#### DCPI 2151/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2151 OF 2009

BETWEEN

MAK SZE YING, FELIX (麥時英) Plaintiff

and

CHUI CHAK YUNG 1st Defendant

trading as SILVER SPIRIT CAR

SERVICES CENTER

(崔澤經營的銀影汽車美容中心)

EMPLOYEES COMPENSATION 2nd Defendant

ASSISTANCE FUND BOARD

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

Date of Hearing: 8 February 2012

Date of Assessment of Damages: 8 February 2012

## ASSESSMENT OF DAMAGES

1. The plaintiff claims against the 1st defendant for damages suffered due to injuries sustained from being bitten by the 1st defendant‘s dog while he was employed at the defendant’s garage as a car polisher on 2 July 2008.
2. Interlocutory judgment against the 1st defendant in default of intention to defend was entered on 17 February 2010. On 22 December 2010, leave was granted to the Employees Compensation Assistance Fund Board (hereinafter referred to as “the Board”) to intervene and join as the 2nd defendant in the action to defend the issue of quantum. Today’s hearing on the assessment of damages was heard in the 1st defendant’s absence.

Background of the accident

1. The plaintiff was 31 years old at the time of the accident. He had been working as a car polisher for 3 years prior to his employment with the 1st defendant on 1 July 2008. On 2 July 2008 at around 4:30 pm, he was alone working at the garage. As he was picking up the car polishing machine, the 1st defendant’s dog (a Doberman Pinscher) bit the 1st defendant’s left hand and wrist, causing it to bleed and swell. He dialled 999 and was subsequently taken to the United Christian Hospital. After assessment by the doctor on duty at the Accident and Emergency Department, he was given an anti-tetanus injection. His wound was dressed and he was discharged.

The plaintiff’s case

1. The plaintiff attended the Accident and Emergency Department of Pok Oi Hospital 10 times between 6 July 2008 and 4 August 2008 due to persistent pain, pin-prickness and numbness of his left hand and wrist and inability to flex and extend the fingers in his left hand. He was referred to the Department of Orthopaedics and Traumatology of Pok Oi Hospital for further management on 11 August 2008.
2. He received occupational therapy at POH from 13 August 2008 to 23 October 2008. He also received physiotherapy treatments for his left hand from 10 September to 15 October 2008 for a total of 18 sessions.
3. After the accident, the plaintiff complained of insomnia and nightmares of being bitten by a dog or other people with flashbacks of the accident and fleeting suicidal idea. He was referred to the Tuen Mun Mental Health Centre for treatment on 2 September 2008. He was diagnosed to be suffering from post-traumatic stress disorder and depressive episode and has been followed up at the Tuen Mun Mental Health Centre and Castle Peak Hospital.

1. The plaintiff claimed that up to the present, he still suffered from left hand pain, weakness and numbness. As he is left handed, he claimed he suffered from difficulties in lifting heavy objects using his left hand, holding a teapot and wringing towels using his left hand. He became bad tempered and his injury had prevented him from engaging in outdoor sporting activities he used to enjoy. Although he had resumed playing computer games, he claimed he was not playing as well as he used to.
2. At the hearing in court, he claimed he took painkillers on a daily basis and sleeping pills occasionally. He blamed the injury was the indirect cause of his divorce with his wife. About 7 months after the accident, the plaintiff began hawking second-hand goods in the Yuen Long area, working two to three days a week. His income from hawking amounted to $1,500 per month. Fortunately, since February 2011, the plaintiff became a tram driver. His present wage with monthly bonus and overtime is more than his earnings as a car polisher before the accident.
3. He is now claiming compensation for:
4. Pain, suffering and loss of amenities at $150,000;
5. Pre-trial loss of earnings based on $7,500 basic monthly salary and $1,800 commission representing $100 commission for each car he polished. He is therefore claiming a loss of earnings of $9,300 per month for 7 months and a reduction of earnings for 25 months. The total pre-trial loss amounted to $147,600 with a claim for loss of retirement benefit of 5% of the $147,600;
6. Loss of earning capacity at $60,000;
7. Costs of future medical treatments and expenses at $4,800 for future psychiatric treatments;
8. Special damages at $3,000 including $2,000 travelling expenses and tonic foods at $1,000.

