DCPI 2275/2014

[2018] HKDC 332

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2275 OF 2014

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BETWEEN

CHEUNG MAU FA（張茂花） Plaintiff

and

REGENT CONSTRUCTION COMPANY LIMITED

（毅俊建築有限公司） Defendant

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Before: Deputy District Judge Jason Wong in Court

Dates of Hearing: 7-9 March 2017, 3 and 25 April 2017

Date of Assessment of Damages: 29 March 2018

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ASSESSMENT OF DAMAGES

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1. Ms Cheung, the plaintiff, was formerly a general labourer employed by the defendant under a contract of employment entered on 22 May 2012. On 29 May 2012 whilst working at a construction site at No 2 Chun Yat Street, Tseung Kwan O, Kowloon, Ms Cheung fell from height and thereby sustained personal injuries. She was born on 18 February 1961 and hence 51 at the time of the accident.
2. Through counsel, this court was informed that liability had been agreed as to 15% on the part of the plaintiff and 85% on the part of the defendant. The trial of these proceedings therefore turned on damages only.

*Injuries and treatments*

1. It was not in dispute that Ms Cheung sustained soft tissue injury to her right ankle by virtue of the accident. Rather the primary complaint of the defendant was that Ms Cheung had gravely exaggerated her symptoms. It was therefore essential to consider the medical evidence in some detail.
2. After the accident, Ms Cheung was taken to the Accident and Emergency Department of Tseung Kwan O Hospital where she was found to have sustained a sprain in the right ankle with decreased range of motion. Ms Cheung experienced pain on plantarflexion and dorsiflexion but X-ray did not reveal any fracture or dislocation of the foot. She was discharged on the same day with 6 days of sick leave.
3. Ms Cheung then continued to attend the Tseung Kwan O Hospital on 4 June 2012, 9 June 2012, 12 June 2012, 18 June 2012, 22 June 2012 and 11 August 2012 where on each occasion she complained of persistent pain in the right ankle. It is of note however that in the last visit, 11 August 2012, no swelling was observed by the treating doctor notwithstanding that Ms Cheung attended the hospital with a walking stick.
4. On 28 June 2012, Ms Cheung began to seek treatment at Our Lady Maryknoll Hospital. Other than her complaint of pain, by 25 August 2012 Ms Cheung was observed to have developed mood problems which were treated with anxiety management training and medication. A further x-ray was taken of the right ankle on 13 July 2012 which showed a vague lucent line at the navicular bone but no fracture. Ms Cheung also started physiotherapy and occupational therapy at the same hospital, and was referred to the Kwong Wah Hospital for further follow up treatments. Similarly, at the Department of Orthopaedics of the Kwong Wah Hospital, another x-ray was taken of the right leg on 4 January 2013 which confirmed the absence of any fracture. Range of motion was found to be good during a consultation on 21 June 2013. However, and despite physiotherapy and occupational therapy, on 15 March 2013 Ms Cheung was still unable to meet her pre-accident job demands and training thereby ceased by reason of her condition being static.
5. Other than the 2 hospitals, on 25 September 2012 Ms Cheung visited the Robert Black General Outpatient Clinic. Throughout these visits up to 15 March 2015, the treating doctors did not find any swelling or acute inflammation of the right ankle. On a number of occasions, the range of motion of the right foot was observed to be full and normal.
6. Starting from 31 May 2013, Ms Cheung was followed up at the East Kowloon Psychiatric Centre. During the first visit, Ms Cheung described that she had become fearful with vivid flashback of the accident. She said that she was afraid of cars when crossing roads and had palpation with shortness of breath. Ms Cheung was diagnosed to have sustained PTSD. In her last consultation on 26 February 2015, Ms Cheung was reported to be in a fair mood and appetite. She was alert and euthymic. No further appointment was recommended by Dr Lau.
7. On 14 August 2014, Ms Cheung attended the pain clinic of Queen Elizabeth Hospital for pain management. At an assessment conducted on 21 August 2014, Ms Cheung primarily complained of pain in the right buttock, right lower leg and right ankle despite a lapse of 2 years and 3 months after the accident. She was also observed to have mild depressed mood. Occupation therapy, physiotherapy and clinical psychology care were provided to Ms Cheung.
8. By 27 January 2015, Ms Cheung still had limited range of motion in the right ankle, and pain which radiated up to the right knee. Dr Wilson Lui recorded that he had explained to Ms Cheung about the biopsychosocial model and the ‘vicious cycle of disuse or fear avoidance’. Dr Lui also explained that she could not expect to reach total pain free and advised Ms Cheung that she must exercise to improve function.
9. Two assessment reports were obtained for Ms Cheung’s claim for employees’ compensation. In the first report dated 27 September 2012, Dr Wally Law recorded that Ms Cheung walked with a stick and a markedly limping gate. There was no swelling, scar or bruise in the right foot and ankle, nor deformity, muscle wasting on the right calf and thigh. Ms Cheung was also able to squat fully with ankle fully dorsiflexed. But then, Dr Law observed that the active range of movement in the right ankle was 20 degrees on dorsiflexion and 0 degree on plantarflexion. On the second page, Dr Law opined that the injury Ms Cheung sustained was likely to be a soft tissue sprain which would heal within 6 weeks. He considered that Ms Cheung was fit to return to work with a whole person permanent disability of 0.5% and a loss of earning capacity of 0.5%.
10. In his second report dated 14 September 2013, Dr Law recorded that Ms Cheung was in a low mood during the assessment and walked with a stick in her right hand. She complained of pain in the right ankle which extended up to the right knee and patellar. There was also diffuse tenderness on the right lower limb. Range of motion of the right knee was 10 to 40 degrees, and of the right ankle at 10 degrees both on dorsiflexion and plantarflexion. Having maintained the same assessments for whole person permanent disability and loss of earning capacity, Dr Law found that the physical condition of Ms Cheung to be stable such that there would be no significant progress with or without treatment. He observed that Ms Cheung demonstrated symptoms of mood disorder which affected treatment progress and her work capacity.
11. A joint report was obtained from Dr Lau Yan Kit and Dr Lee Po Chin dated 20 July 2015. During the medical examination, Ms Cheung complained of persistent pain in the right ankle and foot which increased during rainy days, walking, prolonged sitting for more than 30 minutes, and walking upstairs. She claimed that she was unable to stand for more than 2 hours, or walk for more than 35 to 40 minutes. After walking for 15 to 20 minutes, Ms Cheung required an umbrella for support. Ms Cheung had other complaints which included poor memory and sleep.
12. On physical examination, Ms Cheung was observed to be walking with an umbrella and an antalgic gait. She was unable to tip toe or perform heel walking. No obvious scar or swelling at the right ankle was found, but there was extensive tenderness except for the tibialis posterior tendon and deltoid ligament. The range of motion and muscle power of the right ankle was also significantly less than the left, and Ms Cheung felt great pain when lifting the ankle on dorsiflexion. Flexing of the right big toe was practically nonexistent both ways. X-rays of the right foot were taken on 29 May 2012 and then on 18 January 2013. No fracture or dislocation was found. Multiple level of degeneration was discovered, nonetheless, at the lower lumbar spine.
13. A total of 3 surveillances had been conducted on Ms Cheung respectively in September 2012, in February 2014, and in May 2015. These were each reviewed by the doctors. I shall come back to this later below.
