## DCPI501/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 501 OF 2005

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##### BETWEEN

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| --- | --- |
| LAU CHI MAN | Plaintiff |
| and |  |
| KOWLOON CANTON RAILWAY CORPORATION | Defendant |

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Coram: Deputy District Judge K. Lo in Court

Dates of Hearing: 19th – 21st December 2005, 23rd December 2005 &

6th January 2006

Date of Handing Down Judgment: 17th May 2006

J U D G M E N T

# Introduction

1. The Plaintiff, an unemployed goldsmith, aged 38 sustained personal injuries in an accident which occurred on 13th April 2002, Saturday, at about 5:35 pm at platform no.3 of LoWu Station of the Defendant. He travelled in the first carriage of the train heading for LoWu and when the train arrived at LoWu, huge crowd of people rushed their way to the exit.

2. There were two vertical metal I-beams erected on this platform in the vicinity near the front carriage of the train.

3. The Plaintiff says after he alighted from the train and stepped onto the platform, he went towards the exit, following the flow of the crowd. He was pushed from behind and accidentally trapped his right forearm into the narrow gap inside the I-beam and suffered injuries. He therefore brings this action for damages for personal injuries and other consequential losses.

4. The Defendant, are sued as the occupier of the LoWu Station including the area where the I-beam situate, for breach of the common duty of care cast upon them by Section 3(2) of the Occupiers Liability Ordinance (Cap 314) and also for negligence.

5. The injuries sustained by the Plaintiff is not in dispute but its continued effect on the Plaintiff and therefore the quantification of his loss are not agreed.

6. The Defendant also denies liability.

7. The Defendant admits that it was the occupier of the platform at the material time and that it owed the Defendant the common duty of care set out in S.3(2) of Cap 314. The Defendant denies that platform 3 (including the I-beams) was defective or dangerous and that it was in breach of a duty of care or its common duty of care. Contributory negligence is also alleged and at issue.

8. The Defendant accepts that if the Plaintiff can prove a breach of the occupiers’ common duty of care, he will also succeed in negligence.

Liability

9. According to the Plaintiff, the I-beam in question was further to the back, closer to the wall and had a metal pipe set in the middle. There was no warning sign alerting or warning passengers of the presence the I-beams and to avoid them nor was the I-beam area cordoned off or so arranged as to prevent the passengers from approaching any of the I-beams or getting into contact with them. There was no broadcast on the platform to alert passengers of the dangers exposed to passengers by the I-beams.

10. According to the Defendant’s witness Fung, there has been no risk assessment of the I-beam and therefore there was no safety measure for the I-beam.

11. The Defendant says according to Defendant’s 2nd witness Chan, passengers to LoWu Station travelling at peak hours on busy days would:

1. board the first four carriages
2. many of them would carry luggage
3. rush to the exit in a hurried manner.

It is therefore self-evident that there would be a lot of pushings amongst the passengers and there would be a bottle-neck congestion at the platform area of the front carriages before passengers reach the exit.

12. The Defendant says that it’s self-evident that passengers when leaving the front carriages to LoWu Station platform 3 during peak hours are likely to get into contact with the I-beam because of congestion and pushing and thus would likely be injured in similar manner which the Plaintiff met his accident.

13. The Plaintiff says that it was clearly foreseeable by the Defendant with the vast number of passengers using the platform and many of them having luggage with them and walking quickly or rushing to cross the border ahead of others, that very likely the existence of the I-beam with the small gaps inside it would likely cause injuries to the passengers.

14. The Plaintiff says the Defendant should foresee such a situation arising from the congested platform and yet it simply did nothing or did not take any or any reasonable steps to prevent such occurrence. In short the Plaintiff was placed in such predicament by the Defendant.

15. The Plaintiff points out that the question in the present case is what was reasonable to expect the Defendant in the particular circumstances.

16. The Plaintiff says to leave the I-beam wholly unguarded or without claddings and to allow it to be there in the main thoroughfare posed real risks of injury to the vast number of passengers using this part of the platform.

17. The Plaintiff further says that no reported similar accident in the past does not mean the Defendant should not take note of the real and potential risks.

