitors to be adduced as evidence at AOD without calling the maker thereof.
9. I also gave leave to the plaintiff to file its Revised Statement of Damages (**RSOD**) and the defendant to file its Answer thereto by a certain deadline, failing which the defendant shall be deemed to have elected not to do so.
10. On 15 Dec 2017, the plaintiff filed and served his RSOD. The defendant did not file list of documents, or witness statement as to quantum, nor Answer by the respective deadlines concerned.
11. By another order of mine dated 6 Apr 2018, this matter was set down for AOD.
12. Mr Lou in his opening submissions informed this court that the related employees’ compensation proceedings arising out of the Accident taken out by the plaintiff[[1]](#footnote-1) against the defendant[[2]](#footnote-2) had proceeded to assessment[[3]](#footnote-3) before Deputy District Judge Phillis Loh on 11 June 2014 and the assessment of compensation was given on the same day (**the EC Assessment**). A total award of $316,883[[4]](#footnote-4) was made in favour of the plaintiff in the EC Assessment.
13. Mr Lou further indicated in his opening that the plaintiff abandoned his claim of post-trial loss of earnings made in RSOD and reducedthe claimed amount of pre-trial loss of earnings in RSOD to a smaller sum of $369,337.5 (for a total period of 469 days of full loss of earnings or sick leave).
14. The plaintiff maintained, Mr Lou said, his claim of $250,000 for pain, suffering & loss of amenities (**PSLA**), $100,000 for loss of earning capacity, and $5,000 for special damages as pleaded in RSOD. Interest and costs are also sought. And credit will be given to the award of $316,883 in the EC Assessment.
15. Mr Lou then proceeded to call his only witness i.e. the plaintiff. The plaintiff gave his evidence in punti and adopted the contents of his witness statement dated 4 Aug 2017 as his evidence in chief with one correction as to the length of sick leave granted to him. He afterwards clarified a few matters on questioning by this court and was re-examined by Mr Lou.
16. At the end of the hearing, Mr Lou made his succinct closing submissions both in writing and orally.

*Analysis*

1. I have fully and carefully considered all evidence, submissions and authorities before me. I am grateful for the assistance provided by Mr Lou.

*Assessment of evidence*

1. First, as far as matters in issue, and already decided, in the EC Assessment, the same parties before me are, I think, bound by such determinations in the EC Assessment.
2. Subject to the aforesaid determinations which prevail, having considered their contents against the rest of evidence, I give full weight to the documentary evidence produced before me in the assessment bundle. And I give full weight to the expert opinion given by Dr Wong in the report.
3. Having observed the plaintiff answering my questions in the box, I think he was economical about the whole truth in this witness statement. Among others, he made no reference of his having liver cancer, received two operations, and continuous follow-up treatments, for the same in his witness statement.
4. Having considered the inherent probabilities of plaintiff’s evidence and compared them against the documents and Dr Wong’s opinion before me, I am prepared to accept such of his evidence as set out below.

*Findings of facts*

1. On my assessment of the evidence above, my findings of facts are as follows.

*Plaintiff’s background*

1. The plaintiff was born in Aug 1960 and aged 52 at the time of the Accident.
2. He has 3 marriages, 3 sons and 4 daughters from these 3 marriages. Save for one daughter born in 2016 now living in the Mainland with her mother, the rest of his children are all adults. The plaintiff lives alone in a public housing estate in Hong Kong and provides no support to his children or wives.
3. The plaintiff has only received up to primary education. Since working in about 1972, he has worked as barber and decoration worker.

*Plaintiff’s employment with defendant*

1. Since June 2008, the plaintiff has been orally employed by the defendant as a casual decoration worker. He specialized in painting work but also undertook other tasks assigned to him.
2. His daily wage was $900. He worked about 24 days a month from 9 am to 6 pm. He took Sundays, alternate Saturdays and public holidays off for his rest days. His average monthly earnings were $21,600. For the month of Aug 2012, he has managed to work 25 days and earned $22,500. He received his wages by way of cash cheques every half month from the defendant.

*The Accident*

1. On 10 Sept 2012, the plaintiff met the Accident as described in paragraph 1 above in a domestic unit in a Tai Po residential estate and sustained injuries to his left toe. He felt very painful after the Accident. His colleague at once took him to Accident & Emergency Department (**A&E department**) of Alice Ho Miu Ling Nethersole Hospital (**the hospital**) by taxi for treatment.