14. Dr Lau and Dr Lee both found that Ms Cheung sustained soft tissue sprain of the right ankle which was consistent with the mechanism of injury as described by her. The doctors also diagnosed Ms Cheung to have developed post-traumatic stress disorder. Dr Lee, however, pointed out that the ankle injury was only mild as the A&E Department of the Tseung Kwan O Hospital did not record any swelling or bruising on the day of the accident. The Robert Black General Out-patient Clinic also made similar findings but further recorded that there was no redness or limitation of movement some four months afterwards. Although Ms Cheung complained of pain with tenderness at the anterior talofibular ligament, Dr Lee further pointed out that no instability was observed during the examination carried out at the Kwong Wah Hospital.
15. Dr Lau and Dr Lee were in agreement that the treatments received by Ms Cheung had been appropriate and adequate. Specifically, they highlighted the fact that over the last occupation assessment Ms Cheung was unable to bear weight on her single right leg for more than 2 seconds, or to attend the ladder climbing test. However, and on the other hand, Ms Cheung could squat for 33 seconds and perform repeated squatting for 10 times by holding her knees. She was also able to carry weights of 10 pounds from floor to shoulder level. Ms Cheung was seen to walk with a limp unaided and climb stairs with an adapted gait. Her walking tolerance was recorded to be 35 minutes.
16. Having also agreed that Ms Cheung had reached maximum medical improvement, Dr Lau gave only a fair prognosis. He considered that the right ankle pain and limping gait would persist such that Ms Cheung could not return to her previous job as a construction site worker. Dr Lau also opined that Ms Cheung required long term psychiatric treatment because of her anxious mood.
17. Dr Lee held a different opinion. He considered that the residual pain in the ankle was a mild one if present. The reason was that there was no swelling and the x-rays did not reveal any post-traumatic arthritis. Since there was also no sign of complex regional pain syndrome, Dr Lee took the view that the excessive pain claimed by Ms Cheung in the right ankle was unsupported by these findings. Further Dr Lee observed that there was poor subjective effort in the movements of the knees and right ankle. Dr Lee arrived at this conclusion from the facts that Ms Cheung was able to bend her knees much better when she was distracted, and that she had better right ankle movement during an assessment at Kwong Wah Hospital more than 2 years ago. The weakness of the muscle at the right knee, right ankle and right big toe was also inconsistent with the larger girth of the right calf. At the outset, Dr Lee gave a good prognosis of Ms Cheung’s condition and considered that she did not require further treatment.
18. In terms of working capacity, Dr Lau opined that Ms Cheung could not return to her previous job as a construction site worker. He recommended that she took up sedentary work that would require short walking distances and allow more sitting and standing times. Whereas for Dr Lee, he considered that a change of occupation was unnecessary and that Ms Cheung would only suffer from a very mild impairment in work efficiency. Dr Lau assessed Ms Cheung’s whole person impairment and her loss of earning capacity both at 3%, but Dr Lee gave less than 1% respectively in his own assessments.
19. Ms Cheung was given sick leave from the date of accident up to 19 February 2016. She was thus still on sick leave by the time when she was seen by the medical experts appointed for these proceedings. Dr Lau opined that the period of sick leave was reasonable and appropriate. However, Dr Lee considered that a period of 3 months to be normal for a sprained ankle without ligament laxity. He pointed out that there were strong elements of inconsistencies between the findings in the joint examination and questioned Ms Cheung about her complaints of pain despite an improvement in the ankle symptoms. Dr Lee did not accept that a sick leave period of more than 3 months was justified.
20. Dr Lee also disagreed with Dr Lau that Ms Cheung needed further psychiatric assessment. Nonetheless, a joint psychiatric report was obtained from Dr Hung Bing Kei Gabriel and Dr Law Wun Tong dated 21 December 2015.
21. During the examination by the two psychiatrists, apart from the pain in her right ankle Ms Cheung complained about occasional headaches requiring pain killers to relieve, forgetfulness, poor memory, and irritation with temper tantrums. Ms Cheung also said that she was unhappy, worried about her inability to return to work, and that she was socially withdrawn fearful of meeting with people. Ms Cheung claimed that she had a poor appetite, and interrupted sleeps 2 to 3 times of week by nightmares of falling from height.
22. Ms Cheung said that she liked to return to work. She did not, however, wish to work at construction sites because of a risk of falling from heights again. Of note is that the two psychiatric doctors recorded that Ms Cheung was having financial problems with the family. According to Ms Cheung, by the time of the examination she was no longer receiving salary from the defendant. Her husband and son did not provide regular contribution and so Ms Cheung had to deplete the savings from the compensation received from the defendant. That said, it was also recorded that Ms Cheung did not have any debt or loan.
23. Ms Cheung was reported to have had good health and no other major or psychiatric illness before the accident. When asked of her family and personal history, she was observed to be unable to recall any detail of her parents or the number of siblings she had. As for her cognitive functions, Ms Cheung was able to remember two items out of three immediately but one of three in 5 minutes. She was not able to do simple arithmetic or to tell time and date. For questions posed by Dr Hung and Dr Law, Ms Cheung had a tendency to answer she did not know. Her speech was otherwise seen to be coherent and relevant.
24. At the time of the examination, Dr Hung and Dr Law noticed that Ms Cheung walked unaided but with a mild limp. The surveillance videos were seen by the two doctors who pointed out that she was shown to have walked for considerable distance without aid in 2012 and then in May 2012. Ms Cheung displayed no difficulty using public transport or going shopping in those videos. She was further seen to be talking to her friend.
25. Both Dr Hung and Dr Law agreed that Ms Cheung suffered from adjustment disorder with mixed anxiety and depressed mood. Particularly, Dr Law found that Ms Cheung had a tendency to exaggerate her symptoms when she was able to give details of her symptoms but not her personal background. Based on earlier clinical psychologist reports and pain clinic reports which recorded that Ms Cheung was primarily symptom free and able to do most housework, Dr Law considered that her mental disorder was very mild. Dr Law further opined that this litigation contributed as a stressor which would resolve by the time it ended. A period of 3 months of sick leave from first consultation was seen to be appropriate and a further 6 months of future treatment from the date of the report was necessary to end medications. Dr Law took the view that Ms Cheung had no need to avoid any activity and was able to resume her previous employment as a construction site general work. Whole person impairment and loss of earning capacity was both assessed at 1% by virtue of the psychiatric condition.
26. Dr Hung, on the other hand, also found it odd for Ms Cheung to be unable to answer simple questions about her background. However, Dr Hung observed that the symptoms as reported by her were consistent in the earlier medical reports and during the joint assessment. He explained that Ms Cheung’s inability to remember might be because of her low education level, low level of sophistication and possible nervousness in attending the examination. Dr Hung did not agree that Ms Cheung had necessarily malingered or exaggerated her condition.
27. There was no issue that the psychiatric condition as then present at the joint examination was caused by the accident in question. So were the treatments received by her and the fact that Ms Cheung reached maximal medical improvement. Dr Hung considered that Ms Cheung’s prognosis was good and that the adjustment disorder was mild. He found that a period of 6 months of sick leave from the date of the accident was appropriate and a further 12 months of follow up treatments at a 2-month interval at the psychiatric clinic from the date of the joint assessment to be necessary. Dr Hung also agreed that Ms Cheung was able to return to her pre-accident job. Whole person impairment and loss of earning capacity were both assessed at 2%.