18. The Plaintiff commented that although the Defendant claims that there are similar I-beams (some of them also have a pipe in between the empty space of the I-beam) in many overseas countries, the Defendant did not adduce any evidence in respect of any presence or absence of measures taken to ensure no contact of those I-beams by passengers at the overseas railway stations, size and measurements of the gap in these ‘I’-beams, the Plaintiff says further that the Defendant cannot categorically say that no accident of similar kind have not happened at the overseas stations.

19. The Plaintiff submitted that as the Defendant’s 2nd witness told the court that no risk assessment of the I-beam have been made by the Defendant, it therefore clearly shows that the Defendant did not address its mind to the risk caused by the I-beam and that no preventive/ protective steps had been taken.

20. The Plaintiff says it is obvious that the Defendant has failed to apply its mind to the real and potential risks to the passengers caused by the I-beam. He says the fact that there was no report of previous prior similar accidents cannot be used as an excuse given the fact that LoWu Station is the busiest cross border station.

21. Although the Plaintiff admitted that he had travelled in the front carriage on many occasions prior to the accident, he says that his attention had not in the past been drawn to the potential risks created by the I-beam. He says the occurrence of the accident was no fault of his own. Thus he says he should not be held responsible for the accident at all and there is no contributory negligence on his part.

22. The Defendant’s 1st witness Fung says that the ‘I’-beam in question was actually constructed by the Government in 1986 to support canopy roof over platform and was in compliance with the Building Regulations.

23. He further says that this type of ‘I’-beam is used substantially on East Rail and, including with inset drain pipes.

24. According to the Defendant’s 2nd witness Chan, from 1994, there have been over 1 million passengers using platform 3 (or platform 2). By 2002, the average number of passenger using platform 3 was roughly 2 million per month.

25. He further alleged that there had not been one recorded personal injury to a passenger using platform 3 involving I-beam of this kind, at least 5 years prior to 13th April 2002, i.e., date of accident.

26. He says for platform 2, where similar number of passengers used, in the 5 years between 1997 to 2001, prior to the time of the accident, over 182 million passengers had used this platform 2, there were 3 recorded incidents involving I-beam pillars have of the injuries suffered was similar to that of the Plaintiff. There were all injuries to the forehead.

27. The Defendant’s witness Chan and Lee gave evidence and said steps had been taken by the Defendant at the material times to ensure passengers’ safety on the platform. They said there were different broadcastings by the Defendant and by the police on duty to warn passengers on the platform not to push and to remain orderly and that 7 trained staffs and duty manager were on duty to control the crowd. The Defendant had also arranged 3 police officers and other staff of the Defendant stationed on platform 3 to assist in the crowd control.

28. The Defendant says that there is no evidence before this Court to establish as a fact that platform 3 was not reasonably safe by reason of the presence of the I-beam pillars and/ or with inset of pipes. The Defendant further suggests that the Defendant could not have reasonably foreseen injury of the hand suffered by the Plaintiff.

29. The Defendant says the platform with the I-beams as they were at the time of accident was reasonably safe in all the circumstances.

30. The Defendant further submitted that none of the platform was dangerous or posed a risk to passenger and that the same was reasonably foreseeable by the Defendant. The Defendant says that the risk was ‘usual and entirely normal risk’. The Defendant says there is in law no duty to guard or warn of such risks.

31. Further the Defendant says that even if this Court finds that there was such a risk or danger which was foreseeable by the Defendant, the Plaintiff cannot establish that the Defendant had failed to take all reasonable steps to ensure the I-beams were reasonably safe. The Defendants says that they had taken all reasonably steps to ensure safety of the passengers and that the Plaintiff was reasonably safe when he used platform 3.

32. The Defendant threw doubt on the Plaintiff’s version as to how the accident occurred. The Defendant says the accident could have occurred without the breach of duty of care by the Defendant. He commented the Plaintiff for having no witness as to how the accident occurred. Of course, on this point, the Plaintiff says they did ask and was refused CCTV tape covering the accident site at the material time and was told that of the Defendant did not catch how the accident occurred.