His claim in total is $372,780.

1. In the absence of the 1st defendant at the hearing, the court received the assistance of the 2nd defendant. The 2nd defendant is represented by Mr Chan acting on behalf of the Board. The 2nd defendant is the Employees Compensation Assistance Fund Board. It intervened in these proceedings because the 1st defendant failed to defend the action, probably because he did not take out an employees’ compensaation insurance for the plaintiff. Consequently, the Board has to step in for the protection of public funds. It is therefore the Board’s role at the assessment to examine the plaintiff and to test his claim for compensation.

1. Mr Chan queried the truthfulness of the plaintiff’s evidence in claiming the loss of use of his left hand and his inability to lift weight and his psychiatric condition.

The medical experts’ reports

1. There are two joint medical expert reports produced at the assessment. The first one was prepared by Drs Hung Siu-lun and Chun Siu-yeung, Orthopaedics specialists. The second joint report was by Drs Peter Ho Pang-nin and Benjamin Lai, Psychiatric specialists. At the joint examination by Orthopaedics experts, the doctors found the following:

“Hands

47. Left hand deformity in claw hand position. Unable to extend fingers actively.

48. Muscle wasting (mild) was observed at the abductor pollicis brevis (APB) of the left thumb and marginal wasting was noted at the first dorsal interosseous muscle of the left hand.

49. Sensation to light touch was reduced by 80% over the dorsum of the left hand and the dorsum of the left fingers; reduced by 90% over the left palm; reduced by 80% over the left thumb and left middle finger; reduced by 90% over the left index finger; reduced by 70% over the left ring finger and left little finger.

50. Numbness was found over the dorsum of left hand.

51. Stiffness on left finger flexors.

52. Decreases temperature was noted on the dorsum of the left hand.

53. Normal skin colour, sweating and circulation of the left hand.

54. No trophic changes of the left hand.

55. Fisting of left hand: Nearly full with pain.

56. Full passive extension of the left fingers, especially left middle finger could not be achieved with active resistance. He complained of pain on finger extension.

57. Opposition: The left thumbnail touching the nail of the left ring finger.

58. Grip strength: He was unable to proceed because he could not open the fingers to grip the handle.” (p 91-92 of the bundle)

1. The doctors found no bony lesion on his two wrists and hands and no degenerative change. Dr Chun considered the plaintiff’s wounds were superficial, he found the subsequent development of numbness and claw hands with supple joints of the digits cannot be explained. That the lack of significant muscle wasting of the forearm and the arm indicated no significant disuse of the hand and upper limb. Further, he considered the plaintiff’s poor compliance to splinting and home exercise also indicated his symptom and his disability cannot be genuine.
2. Dr Hung’s opinion was, the plaintiff’s residual problems of left hand and fingers pain, numbness, deformity and stiffness are compatible with the clinical findings of stiffness of the left fingers and thumb, and under paragraph 72 of the joint expert opinion at page 94, Dr Hung stated the examination revealed:

“72.

1. stiffness of the left fingers and thumb;
2. temperature difference in both hands (cooler on the left hand dorsum);
3. reduced arm and forearm girth on the left side;
4. wasting of the small muscle of the left hand; poor left hand function (fisting with pain, poor opposition of the left thumb and poor grip performance);
5. widespread numbness, tenderness and reduced sensation of the left upper limb.

73. All these features are compatible with Complex Region Pain Syndrome.

1. with the hallmark of pain that is present without stimulation or movement, that occurs beyond the territory of a single peripheral nerve, and is disproportionate to any suspected inciting event which was the crushed injury of the left hand and forearm by dog bite in the accident of Mr Mak…. The stiffness of the left fingers and thumb has been persistently demonstrated in the physiotherapy rehabilitation and the assessment. The reduction in left arm and forearm girth; the reduction in light touch sensation of the left upper limb etc …..”

in Dr Hung’s opinion, the symptoms supported his findings of CRPS.