*Evidence of Ms Cheung*

1. Ms Cheung adopted her witness statement as evidence in chief. According to her statement, she came to Hong Kong in 1997 and gave birth to two sons who in 2015 were 26 and 30 of age. She received little education in China without completing primary one. Starting from about 2002, she began to work as a general labourer at construction sites. Her primary duties were clearing debris and cleaning. She had also been a dish cleaning lady but for most of the time she worked at construction sites.
2. On about 22 May 2012, Ms Cheung became employed by the defendant and was paid a daily wage of $500. Her average monthly income was $13,000 before the accident. After the accident, she experienced pain when walking and was unable to sit or stand for more than 2 hours. Despite all the treatments received, Ms Cheung complained that she was unable to resume pre-accident job at construction sites or to find part time positions as a dish washer. She also complained about being affected mentally which required her to receive psychiatric treatments. By the time of trial, she still felt pain and numbness in her right ankle. She frequently felt numbness in the right leg and pain when walking or climbing stairs which she found to be particularly difficult. That was generally her evidence in the witness statement.
3. At trial, Ms Cheung testified that she found work as a dish washer in Kwun Tong starting from 15 July 2016. The relevant salary receipts were produced which went up to 1 March 2017. They showed that she was being paid $40 an hour. It appeared the total number of hours that she worked varied from month to month, ranging from 77 to 132 hours in a month. The most salary she received was $5,720 for the month of December 2016. In court, Ms Cheung confirmed that she worked for 5.5 hours a day, 5 days a week.
4. As to why she started work on 15 July 2016, Ms Cheung explained that she attempted to find work after the sick leave period ended in February for a long time. There was no success because of the short number of hours she could work. At the end, she became employed in July through the introduction of a friend.
5. Counsel for the defendant, Mr Sakhrani, began his cross examination with the joint medical report where at page 2 one of the duties of Ms Cheung’s pre-injury occupation was described to be lifting heavy objects of about 100kg. When it was put to her by Mr Sakhrani, Ms Cheung agreed that her role as a general construction worker was to conduct light duties such as cleaning and sweeping duties. Understandably, she was then asked what was the 100kg she lifted. To that question, Ms Cheung answered that she had to dump cement and earth from time to time with another worker. After the accident, she was no longer able to do so.
6. It was not disputed that at the time of the accident, Ms Cheung worked for the defendant for only 7 days. She was paid $500 a day by the defendant. Under cross examination, Ms Cheung claimed that she made more up to $15,000 a month before working for the defendant. However, she was unable to remember any detail about her previous employment such as what was her daily salary or how many days a month she worked. There was also no document in support of her claim.
7. Ms Cheung was then referred to her visit to the Our Lady of Maryknoll Hospital (“OLMK”) on 24 September 2012. In the consultation summary for her mental health, it was recorded that Ms Cheung spoke of her financial hardship. She had two sons, the younger of the two was in prison. The elder son was then 27 years old and made an income of $5,000. Ms Cheung also revealed that she had conflicts with the elder son over trivial matters for which she felt annoyed. Three main stressors were hence identified, being the pain in the foot, financial problems and the son’s disciplinary problems.
8. When asked about the latter two of these stressors, rather remarkably Ms Cheung was not able to provide much detail about a number of significant matters. At one point, she did not even remember telling the doctor about the financial or disciplinary problem. Other than that, and for example, she did not remember when her younger son was sentenced to prison and for how long, or the offence for which he was convicted. She did not remember when her younger son was born or whether he brought money home. For her elder son, she did not remember any particulars about his job or what personal issues she had with him. She did not remember whether she was annoyed with him, or whether the sum of $5,000 was his salary for a month. Ms Cheung did say, however, that her elder son gave her $1,000 every 3 to 4 months making up to about $4,000 a year.
9. The consultation summary further made mention about her 90-year-old husband who suffered from a stroke and received disability allowance. Similarly, Ms Cheung did not remember about the stroke or the disability allowance. She did not remember whether she had received any living allowance as the career for her husband.
10. Ms Cheung did not deny that she was the only breadwinner of the family and had remained so for years before the accident. She disagreed nonetheless that she was stressed by the financial constraints or the issues with her son. When she was asked to explain why she believed that to be the case, Ms Cheung said that she did not know how to tell.
11. It was then pointed out by Mr Sakhrani to Ms Cheung that the defendant continued to pay her monthly salary up to September 2013. In a table of summary of sick leaves, it was shown that as between the date of accident up to 16 February 2016, a total of 1,229 days of sick leave were obtained by Ms Cheung from different hospitals. Mr Sakhrani suggested that every month when Ms Cheung collected payment from the defendant she would engage in small talks with particularly a staff called Ms Kam. For example, Ms Cheung would be asked of her condition and the time she expected to return to work.
12. The case for the defendant was that it had other lighter duties available for Ms Cheung if she returned for work after recovery. She remained employed by the defendant during the period of sick leave. By the time of the accident she was under employment for only 7 days but received payments from the defendant for a total of 16 months thereafter. Ms Cheung did not dispute that the defendant was under these circumstances being helpful. When asked by Mr Sakhrani why she did not ask to be assigned other duties or why she did not think that the defendant could provide help with the subsisting employment, Ms Cheung claimed that she could not do any job for the defendant because of pain. She said that she was unable to do any other work other than washing dishes.