*Injuries & treatments*

1. The diagnosis at A&E department of the hospital was laceration left foot with cut tendon. There was a laceration over the dorsum of his left foot. There was a tendon cut. He was admitted to Department of Orthopedics & Traumatology (**O&T**) of the hospital for further management.
2. X-ray examination carried out by the O&T Department of the hospital did not reveal any fracture or retained foreign body. The wound was explored on admission under local anesthesia. The extensor digitorum communis tendon to the left 4th toe was found to be completely cut and repaired.
3. On 14 Sept 2012, the tendon was found to have re-ruptured. It was repaired under local anesthesia on the same day. Short leg cast was applied. The plaintiff was put on heel walking and prescribed with antibiotics.
4. On 17 Sept 2012, the plaintiff was discharged from the hospital after 7 days.
5. On outpatient orthopedic follow-up, the plaintiff’s wound has healed. He was referred to physiotherapist for mobilization exercise and occupational therapist for work assessment.
6. He had a total of 9 sessions of physiotherapy treatment at the hospital from 17 Jan 2013 to 12 Apr 2013. He walked unaided with normal gait. He had stiffness at metatarsophalangeal joint of left 4th toe. Flexion was 2/3 of normal range. There was minimal pain on extension. Power over 4th toe flexion was grade 3-. Left single leg standing was reduced. He reported pain on tip-toe standing. He reported 70% improvement.
7. On another outpatient orthopedic follow-up on 4 Mar 2013, there was mild residual pain over plaintiff’s scar. He could not tolerate ladder climbing.
8. Since about mid-2013, the plaintiff no longer received further treatment for his left foot injuries in the Accident.
9. The plaintiff has paid for his medical expenses at the hospital and related travel expenses (which are estimated by him, and I accept, to be several tens of dollars per trip). He has not incurred other expenses due to his injuries in the Accident.

*Examination by Dr Wong*

1. Examined by Dr Wong on 4 Aug 2017, the plaintiff walked at normal pace unaided without any limping. He could walk on heels and squat down fully with no support. However, he was unstable to walk on tip-toes and complained of left foot pain. He made same complaint on standing single-legged.
2. A 3.5cm oblique scar was found over dorsum of metatarsophalangeal joint of plaintiff’s left 4th toe. There was slight stiffness at the said joint. Tenderness was reported over the scar. Active extension of 4th toe was found, with power grade 4/5. No other deformity or discoloration was found.
3. As a result of the Accident, the plaintiff, opined Dr Wong, suffered from laceration on dorsum of his left foot with cut extensor tendon of his left 4th toe.
4. The plaintiff has been appropriately treated, said Dr Wong. The wound has healed. He has reached the stage of maximal medical improvement and no other treatment is recommended.

*Complaints & disabilities*

1. Nonetheless, the plaintiff has suffered and continues to suffer from residual stiffness in his left 4th toe.
2. He suffers from persistent pain in his left foot after prolonged walking. He has limited ability to stand on rung-ladder due to the pain. He cannot climb ladder due to pain. He, however, does not find it necessary to take painkillers.
3. According to Dr Wong, the plaintiff needs to modify his work to avoid climbing or standing on rung-ladder should he desire to return to work at construction site. The plaintiff would be suitable for alternative jobs that do not demand prolonged walking and ladder-climbing such as courier or petty office assistant. The total impairment of the whole person suffered by the plaintiff as a result of the Accident is assessed by Dr Wong to be 3%.

*Liver cancer and operations*

1. Incidentally, while the plaintiff stayed at the hospital, he was found to have deranged liver function with HBsAg positive. He was seen by physician and was suggested to have active hepatitis B and alcoholic liver disease. Follow-up was arranged for him.
2. In 2014, the plaintiff was diagnosed to have liver cancer. He was admitted to Prince of Wales Hospital (**PWH**) for 10 days and received hepatocellular carcinoma surgery (partial hepatectomy). Afterwards, he prescribed regular medications and he received continuous follow-ups to monitor his liver disease.
3. In Feb 2018, the plaintiff was again admitted to PWH for 7 days to receive another partial hepatectomy.

*Post-accident employment, if any*

1. Continuous sick leave was granted to the plaintiff for his left foot injuries in the Accident from the day of the Accident to 1 Aug 2013, and thereafter from 2 September to 23 December 2013. However, I accept that he was rendered unable to resume working by the said injuries from the day of the Accident to 23 December 2013 i.e. a total of 469 days.
2. Since about 2014, the plaintiff managed to resume working but was, I accept, unable to work the same way as he did before the Accident like working on a ladder. That was, I find, partly caused by the Accident and partly by his liver disease.
3. Since about Jan 2017, the plaintiff has been unemployed and dependent on public assistance. He received public assistance on grounds of unemployment and disability (the latter due to his liver disease and not his left foot injuries in the Accident). He has been arranged job referral by the Labour Department as a condition of receiving public assistance but he is still unable to find a job.