33. The Defendant says the Plaintiff has previously told the Defendant’s witness Lee, the staff at the platform at the time that he was pushed by a boarding passenger whereas later he gave instructions to his counsel that he was pushed by departing passenger.

34. The Defendant also queried the Plaintiff for not demonstrating in Court as to how the accident caused the claimed injuries.

35. The Defendant advanced that as the Plaintiff was very experienced in using the front compartment of the train to the LoWu station (as per his evidence) during busy hours like Saturday evenings over the previous 2 to 3 years prior to the accident, he must have seen the pillars and should know to avoid them.

36. The Defendant says the evidence of the Plaintiff show that the Plaintiff did use platform 3 for about 180 to 238 times before the accident, that he agreed that crowd pushing on the train and the platform was common. It was said the Plaintiff must be taken to guard against such “perfectly normal” and obvious risks.

37. The Defendant says that great care had already been taken to cater for crowd safety on platform but he admitted that it is impossible to stop crowd pushing and rushing, especially given the need to keep a substantial flow of passengers moving. The Defendant says this was perhaps the *cause* *sine qua non* of the Plaintiff’s injury rather than the presence of I-beam pillar.

38. The Defendant referred to the case of Kam Wai Ming v. MTR Corporation and others, DCPI 1408 of 2002 where HH Judge Carlson says the proximate cause for the injury to the passenger on the escalator was because the Plaintiff did not hold the handrail and the unexpected stop of the escalator which provided the setting against which the accident occurred but that has not been shown to be result of any negligence or breach of duty of on the part of the Defendants.

## The Law

39. The issue here was whether the Defendant was in breach of the common duty of care. The burden of proof lies on the Plaintiff to establish that the Defendant failed to take such care as in all the circumstances of the case as is unreasonable to see that Plaintiff the visitor is reasonably safe in using the platform as a passenger.

40. Section 3(2) of the Occupiers Liability Ordinance defined the “common duty of care” as “a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there”.

41. Section 3(4) of the Occupiers Liability Ordinance provides: “In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) - where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.”.

42. The Plaintiff invited the Court to consider the case of Blackett v. British Railways Board, the Times, 19th December 1967, unreported, where the Plaintiff passenger walked on the train platform in order to make his way. The accident occurred when he caught his foot and fell when trying to step over a mail-bag in order to get away from two converging luggage trolleys. Phillimore J observed that the Defendant company had chosen to run two sets of goods trolleys in opposite directions along a platform crowded with passengers preparing for departure and with load on one of them badly secured that a mail bag fell off. It was held that the Defendant was negligent in placing the Plaintiff in that predicament and was in breach of the duty under the Occupiers’ Liability Act 1957.

43. The Plaintiff says similarly that the presence of the uncladded I-beam pillars on platform 3 placed the Plaintiff in that predicament and the Defendant was in breach of the duty under the Occupier’s Liability Ordinance.

44. The Plaintiff also referred this Court to Lord Goddard CJ in Tuner v. Arding & Hobbs Ltd [1949] 2 ALL ER 911 where at 912 he said: “The duty of a shopkeeper in this class of case is well-established. It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and if an unusual danger is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present, the onus of proof in on the Defendants to explain how it was that the accident happened.”.

45. The Plaintiff cited The ***Law of Tort in Hong Kong*** by Srivastava & Tennekone, at page 313 under the heading “General Principle” which states “Whether or not the occupier has breached his common duty of care is a question of fact. It is determined by applying the same tests as may be applied in the case of a breach of general duty of care. For example, the courts will inquire into such matters as foreseeability of the occurrence of the injury, (see Chordas v. Bryant (Wellington) Pty Ltd (1988) 91 ALR 149), the risk of greater injury if caused, the costs of avoiding such injury, the utility of the defendant’s act, and the frequency of accidents causing such injury … By the same token, the occupier is not required to guard against improbable risks.”.