13. Mr Sakhrani then referred to a number of reports and hospital records to suggest that Ms Cheung had been exaggerating her symptoms on different occasions. First, he pointed out that at paragraph 5 of the joint psychiatric report dated 21 December 2015 obtained for the purpose of these proceedings, Dr Hung Bing Kei Gabriel and Dr Law Wun Tong recorded, pursuant to a joint interview carried out on 23 November 2015, that “She cannot tell us if she was admitted to hospital. She had a swollen ankle for six months and she suffered from intense pain”. But according to the medical report of the A&E Department of the Tseung Kwan O Hospital, on the day of the accident the general condition of Ms Cheung was described to be good. Despite local tenderness, there was no swelling or bruising at the right ankle.
14. In a consultation note written on 25 September 2012, which was just short of 4 months from the date of accident, Ms Cheung was observed by the Robert Black General Out Patient Clinic to have no bony lesion, redness, swelling or limitation of foot movement at the right ankle. This was followed by a further consultation on 3 October 2012 when the same clinic, despite complaints by Ms Cheung of severe pain and a limping gait, found no sign of swelling or acute inflammation. There was full passive range of motion with active resistance at the right ankle.
15. Then at another follow up on 24 October 2012 with the same clinic, Ms Cheung was similarly found to have no sign of acute inflammation with full range of motion at the right ankle. She complained of pain in all directions.
16. At trial, Ms Cheung insisted that she had a swollen ankle for a very long time after the accident. However, and having been shown the various contemporaneous records which apparently did not support her claim, Ms Cheung then said that she could not remember about telling the joint psychiatrists that her ankle was swollen for 6 months.
17. In the joint orthopaedic report dated 20 July 2015 prepared by Dr Lau Yan Kit and Dr Lee Po Chin, it was recorded that Ms Cheung complained about pain in her left knee and ankle pain one year after the accident. When questioned about this, Ms Cheung clarified at trial that she experienced pain firstly in the right knee after the accident and then also in her left knee 2 or 3 days thereafter. She remembered telling the doctors about pain in one knee at the A&E Department of the Tseung Kwan O hospital, and pain in both knees at the next follow up treatment.
18. Similarly, as was pointed out by Mr Sakhrani, the assertions of Ms Cheung were not supported by the medical records. This included the medical report from the A&E Department of the Tseng Kwan O Hospital dated 8 November 2013 which recorded that Ms Cheung only complained about her right ankle on the date of the accident and in the subsequent follow up treatments in June and August 2012. She did not make any complaint about either of her knees. The absence of such a complaint was confirmed by the corresponding attendance records dated 4 June 2012 or 9 June 2012.
19. Mr Pun, counsel for Ms Cheung, suggested that Ms Cheung had mentioned about knee pain which could be found in a statement dated 23 January 2014 made by the occupational therapist at the Kwong Wah Hospital. However, that complaint, as it appeared, was made only at a final work assessment carried out on 11 March 2013 and the complaint only related to the left knee.
20. It was put by Mr Sakhrani to Ms Cheung that she did not raise with any doctor about knee pain at the time of the accident or 6 months after the accident. Ms Cheung answered that she did not remember. It was further put by Mr Sakhrani that she mentioned about knee pain to the occupational therapist in order to exaggerate the extent of her injuries. Ms Cheung denied the suggestion at first, but then claimed again that she could not remember what was said at the assessment.
21. On 15 October 2012, Ms Cheung visited the OLMK General Outpatient Clinic. Dr Lee Kam Pui wrote a letter of referral for an orthopaedic assessment for Ms Cheung’s ankle. According to the letter from Dr Lee, Ms Cheung claimed that she received advice from a private orthopaedic centre funded by the insurance company. She further indicated to Dr Lee that she wanted surgery for a possible tendon injury. Dr Lee, however, was not provided any letter from the private doctor or a reason for the orthopaedic assessment. There was no mention of knee pain by Dr Lee in his letter.
22. It was suggested by Mr Sakhrani that this was one more example of an exaggeration to make the injuries appear worse than they were. In answer, this time somewhat differently, Ms Cheung said yes. Be that as it may, Ms Cheung also said that she did not remember having asked for a surgery for her right ankle.
23. In so far as how sick leave certificates came to be issued, the following hospital records were significant: -
24. In a case summary dated 25 October 2013, the East Kowloon Psychiatric Centre recorded that Ms Cheung requested for sick leave because she was unable to get any financial assistance. However, the handling medical officer replied that ‘no sick leave can be given for psychiatric reason’.
25. In a pain intake form dated 14 August 2014 from the Queen Elizabeth Hospital, Ms Cheung was recorded as being unemployed and receiving comprehensive social security allowance. She further described that her pain would get worse on any movement and she expected the pain would worsen in the following months. It was her believe that the pain was caused by a serious disease which had not been discovered by medical investigation.
26. In a consultation note dated 18 August 2015, OLMH recorded that Ms Cheung attended the hospital for an extension of sick leave. The hospital explained that sick leave was not needed after the assessment by the Medical Assessment Board, but Ms Cheung insisted for a sick leave certificate ‘as instructed by lawyer’.