*Plaintiff’s heads of claim*

*PSLA*

1. Mr Lou referred me to 2 comparables for PSLA assessment. They are (1) *Chan Kam Fai v 李志傑經營之惠林運輸公司*, unreported, DCPI 352/2009, H H Judge Lok, 1 Dec 2010, $180,000 awarded for PSLA; and (2) *Lau Yuk Sang Jimmy v Victoria Sight Ltd trading as Windsor Spa*, unreported, DCPI 579/2014, Deputy District Judge M. K. Liu (as he then was), 27 Oct 2015, $150,000 awarded for PSLA.
2. I have carefully compared, among others, the circumstances of the claimants in comparables (1) & (2) above, the severity of the injuries, and nature of treatments, they received and the disabilities they suffered against those of the plaintiff. In paragraph 29 of comparable (2), the court further referred to a number of other comparables and gave brief details of them and the amount of PSLA awards given.
3. Taking inflation into account as submitted by Mr Lou, I think a PSLA award of **$200,000** is appropriate in all the circumstances of the plaintiff.

*Special damages*

1. As the plaintiff cannot recall of paying for tonic food at all in the box, Mr Lou sensibly abandoned this claim of damages in his closing submission.
2. I accept the claim of $1,183 for medical expenses paid for by the plaintiff as proven by the statement of account issued by the hospital before me.
3. For travel expenses incurred by the plaintiff, doing my best to ascertain the total number of trips undertaken by him on the documents before me and taken an average sum of $30 spent on each trip as suggested by Mr Lou, I award him another $1,800 i.e. $30 x 60 trips.
4. This head therefore comes up to **$2,983** i.e. $1,800 + $1,183.

*Pre-trial loss of earnings*

1. Notwithstanding Dr Wong only endorsed sick leave given to the plaintiff up to 1 Aug 2013, as was the case with the EC Assessment, I accept the judgment of his treating doctors at the hospital as to the length of his sick leave and award a total period of 469 days of pre-trial full loss of earnings as claimed by Mr Lou on his behalf.
2. I find it more appropriate to adopt the average monthly earnings of $21,600 than the higher figure of $22,500 for the single isolated month of Aug 2012.
3. On the above basis, I award pre-trial loss of earnings, inclusive of loss of mandatory provident fund contribution by the defendant, to the plaintiff in the sum of **$349,707** i.e. $21,600 x 12/365 x 469 x 1.05.

*Loss of earning capacity*

1. Considering the expert opinion of Dr Wong in paragraph 44 above, plaintiff’s limited education and working experience in paragraphs 24 to 26 above, and his difficulties at work in paragraphs 49 & 50 above, I agree with Mr Lou that the plaintiff suffers a handicap in the labour market as a result of the Accident and an award of loss of earning capacity is properly called for.
2. However, I differ from Mr Lou as to the quantum of such risk or the amount of proper award to be given to the plaintiff. The diagnosis of liver cancer, its treatments and adverse effect on plaintiff’s working ability must, I think, also be taken into account as they reduce the length of plaintiff’s otherwise remaining working life.
3. Considering further that the plaintiff has already reached 57 by the hearing before me, I am only prepared to make an award of loss of earning capacity in his favour in a sum of **$86,400** equal to 4 months of his average monthly earnings at the time of the Accident i.e. $21,600 x 4.

*Summary*

1. After giving credit for the EC Assessment, the total amount of damages I award to plaintiff are **$322,207** i.e. $200,000 + $349,707 + $86,400 + $2,983 - $316,883.

*Disposition*

1. Judgment is therefore entered in plaintiff’s favour against the defendant in the sum of $322,207.
2. I further award interest on PSLA award in the sum of $200,000 at 2% p.a. from the date of the writ i.e. 18 Aug 2015 to the date hereof, and interest on special damages in the sum of $2,983 and on pre-trial loss of earnings in the sum of $349,707 at 4% p.a. from the date of the Accident i.e. 10 Sept 2012 to the date thereof.
3. The total judgment sum of $322,207 would, of course, carry further interest at judgment rate until payment.

*Costs*

1. Mr Lou applied for costs of AOD to be paid by the defendant. He opted for summary assessment for such costs awarded to plaintiff by submitting a statement of costs dated 7 May 2018 and undertook to waive common funds costs from the Director of Legal Aid.
2. Costs normally follow the event. I see nothing to depart from this general rule in the circumstances before me. In view of the total amount claimed in plaintiff’s statement of costs and the fact that costs on liability are to be taxed in any event, I decline Mr Lou’s suggestion of summary assessment.
3. For the above reasons, I make an order nisi that the costs of the assessment of damages, including the hearing before me on 7 May 2018, be paid by the defendant to the plaintiff to be taxed if not agreed, and that plaintiff’s own costs are to be taxed in accordance with Legal Aid Regulations. The said order nisi shall become absolute if there is no written application to vary it within 14 days from the date hereof.

(LEE Siu-ho)

Master, District Court

Mr Damy I. K. Lou of Messrs. Edward Lau, Wong & Lou, assigned by the Director of Legal Aid, for the plaintiff

The defendant is not represented and did not appear

1. As applicant thereof [↑](#footnote-ref-1)
2. As respondent thereof [↑](#footnote-ref-2)
3. In the absence of the unrepresented respondent [↑](#footnote-ref-3)
4. Together with interest and costs [↑](#footnote-ref-4)