46. In ***Clerk & Lindsell on Torts*** 18th Edition, referred by the Plaintiff, para 10 – 28, it is said: “In determining whether what was done or not done by the occupier was in fact reasonable, and whether in the particular circumstances of the case the visitor was reasonably safe, the court is free to consider all the circumstances, such as how obvious the danger is, warnings, lighting, fencing, the age of the visitor, the purpose of his visit, the conduct to be expected of him, and the estate of knowledge of the occupier. The difficulty and expense of removing the danger is a relevant factor.”.

47. The Defendant says the duty is take reasonable care to ensure reasonable safety in all the circumstances and not to ensure no accident or perfection. He referred to the cases of Beaton v. Devon CC [2002] EWCA Civ 1675, Stojan Petrovic v. Chedone – McMaster Hospitals [1988] 10 ACWS (3d) 97, Ontario High Court, Siu Shi Cheung v. Sincere Time (unrep.) HCPI 606 of 2004.

48. He says the Courts have recognized that they must look to “all the circumstances” before deciding that a place or fixture is not reasonably safe. There are 2 critical factors (a) how common the feature is in use and (b) whether there has been any significant history to show that it is not reasonably safe. E.g.: Word v. Hertfordshine [1970] 1 WLR 357 and Staples v. West Porset DC [1995] 91 QR 439.

49. The Defendant says therefore that if the I-beam pillars are common installation and that there is no significant history of danger or injury, the Court should not find the premises to be defective or dangerous.

50. It is further submitted that if the risk is usual and entirely normal and which the visitor can see, the Defendant does not have the duty to guard against the same, Simonds v. Isle of Wight Council [2003] EWHC 2303 (QB).

51. The Defendant says that if the risk is obvious, there is no duty to warn, Staples v. West Dorest District Council [1995] PIQR 439.

Decision on liability

52. This Court has carefully considered all the medical evidence and had the benefit of observing and hearing the witnesses in Court. This Court finds on a balance of probability that the Plaintiff was injured as a result of being pushed by others against the I-beam pillar in question on platform 3 of LoWu Station at the material times. This Court does not find the discrepancy in the departing passenger and the boarding passenger as being very material. There is no point for the Plaintiff to lie about being pushed by a ‘boarding’ or a ‘departing’ passenger so long as he said he was pushed by this person. He could be pushed from his front or back or his side.

53. Medical evidence from the medical experts of the parties did not say the injury of the Plaintiff was inconsistent with the way the Plaintiff sad he was injured.

54. It was accepted that the Plaintiff did ask the Defendant for CCTV tape concerning the area of the I-beam in question at the material times but was told the same was unavailable.

55. It was undisputed that during the few years prior to the accident, several millions of passenger used both platform 2 and platform 3, where I-beam pillars situate.

56. This Court also accepted the Defendant’s submission that the Plaintiff was familiar with platform 3 and had been a frequent user of the same during busy hours alighting from the first compartment of the train.

57. It is not disputed further that only 3 passengers were injured, all with forehead injuries involving contact with the I-beam pillar on platform 2 and that there was no record of anyone getting injured after they got in contact with I-beam pillars on platform 3.

58. The Defendant’s witness gave evidence and said these I-beam pillars were constructed by the government in the past and that they comply with the Building Regulations, that they are also frequently found in platforms in East Rail and overseas.

59. It is worth noting however that LoWu is one of the busiest railway stations in the world and that on Defendant’s admission, whatever measures the Defendant took, they could not really avoid the crowd pushing on the platform. It strikes to this Court that should that be the case, then it is reasonably foreseeable that passengers on the platform might get in contact with these I-beam even if they should have already tried to avoid.

60. On the Defendant’s admission, there was no broadcasting that people should avoiding contacting these uncladded I-beams nor were these I-beams cladded. The I-beam pillar with inset of pipes pillars uncladded pose reasonable foreseeable risks to the passengers nearby.

61. The Defendant’s witness admitted that the Defendant did not have risk assessment on the I-beam pillars despite the 3 reported accidents involving them.

62. There are also, as admitted, nothing that condoned the said I-beam pillars from these rushing passengers during busy hours.

63. This Court did also consider the fact that by cladding the I-beams, some space on the platform would be taken away and that the costs for such cladding was not something exorbitant or unaffordable by the Defendant.