27. Similar records were found, perhaps in some cases slightly differently described, from other consultation notes issued by OLMH dated 17 December 2014, 13 February 2015, 20 April 2015, 24 April 2015, 28 April 2015, 2 May 2015, 6 May 2015, 14 May 2015, 22 May 2015, 26 May 2015, 30 May 2015, 3 June 2015, 11 June 2015, 15 June 2015, 19 June 2015, 23 June 2015, 26 June 2015, 30 June 2015, 4 July 2015, 8 July 2015, 13 July 2015, 21 July 2015, 29 July 2015, 22 August 2015, 26 August 2015, 7 September 2015, 11 September 2015, 15 September 2015, 19 September 2015, 23 September 2015, 2 October 2015, 6 October 2015, and 10 October 2015.
28. In a consultation summary dated 4 January 2015, the Robert Black General Out Patient Clinic recorded a similar request from Ms Cheung, namely, for an extension of her sick leave period as ‘asked by lawyer’ and that she was ‘on legal process x negligence’.
29. The Robert Black General Out Patient Clinic had records of similar requests repeatedly being made during consultations held on 12 December 2014 and 1 February 2015.
30. In the consultation summary dated 2 August 2015, the Robert Black General Outpatient Clinic recorded that Ms Cheung ‘insisted on sick leave because of court case’. Then in a consultation dated 30 August 2015, in addition to a request by Ms Cheung for a sick leave certificate as ‘instructed by lawyer’, it was recorded that she had ‘very exaggerated pain response’ when Ms Cheung moved her right ankle on physical examination.
31. By virtue of what was stated in these hospital records, Mr Sakhrani suggested to Ms Cheung that she was told by her lawyers to extend the sick leave period and her aim was to extend it for as long as possible. When each of those records was shown to her, in the same fashion Ms Cheung claimed that she could not remember what was said to the doctors on each occasion. Ms Cheung, nonetheless, insisted that she made those visits at the time because she was in pain and needed painkillers.
32. This was also the reason, as Ms Cheung explained, for pleading in the Revised Statement of Damages that she ‘expected to continue to be granted sick leave’ after 9 January 2016. Ms Cheung claimed that she was still in pain after January 2016. She said that even at trial she was unable to sit for long periods of time and felt numbness in the limbs.
33. Apart from asserting that Ms Cheung had exaggerated her injuries, the defendant also complained that she failed to mitigate them. In the consultation note dated 3 October 2012 from OLMH General Out Patient Clinic, it was recorded that Ms Cheung had failed to attend a relaxation workshop. Ms Cheung was contacted by telephone on the same day and the reply received was that she had improvement mentally, in her mood and in her sleep. Ms Cheung further denied having any suicidal idea or aggressive behaviour at the time.
34. The note continued to state that Ms Cheung complained of ‘mild fearful feeling and annoying’. However, and subjectively, she claimed that she felt better and had regularly taken an anti-depression medicine Fluoxetine. Ms Cheung also said that she would continue to be followed up at the General Out Patient Clinic and at the Integrated Community Centre for Mental Wellness. A lengthy persuasion was recorded to have been carried out with Ms Cheung, who nonetheless refused to complete the anxiety or depression assessments and wished to terminate the workshop services.
35. This was in contrast with a consultation summary from the same hospital dated some 2 weeks earlier which recorded that Ms Cheung complained about feeling depressed, worried, helpless and financially distressed. She also claimed to be distressed about the defendant not making compensation and about the family condition. She was regretful about working at constructions sites and had repeated dreams about falling from the scene of the accident. Ms Cheung told the doctors that she was easily frightened about for example being hit by cars such that she stood far away from roads or even avoided going out. She said that she did not return to work partially because of her mood problems.
36. An assessment report for employee’s compensation was made by the Supreme Health Care Management Company on 27 September 2012. On the day of assessment, which was carried out 2 days before the report, it was observed that there was no swelling, scar or bruise in Ms Cheung’s right foot or ankle. There was no reflex sympathetic dystrophy and the reflexes on the right ankle and both knees were found to be normal.
37. Ms Cheung had severe pain when the passive range of movement of her right ankle was being tested. The active range of movement was limited to 20 degrees on dorsiflexion and 0 degree on plantarflexion. However, she was able to do a full squat with her right ankle fully dorsiflexed.
38. Dr Law Yee Cheong Wally opined that Ms Cheung sustained a soft tissue sprain at the right ankle and foot, which would heal within 6 weeks from the accident. Despite what was observed over the examination, her condition was considered stable. He gave an assessment of 0.5% permanent disability of the whole person and a 0.5% loss of earning capacity. Dr Law concluded that Ms Cheung was fit to return to work.
39. The results of the assessment coincided with a consultation summary dated 25 September 2012, when the Robert Black General Out Patient Clinic also recorded that there was no redness, swelling or limitation of movement of Ms Cheung’s right ankle.
40. The conclusion that could be drawn from the above records, as Mr Sakhrani appeared to suggest, was that Ms Cheung had not used sufficient subjective efforts by refusing treatments for her mood problem when they were offered and by refusing to go to work despite that she was physically fit to do so.
41. Ms Cheung denied the suggestions. She maintained that she experienced pain at the time of the consultations. She said that she was unable to stand or sit for a long time which made her unsuitable to work for the defendant because of the long hours. According to her, apart from a one hour lunch time, standing for a continuous 8 or 9 hours was a requirement for working at a construction site. During her employment with the defendant, she did not remember about having afternoon tea breaks or taking short moments of break from time to time.
42. Ms Cheung also claimed that she applied bone setting medicine to her ankle and believed that had she not done so she would not be able to walk at all. Even at trial, she was still experiencing pain in the foot and the pain varied at different times. She did not consider herself to be fully recovered as she felt pulling pain just from sitting.