1. Dr Chun disagreed with Dr Hung’s finding of CRPS because in his opinion, the hallmark symptoms of CRPS is burning pain which is absent in the plaintiff. In his opinion, CRPS is difficult to accurately diagnose and the diagnosis of CRPS has not been scientifically validated. He considered the plaintiff’s problem was due to psychiatric disorder or malingering.
2. Dr Hung on the other hand, pointed to the temperature difference in the two hands of the plaintiff, the atrophy of the small hand muscles, reduction of arm and forearm girth of the left hand upper limb of the plaintiff because the plaintiff is left hand dominant. He referred to these findings in support of his diagnosis of CRPS.
3. In Dr Hung’s opinion, the plaintiff’s recommended sick leave from 2 July 2008 to 6 January 2009 was reasonable, while Dr Chun considered that four weeks’ sick leave to be sufficient. Dr Hung assessed the plaintiff suffered from 4% whole person impairment and 6% loss of earning capacity. Dr Chun on the other hand considered the impairment to be 0.5% and loss of earning capacity also to be 0.5%.
4. According to the joint psychiatrists’ report, Drs Lai and Ho agreed the plaintiff suffered from adjustment disorder with mixed anxiety and depressed mood. They disagreed that the plaintiff was suffering from post-traumatic stress disorder. Dr Ho, however, observed that the plaintiff’s depressive symptoms arose as part of the features of post-traumatic stress disorder in the early stages after the accident. It was a reaction to the physical disabilities and social consequences. Both doctors agreed the plaintiff’s complaint is compatible with the accident, it was the main cause of his psychiatric condition. Dr Lai considered that the plaintiff defaulted follow up at the Tuen Mun Metal Health Centre probably because it was a remission of his mental condition and that his return to seek psychiatric treatment was probably induced by the marital breakdown and his wife leaving him in 2010.
5. Dr Lai assessed the permanent disability impairment of the plaintiff based on his psychiatric condition to be 1 to 2%, while Dr Ho considered 3 to 4% to be appropriate and assessed the same percentage for loss of earning capacity. Both doctors considered a period of further treatments and marital therapy from social workers would be beneficial to the plaintiff.

Quantum

Pain, Suffering, Loss of Amenities

1. Based on the authorities referred to me, Miss Chao claimed the plaintiff should receive an award of $150,000. However, most of the cases she relied on were cases involving fractures of the hand or fingers or arm and the victims’ impairments were around 5%. Her list of authorities included three cases on dog bites or attack.
2. In the case of *Susi Yanti v Chu Shui Chuen,* HCPI1176/2000 (an assessment by Master de Souza on 2 November 2001), the victim, a girl of 4, was attacked by a pack of dogs. She was left with multiple scars and received an award of $130,000. In the case of *Chiang Ki Chun Ian v Li Yin Sze,* DCPI2067/2009, Deputy Judge C. Lee awarded the plaintiff $80,000 for injuries suffered for which the plaintiff had been hospitalised for eight days. In the case of *Mujiati v Chong Wai Kwan*, DCPI424/2003, the plaintiff was bitten by dogs and suffered injuries to both forearms and right flank and buttocks. The award was $70,000.

1. In the present case, the plaintiff received left hand and wrist injuries which he claimed had rendered his left hand weak, numb and painful. He also claimed he suffered from insomnia, recurring nightmares and forgetfulness as a result. His claim of continuous left hand pain and weakness was doubted by the defendant’s medical experts. So far as the depression claimed by the plaintiff is concerned, the psychiatric experts accepted his psychiatric condition was a result of the accident of the dog bite.

1. From the background, I accept his psychiatric condition was a result of the dog bite incident. On the other hand, I considered his recent relapse and return for psychiatric treatment in 2011 was partly attributable to his marital problems.
2. I am not convinced that he suffered from CRPS based on the experts’ opinion, though I agree his left hand may still suffer from pain, weakness and numbness.
3. Based on the aforesaid, I make an award under this head of $80,000.