64. It is also reasonable to say that if one should avoid the crowd on the platform during busy hours, one really could not really proceed at reasonable speed because then, the trains schedule is very frequent and the platforms are always crowded.

65. I agree with the Defendant that though the I-beam pillars are common features in MTR or railway stations elsewhere, there is no evidence whether there are accidents in these places and there was no evidence of the dimensions of these I-beams or the size of the gap between the pipes inset in these I-beam pillar.

66. This Court is aware of the relatively low incidence of accidents involving these I-beams.

67. This Court rules that in all the circumstances of the case, the Defendant had breached the duty under Occupier’s Liability Ordinance and common duty of care and was negligent in not ensuring reasonable safety in all the circumstance of the case for its passengers on the platform although injuries to passenger resulting from contact with uncladded I-beam pillars was reasonably foreseeable.

68. I also do not find any evidence to support the contributory negligence on the part of the Defendant.

## Injuries and medical condition

69. The Plaintiff was born on 14th April 1964. He was 38 years old at time of accident and was 41 years old at time of trial.

70. According to the Plaintiff, after the accident, he was immediately admitted to the Emergency Unit of North District Hospital for medical treatments where he was diagnosed as having a fracture shaft of right radius. His right forearm was swollen, tender, deformed with marked decrease in the range of movement. The radial pulse is palpable. Open reduction and internal fixation of fracture right radius was performed on 14th April 2002 with a long scar left on his right forearm after the surgery. There were abrasions over his left knee as well.

71. He was hospitalized for 4 days and discharged on 17th April 2002. He had, since then, been attending regular outpatient treatments about once in every 4 to 6 weeks. A series of physiotherapy treatment was also followed initially about twice in every week for a period of a month and thereafter about once in every week until about December 2002 when the pain in his right forearm had got worse. He had also received occupational therapy treatments.

72. Despite having attending a series of physiotherapy treatment, the Plaintiff says he still felt soreness and ache discomfort over volar side right forearm. He also had swelling of right hand after doing physical exercise for about an hour and had pain while having physiotherapy. He also had a weakened right hand grip. Because of the forearm pain, he cannot engage in any kind of activities requiring repetitive movement of his right hand. His dominant hand is right hand.

73. An implant removal surgery was performed on 29th August 2003 and the attended rehabilitation program thereafter. Sick leave certificates were granted from the date of the accident to 24th February 2004 continuously. The Plaintiff says he still feels stiffness and soreness over his right forearm when pressure was applied over the previous fracture area. He feels discomfort when pushing heavy object or during turning motion of forearm. The strength of the right limb is slightly weakened.

74. He was further examined by Dr Tsoi on 27th February 2004. In his second medical report dated 28th February 2004, Dr Tsoi observes that when compared with the physical findings in his first report (14 months ago), there was improvement in range of motion of the right wrist and strength of the right hand grip. X-ray also revealed anatomical alignment of the distal radius as well.

75. Dr Tsoi comments that the Plaintiff is considered.Fit to resume his pre-injury job as a jewellery worker and the residual stiffness and weakness will slightly affect his efficiency in performing hammering work and he may have to rest for 10 to 15 minutes after continous hammering activities for 2 to 3 hours.

76. According to Dr. Tsoi’s assessment on 27th February 2004, the Plaintiff’s residue stiffness of the right wrist and mildly weakened right hand grip accounts for 5% permanent impairment of the right upper limb, which translates to 3% permanent impairment of the whole person. Dr Tsoi adds that should the Plaintiff decided to change occupation, job such as warehouse attendant, internal decorator, cleaning worker, restaurant assistant, office assistant etc would be suitable for him. Lastly Dr Tsoi states the sick leave of 22 months granted to the Plaintiff was reasonable.

77. The other medical expert Dr Chun does not state that the sick leave period was unreasonable. However Dr Chun does not consider the Plaintiff has suffered any permanent disability or loss or earning capacity.