*Surveillance*

1. The defendant relied on a number of surveillance videos which were said to demonstrate that Ms Cheung had been seen walking normally without much difficulty. Ms Cheung did not dispute that she was the person in these footages.
2. Particularly, the following were significant: -
3. On 11 November 2012 at about 9:17 am, Ms Cheung was seen walking through a pedestrian tunnel and then up some stairs to a market in Ngau Chi Wan. She walked with a normal gait without limping. She did not use a handrail or any walking aid such as an umbrella.
4. At about 10:09 am on the same day, Ms Cheung was seen trying on a shoe on her left foot while standing on the right foot. After a few moments, Ms Cheung proceeded to a different stall to try on other shoes. She did not appear to have any difficulty standing on either foot. At about 10:15 am, the video showed that there was a stool next to Ms Cheung. She did not sit on it. From the start of the video up to this point, Ms Cheung did not sit or rest.
5. After having left the Ngau Chi Wan market, Ms Cheung walked the same way back through the tunnel. She was seen descending and ascending slopes and stairs without difficulty. Her gait was normal, and she did not use any walking aid.
6. On 22 February 2014 at about 8:42 am, Ms Cheung was seen walking up some stairs of a footbridge. She was carrying a bag on her left shoulder and her right hand appeared to be placed in the jacket pocket. In about 12 minutes, Ms Cheung arrived at the East Kowloon Polyclinic. She walked with a normal gait without limping. Ms Cheung did not use any walking aid.
7. After leaving the clinic, Ms Cheung walked to a nearby MTR station. She descended to the station down some stairs and exited by walking up another flight of stairs. Ms Cheung walked with normal gait without limping. She did not use any handrail or walking aid. Her right hand appeared to be placed inside her jacket pocket all the time.
8. At about 10:20 am on the same day, Ms Cheung went inside a Mannings shop. While looking at some items, Ms Cheung did a full squat and then stood up without difficulty or any sign of pain. When she squatted, she appeared to rely on her right foot as the main support.
9. On 6 March 2014 at about 8:42 am, Ms Cheung returned to the East Kowloon Polyclinic for a follow up consultation. On the way, she walked with a normal gait without limping. Although Ms Cheung was holding an umbrella at the time, she did not appear to have relied on it as support. At about 9:36 am when Ms Cheung left the clinic, she opened the umbrella and held the umbrella up with her right hand.
10. On 29 May 2015, that is to say the date on which Ms Cheung attended a joint examination with Dr Lau and Dr Lee, Ms Cheung was seen walking at a normal pace for some time after she had left the clinic of Dr Lau in Mongkok. She did not limp, and was holding an umbrella up with her right hand for shade.
11. Both Dr Lau and Dr Lau reviewed the surveillance videos. Dr Lau, in the joint report dated 20 July 2015 only stated that the surveillance report from Secret Eye Investigation Co Ltd dated 8 June 2015 had no probative value and was not helpful. No specific reason was given by him. He wrote further on 27 August 2015 to confirm that he had considered also the Investigation Report by Verity Consulting Ltd dated 26 November 2012 but he did not add anything else.
12. Dr Lee held a different opinion. In the joint report, he observed that Ms Cheung was able to walk normally and without difficulty on all 3 days of surveillance. In his supplemental report dated 25 September 2015, Dr Lee pointed out that in the video dated 25 September 2012 Ms Cheung was not using the walking stick as a support although she was seen holding one in the right hand and walked with a limp. Dr Lee opined that Ms Cheung should not be experiencing significant residual pain at the time.
13. As for the other surveillance videos, Dr Lee observed that Ms Cheung was able to walk without aid in normal gait. He noted that she walked leisurely in the crowd, twisted and turned without difficulty. Ms Cheung was also seen standing on her left and right feet alternatively. In conclusion, Dr Lee maintained his view that it was very likely for Ms Cheung to continue to complain of pain despite that the symptoms in her right ankle had improved, and that a sick leave period of no more than 3 months was appropriate.