Pre-trial loss of earnings

1. I do not accept the plaintiff was capable of earning a regular wage of $9,300 working for the 1st defendant that he would be paid $1,800 extra per month as a bonus for $100 per car he polished. The reason is, I am not convinced that he would be able, if he had carry on with this job, to polish 18 cars in a month in addition to the chores he had to complete at the defendant’s garage.

1. He admitted he had to do other chores besides polishing cars, in fact, he told the doctors that the 1st defendant had sacked two workers on the day he reported for duty on 1 July 2008 and he had to take up the work of two persons. Unfortunately, since he was injured on the second day of his employment, there is no evidence of the plaintiff’s actual monthly earnings at the defendant’s garage.
2. I am however, prepared to accept that he would be able to make a monthly salary of $9,000.
3. I also accept the sick leave recommended by the Hospital Authority doctors at Tuen Mun Hospital and Pok Oi Hospital. His pre-trial loss of earnings therefore is:
4. From 2 July 2008 and 1 February 2009

(seven months):

$9,000 x 7 = $63,000

1. From 1April 2009 to 27 February 2011

(approximately 25 months):

($9,000 - $6,000) x 25 = $75,000

Seven months loss plus 25 months of reduced earnings:

$63,000 + $75,000 = $138,000

The loss of MPF or retirement benefit of 5% on $138,000 = $6,900.

Therefore, the total including the 5% loss retirement benefit is $144,900.

Loss of earning capacity

1. The plaintiff is now earning a higher salary than before the accident. However, he is claiming for compensation under this head of damages in case he should lose his present job. I am prepared to make an award of $20,000 because he is now a trained tram driver and has a good prospect of continuing similar employment in a similar field even if he should lose his present employment.

Future medical treatments and expenses

1. I am prepared to award the sum of $3,000 for it has been 1¼ years since the joint psychiatrists’ report in September 2010, he would have received treatments during this period, and if he did, it will soon be completed.
2. His relapse was partly due to his marital problems and his new employment has given him an incentive to improve and it has proved to be beneficial to his mental well-being.

Special damages

1. I allow the sum of $3,000 as travelling expenses and tonic food.

Summary

1. PSLA $ 80,000

Pre-trial loss of earnings and

MPF/retirement loss $144,900

Loss of earning capacity $ 20,000

Future medical treatment and expenses $ 3,000

Special damages $ 3,000

Total $250,900

Interest

1. Interest on special damages at 2% p.a. from the date of the writ to the date of judgment, thereafter at judgment rate.

Costs

1. Mr Chan submitted that the plaintiff should have informed the Board that the plaintiff had found a job and would abandon his claim for loss of earnings from February 2011 onwards. He submitted that the parties would have reached a settlement on the quantum issue in these proceedings.
2. I am not totally convinced by the 2nd defendant’s submission that it was not able to obtain instructions and settle the quantum issue before the hearing and blamed the plaintiff for the delay in disclosing his present employment until last Friday. I am not convinced the plaintiff should be penalised for not given early notice of his obtaining a job that pays him a steady salary higher than the pre-accident income for it would be a matter of uncertainty when he first received the engagement as a trainee tram driver. It was by no means certain if he would be given a full-time job during the probation period or that he would be able to sustain the job at the early stages of his employment.
3. I find the 1st defendant is the real culprit here for not defending the action and not turning up in the assessment of damages. My order of costs is: the 1st defendant should bear the plaintiff’s and the 2nd defendant’s costs, to be taxed if not agreed, with certificate for

counsel. The plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

# (H C Wong)

# District Judge

Miss Chao Tsz-kwan, Jolie, instructed by Yip Tse & Tang, assigned by the Director of Legal Aid, for the plaintiff

The 1st defendant was not represented and did not appear

Mr David Chan, instructed by Gallant Y T Ho & Co, for the 2nd defendant