78. On 2nd December 2005 Dr Tsoi made a supplementary report. In that report he states that he does not agree with Dr Chun that Mr Lau did not suffer from any permanent disability or loss of earning capacity. Dr Tsoi stresses that “(f) racture distal radius is a major injury. Despite good healing was achieved after surgical fixation, there should be certain tissues that were damaged by the injury. The scar tissues formed will be the source of pain upon exertion. This will slightly affect his capacity to work as a goldsmith. His right wrist function will never return to as “Normal” as before the accident. In fact Dr Chun could not rule out the possibility of intermittent mild right wrist pain. This will constitute a slight loss in earning capacity.”

79. Dr Tsoi however did not give a percentage of the loss in earning capacity of the Plaintiff.

80. Dr Tsoi in making his last report also noted that Dr Chun did not record the Plaintiff’s wrist strength.

81. Defendant submitted that Dr Tsoi’s opinion should be preferred as he has taken note of Dr Chun’s opinion before making his supplementary report.

82. Defendant also said that although Dr Chun states in paragraph 3.3 of his report that “[t] he hand grip power pattern on right is suggestive of sub-maximal effort.”. This saying is purely speculative. Plaintiff said if Dr Chun was in doubt that the Plaintff did not try enough, he should have asked the Plaintiff to perform the test again so as to get more data to support his speculation. Yet he had not done so. Defendant is respectfully submitted that the court should not attach any weight to his comment.

83. Defendant also said that neither Dr Tsoi nor Mr. Lai, Physiotherapist I of North District Hospital opined that the Plaintiff deliberately unperformed during grip power test.

84. Defendant also submitted to this Court that there was no evidence that the injury of the Plaintiff was not consistent with the pushing by someone.

85. The Defendant says that in this case, apart from the issue of liability, the Plaintiff needs to establish:

1. The nature and extent of the Plaintiff’s injury;
2. The resultant liability, if any;
3. The Plaintiff’s loss of earnings during the period of certified sick leave between 13.4.02 and 24.2.04;
4. The Plaintiff’s loss of earnings attributable to the injury;
   1. 24.2.04 to trial;
   2. Post-trial;
5. Whether the Plaintiff would suffer any (quantifiable) loss of earning capacity by way of disadvantage in the job market due to the injury in that he would find it easier to lose a job and harder to secure further employment.

86. The Defendant says that the extent of the Plaintiff’s injury and resultant disability were agreed by the Plaintiff in the box as that set out by the physiotherapist Lai and by Dr. Tsoi including Dr. Tsoi’s acceptance of Dr. Chun’s findings. The Plaintiff’s remaining disability, “if any”, according to Dr. Chun, is “intermittent mild pain” with no impairment of the whole man. In his latest report, Dr. Tsoi noted that there was improvement of the previous assessment of 3% in February 2004. Dr. Tsoi no longer quantified any disability and could only find a “slight” loss of earning capacity.

87. The Plaintiff however disagrees with the findings of both Dr. Tsoi and Dr. Chun and says he could not return to his previous job as a goldsmith.

88. The Defendant does not dispute the reasonableness of the Plaintiff’s period of certified sick leave between 13th August 2002 and 24th February 2004.

89. The Plaintiff in the Court says he could not return to his job as a jewellery worker. He told this Court that he has worked in jewellery job since Feb 2004 and was dismissed shortly afterwards. He submitted to the Court letters from these employees, written a year later after the termination of these employments. In the letter from Wellgold, one of the employers, where he worked for 11 days in May 2004, it stated that it might be due to the Plaintiff’s problem with the hand that affected the stability his job performance as a quality control supervisor and that therefore the performance of the Plaintiff was short of what the Company requires.

90. In letter from Shing Hing Jade Jewellery Ltd. where the Plaintiff worked for 5 days in June 2004, it was said the work the Plaintiff did was of standard lower than that required by the company. The letter also stated that the Plaintiff did not inform them of his hand injuries. The letter was delivered to solicitors for the Plaintiff.

91. The Defendant says therefore this Court has a stark choice on resultant disability between the substantive agreement of the two medical experts and Mr. Lau’s professed inability ever to work as a goldsmith again. It was said that the finding will determine the quantum of award for PSLA and items (d) and (e).