*Analysis*

1. Having seen and heard from Ms Cheung, I have no hesitation to reject her evidence. In her 3 days of testimony, she was uncooperative and evasive to the questions put by Mr Sakhrani. For most of the time, she answered that she could not remember the events in question. At one point, Ms Cheung went as far as to say that she was unable to answer any question.
2. I accept the submissions from Mr Sakhrani that there was exaggeration of pain on the part of Ms Cheung and I find that to be the case. Mr Pun drew to my attention to a number of medical reports which recorded that Ms Cheung experienced some degree of pain or limitation in her right ankle such that her condition was found to fall far below the previous job demands: -
3. In the report from OLMH East Kowloon General Out Patient Clinic dated 11 October 2012, it was recorded that on physical examination Ms Cheung ‘had limping gait and used umbrella to assist walking’. However, Ms Cheung was last seen at the clinic on 10 October 2012. It was also recorded by the clinic that ‘When we last saw her, she reported similar right foot pain, especially on walking stairs. There is a feeling of instability over the joint’.
4. In the report from the same clinic dated a year later on 11 October 2013, Mr Pun placed emphasis on the paragraph which stated that Ms Cheung ‘reported partial improvement of the pain of around 30-40 percent during the 1 year treatment’. This is to ignore the remainder of the paragraph which recorded that Ms Cheung complained of persistent right ankle pain, and that ‘pain was most severe on initial walking or walking on stairs. Physical exam found mild limping gait’.
5. At the last consultation at the Robert Black General Out Patient Clinic which took place on 3 December 2012, physical examination of the ankle ‘showed generalized ankle pain around whole right ankle joint line’.
6. According to a work assessment conducted at the Occupational Therapy Department of the Kwong Wah Hospital on 28 November 2012, the results showed that ‘Ms Cheung’s walking balance and tolerance, squatting ability and lifting capacity are far below her mentioned job demand’. On the first page of the report, however, it was also recorded that Ms Cheung ‘still complained of persistent pain over the lateral aspect of her right ankle and her right forefoot. Active movement ranges of her right ankle were poorer than her left. Ms Cheung needed to hold her own knees for support to squat and she could sustain squatting for 22 seconds. She failed to bear weight on her single right leg and to participate in ladder climbing test due to sense of right ankle instability’.
7. In a further work assessment conducted by the same hospital on 11 March 2013, Mr Pun relied on the last sentence of the report which stated that ‘Ms Cheung’s walking tolerance, squatting tolerance, ability in climbing ladder and lifting capacity were far below her mentioned job demand’. At the preceding paragraph, and yet again, it was also recorded that Ms Cheung ‘still complained of persistent pain over the lateral aspect of her right ankle and her right forefoot and left knee pain. Active movement ranges of her right ankle were poorer than her left. Ms Cheung could repeat squatting for 10 continuous repetitions when holding her own knees for support and she could sustain squatting for 33 seconds. She failed to bear weight on her single right leg for more than 2 seconds and she failed to participate in ladder climbing test due to sense of right ankle instability’.
8. In the assessment report made by Dr Wally Law dated 13 September 2013, Dr Law recorded that at the assessment carried out on 29 August 2013 Ms Cheung ‘complained of pain in her right foot and ankle, over the right foot dorsum, on both medial and lateral malleoli, on right shin, right knee and supra-patellar area. There was diffuse tenderness on the right knee, right shin, right ankle, right foot and right sole’.
9. In a consultation note of the OLMH dated 2 May 2015, entries ‘R ankle pain persisting’ and ‘Active ROM limited in all directions’ were recorded.
10. It is unnecessary to repeat here all of the complaints made by Ms Cheung when she attended the different hospitals. It is clear from the above examples that her complaints were contradicted by the surveillance videos obtained by the defendant. Since at least November 2012, Ms Cheung demonstrated no difficulty in walking unaided. There was no instability in either of her ankles. Rather than to say that Ms Cheung had been in pain, her walks were demonstrated, and to use the words from Dr Lee, to be quite leisurely in the videos.
11. Ms Cheung attempted to explain at trial that her pain varied at different times. In the first place, that was not her complaint to the doctors. The hospital notes and records showed that she described her pain to be persistent which worsened on climbing stairs. By 2013, there was pain at the whole foot which extended to her knee. When she was asked whether she was told to attend the hospitals and clinics by her lawyers, Ms Cheung insisted that she had gone because of pain. By 2015, she further demonstrated a ‘very exaggerated pain response’ at the Robert Black General Outpatient Clinic.
12. I therefore find her explanation to be unbelievable. Ms Cheung said so only because she was caught walking normally under surveillance.

*Other witnesses*

1. Ms Cheung did not call any witness.
2. For the defendant, two witnesses gave evidence on its behalf. The first witness was Ms Chung Man. She was an office assistant who met Ms Cheung on 7 July 2012 and 8 August 2012 for the purpose of collecting salary payments. On both occasions Ms Cheung was observed to be limping but her condition appeared significantly worse on the second of the two visits. That prompted Ms Kam Lai Ha to instruct her subordinate Ms Chung to follow Ms Cheung after the latter had left the office.
3. Ms Chung followed Ms Cheung for some distance and watched her crossed roads at pedestrian lights. Ms Cheung then walked up the stairs of a nearby footbridge. All along, Ms Chung kept a short distance of about 10 to 20 meters from Ms Cheung. According to Ms Chung, Ms Cheung walked with a normal gait without any limb. In her opinion, Ms Cheung was not in pain.
4. The second defence witness was Mr Hau Gwai Shing, the managing director of the defendant. Briefly, his evidence was that he spoke with Ms Cheung on one of the occasions when she came to collect salary payments. He invited Ms Cheung to consider returning for work after recovering from injury. It was the position of the defendant that there were lighter duties available such as a general cleaner.
5. I find both Ms Chung and Mr Hau to be honest witnesses. Their testimonies were straightforward and were not shaken under cross examination by Mr Pun.