92. The Defendant commented that the Plaintiff has problems of credibility in his claimed remaining injury and disability. His claim is not objectively supported. Of his 3 professed problems: unsteady hand, lessened grip and reduced strength, the first problem was never previously reported to the doctors and Dr. Chun found to the contrary; the second problem may exist and Dr. Tsoi found 80% grip returned in February 2004. and Dr. Chun says he may not have been using maximal effort when tested by him although Dr. Tsoi disagreed.

93. Dr. Tsoi, however agreed that the Plaintiff’s grip hand improved since. As for the third problem, the Plaintiff’s forearm and wrist muscles were measured and observed to be the same on both sides and therefore, again, the third complaint was not substantiated by any medical report.

94. The Plaintiff added a new complaint in the witness box that he had restricted movement in the right wrist. This is contradicted by all the medical evidence, including the physiotherapist as far back as November 2004 and both doctors. The Defendant says the Plaintiff was clearly not truthful.

95. Although the Plaintiff claimed he could not return to work as a goldsmith on his own subjective perception, Dr. Tsoi found the contrary as from 24th February 2004. It was said that as Plaintiff’s evidence was that he needed only to hammer intermittently, and for much shorter periods continuously, the restriction in efficiency that Dr. Tsoi envisaged would not affect his job as a gold goldsmith.

96. The Defendant says there must be independent cause for the Plaintiff’s failure to hold the job at Shing Hing in May 2004 and Wellgold in June 2004. It was said that letters from these companies were obviously obtained a year later and solely for the purpose of this trial.

97. The Defendants says the Plaintiff changes jobs frequently and has chosen to remain unemployed for significant periods since 2001. He also took up to 4 months off in 1998-99. The Plaintiff had stayed out of work for 10 months prior to this incident. After the end of his sick leave, 2 months passed before he took employment again; after failing in job in June 2004, he remained entirely unemployed until August 2005. The Defendant says the Plaintiff’s claim that he could not find other suitable work in those 13 months is not credible.

98. The Plaintiff says also that a goldsmith needs only materials, tools and a bench to make a living on self-employment. In Court, the Plaintiff had inadvertently admitted that he did “work on his own materials, with his own tools, on his own bench”. He also knew of the trade practice of lending materials between goldsmiths. It was said the Plaintiff’s answers following cross-examination subsequent to the aforesaid admission was not credible. E.g.: The Plaintiff’s saying that he was ignorant of material costs.

99. He also explained the way he worked at the bench as shown in the photos produced was merely for demonstration and that he did not work at the bench as demonstrated although he admitted the tools and layout of the bench was suited to him and laid out in a way he liked. The Defendant asked this Court to note the way the Plaintiff used both hands to work the heavier tasks in the photos.

100. The Defendant says the Plaintiff is capable of working as before (or earning a comparable sum as a supervisor and/ or trainer) and therefore he should fail both on item (d) from the date found on which he was again so capable, and on item (e). The Defendant says if the Court finds that he has some “slight” inefficiency from a “slight” residual disability, that is then for the Plaintiff to quantify in earnings terms established by credible evidence. It was said by the Defendant that if the Court prefers Mr. Lau’s account, the Defendants submits HK$1,000 per month is a fair figure to apply.

101. The Defendant says although there is no dispute to loss of earnings during sick leave at their prevailing wages, the Court should make a reduction to allow for part of the period when it is likely the Plaintiff would have chosen to be unemployed and “live on his savings”.

Quantum

Pain, Suffering and Loss of Amenities

102. The Plaintiff says his cases falls below the category of serious injury category of Lee Tin Lam v. Leung Kam Ming [1980] HKLR 657.

103. The Plaintiff quoted the following relevant cases: -

Chan Wai Lun Robin v. Kai Shing Management Services and others (HCPI 153/2003) (Sakhrani J; 10 May 2004)

Male, aged 35 at accident. Injuries to right wrist. Post-trial Multiplier of 11 (agreed).

On 25th February 2000, in the course of moving some glass panels, the plaintiff slipped and fell, sustaining an injury to his wrist caused by broken glass. There was a 100% cut of the ulnar artery nerve.