*PSLA*

1. Ms Cheung claims $350,000 as damages for PSLA. Mr Pun relied on the following authorities:-
2. *Li Fat Tsang v Shun Tat Engineering Co and Anor*, HCPI 558 of 2000, unrep, 15 July 2002;
3. *Lau Pai Yam Bottomley v Tai Tung Coffee Co Ltd*, HCPI 745 of 2002, unrep, 29 September 2003;
4. *Luk Shu Keung v Kwok Chi Shing*, HCPI 848 of 2005, unrep, 28 February 2011;
5. *Ching Yuk Yee v Furniss Jacqueline Elizabeth & Another*, CACV 236 of 2014, unrep, 25 June 2015.
6. Mr Sakhrani relied on the following authorities:-
7. *Cheng Liu Nei Su v Clare Environmental Services Limited*, DCPI 842 of 2008, unrep, 30 July 2009;
8. *Lau Chi Keung v Wong Wai Kei* *and Another*, DCPI 1846 of 2008, unrep, 4 March 2010;
9. *Chang Tsun Tein v Wai Lee Scaffolding Co Ltd*, DCPI 818 of 2008, unrep, 26 May 2010;
10. *Au Yeung Long Tak v La Salle Primary School & Others*, HCPI 916 of 2011, unrep, 9 June 2015.
11. Both Dr Lau and Dr Lee agreed that Ms Cheung sustained a soft tissue injury of the right ankle. By July 2015, she had reached maximum medical improvement. Dr Hung and Dr Law also agreed that Ms Cheung suffered from mild adjustment disorder with mixed anxiety and depressed mood. Given the evidence in this case, I consider that an award of $150,000 to be appropriate.

*Pre-trial loss of earnings*

1. There was no dispute that at the time of the accident Ms Cheung received a monthly salary of $13,000.
2. I have found that Ms Cheung had been exaggerating her symptoms. For the reasons set out above, I prefer the opinion of Dr Lee that the appropriate sick leave period for a sprain injury would be three months.
3. As for her psychiatric disabilities, both Dr Hung and Dr Law opined that Ms Cheung was mentally fit to return to her pre-accident job. Dr Hung noted that Ms Cheung demonstrated some fear when working in high places, but considered that this was not a major factor in limiting her ability to work.
4. Mr Sakhrani further argued that, and as recorded in the various hospital notes, Ms Cheung was subjected to existing stressors such as her family and financial problems. She had failed to return to work with the defendant when a position but with lighter duties was offered and she further refused to attend the relaxation workshop at OLMH. Had she taken a more active role, as it was argued, Ms Cheung would have significantly reduced the extent of the stressors.
5. Ms Cheung only started to work as a dish washer in July 2016. I agree that she had herself to blame both in terms of the time needed to find work and in terms of the nature of work that could be performed. It is clear that she intended to extend her sick leave period for as long as possible when she returned to the different hospitals and clinics, despite on many occasions she was either told that sick leave could not be granted for psychiatric reasons or simply that sick leave was not needed.
6. I consider that a period of 3 months of sick leave to be appropriate given the nature of injuries sustained by Ms Cheung. I allow a further 3 months of time for her to find work thereafter.
7. I do not accept that Ms Cheung would have sustained a loss of monthly income as alleged. Mentally, she was found fit to return to work. Orthopaedically, Dr Lee further found that she could work at a construction site with very mild impairment in work efficiency such that a change of occupation was unnecessary.
8. On that basis, the award for pre-trial loss of earnings will be:-

$13,000 x 6 months x 1.05 = $81,900.

*Loss of earning capacity*

1. The injuries sustained by Ms Cheung were of a mild nature. I am not impressed by the testimony of Ms Cheung when she claimed only very generally that she could not work for the defendant or at a construction site because of pain. Her explanation was simply unsupported by the medical evidence or expert opinion referred to above.
2. For these reasons, the claim by Ms Cheung for loss of earning capacity is refused.

*Future loss of earnings*

1. For the reasons set out above, the claim by Ms Cheung for future loss of earnings is also disallowed.

*Future medical treatments*

1. No future treatment was found by Dr Lau or Dr Lee to be necessary for the sprained injury. Psychiatrically, both Dr Hung and Dr Law considered that Ms Cheung would benefit from further follow up treatments. Dr Hung considered that consultation at two monthly intervals for a period of one year would be appropriate. The charges by the Hospital Authority were $60 per consultation plus $10 medication every 16 weeks. Dr Law on the other hand opined that Ms Cheung should continue to attend follow up treatments at the East Kowloon Psychiatric Centre for six sessions. The cost was estimated at $600.
2. I allow $600 as expenses for future medical treatments.

*Special damages*

1. Ms Cheung claims medical expenses in the sum of $6,810 and travelling expenses in the sum of $3,000 in the Revised Statement of Damages.
2. There is no dispute that Ms Cheung received Comprehensive Social Security Assistance between 7 March 2014 and 31 August 2015. Mr Sakhrani hence argued that medical expenses during that period would have been waived by the Hospital Authority.
3. Be that as it may, I have already found 3 months to be the reasonable period of sick leave for the injuries sustained by Ms Cheung. As between 29 May 2012 and 29 August 2012, Ms Cheung paid a total of 23 visits to the different hospitals. At $60 per visit, she would have incurred a total of $1,380 as medical expenses.
4. The defendant agrees to pay a global sum of $2,000 as special damages. I allow that sum under this head of claim.

*Summary*

1. The total award exclusive of interests is as follows:-

PSLA $150,000.00

Pre-trial of earnings $81,900.00

Future Medical Treatments $600.00

Special Damages $2,000.00

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

$234,500.00

Less 15% ($35,175.00)

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

$199,325.00

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1. Ms Cheung has received a total of $362,206.62 as Employees’ Compensation on 15 January 2015. Even if such interests as Ms Cheung was entitled were included in the quantification, the Employees’ Compensation received was more than adequate to cover her claim.

*Order*

1. The plaintiff’s claim is thereby dismissed with an *order nisi* for costs to the defendant, with certificate for counsel, to be taxed if not agreed, and for the plaintiff’s own costs to be taxed according to the Legal Aid Regulations.

( Jason Wong )

Deputy District Judge

Mr Chase Pun, instructed by Tang, Wong & Chow, assigned by the Director of Legal Aid, for the plaintiff

Ms Sanjay A Sakhrani, instructed by Paul C K Tang & Chiu, for the defendant