PSLA $250,000

Tang Shu Shek v. Leung Chi Kit t/a Leung Pui Form Mould Works & Anor (HCPI 219/2002) (Master Levy; 13 May 2004)

Male, aged 41 at accident and 46 at trial. Fractured wrist (fractured left scaphoid bone) on non-preferred hand. Post-trial Multiplier of 8.

On 22 March 1999, the Plaintiff fractured his wrist in the course of his employment as a formwork carpenter. He was hospitalized for two days and wore a plaster cast for two months. After removal of the cast, the plaintiff underwent physiotherapy and occupational therapy. The injury had healed with mild reduction of power and good prognosis. The Plaintiff was able to resume his pre-injury job as a formwork carpenter with reduced capacity due to residual pain.

PSLA $180,000

Ho Kwai Kong v. Cheung Kok (HCPI 93/2002) (Master E Shum; 31st October 2002)

Male, aged 59 at accident and 62 at assessment hearing. Broken left radius. Post-trial multiplier 4.

On 30th March 2000, the Plaintiff, a shop proprietor, suffered injuries to his left arm and wrist arising from an attack by the Defendant. He sustained a 5 cm oblique chop wound at his distal left forearm. X-ray revealed that there was a cortical break at distal left radius. Multiple extensor tendons cut on the left forearm and superficial branch of radial nerve was also cut. Tendon and nerve were repaired with a splint on his left wrist with thumb in extension. Attended out-patient physiotherapy treatment and follow-up consultation. Plaintiff is a righ-handed person and now handicapped in not being able to play music nor can he return to pre-accident employment.

PSLA $380,000

104. The Plaintiff says taking into account of the medical operations, long period of sick leave, and medical treatments (including physiotherapy and occupational therapy sessions, out-patient treatments) and his present medical complaints which rendered him unable to return to his pre-accident job, an award within the range of $250,000 to $380,000 is appropriate.

105. The Defendant says that $150,000 is appropriate on the medical evidence of Dr. Tsoi at February 2004.

106. This Court has also considered the other cases submitted to the Court for reference regarding the appropriate multiplier and for the assessment of the PSLA quantum: Lee Kwan Tong v. Liu Yee Lim & others [1977] HKLY 444; Sung Fuk Wah v. Lam Wai Leuk & another [1995] HKLY 527; Chan Ming v. Wayfair Investment Limited [2001] HKLRD (Yearbook) 420; Tsoi Kwong Ming v. Green Valley Landfill Limited [1999] HKLRD (Yearbook) 358; Chan Yiu Ping v. Mok Yuk Kwong & others [2000] HKLRD (Yearbook) 369; Tam Yuen Hoi v. Chan Muk Sing & others [2003] HKLRD (Yearbook) 419; Wong Lai Kai v. Wu Chan Choi & others [1999] HKLRD (Yearbook) 376; Lai Kam Wah v. Wing & Kwong Co. Ltd. [2003] HKLRD (Yearbook) 418; Chan Cheuk Yiu v. Chan Ho Kwan HCPI 879/200, 30.6.01, Master M. Yuen; Yuen Wai Kuen v. Chan Shan HCPI 957/1996, 1.12.98, Master Cannon; Tsang Hin Cheung v. Ng Kit Yeung HCPI 956/2003, 3.1.05, Beeson J.; Ho Bing Cheung v. Lam Yun Tuk DCPI 66/2004, 3.12.04, C. B. Chan DJ; Gurung Netra Bahadur v. Hip Hing Construction Co. Ltd., HCPI 633/2000, 21.10.02, Master de Souza; Muhammad Ismail v. Or Wah, DCPI 293/2003, Wesley Wong DJ; Tang Shu Shek v. Leung Chi Kit & another, HCPI 219/2002, 13.5.04, Master Levy; Chan Kwok Wah v. Tsoi Leung Ming t/a Tsoi Ming Gei Engineering Co. DCPI 412/2004, 24.6.05, H. C. Wong DJ; Li Man Yuen v. Li Chung, CACV91/1991, 26.11.91, Hon. Sir Derek Cons, Ag. C.J., Fuad, V.P. & Clough, J.A.; Tsang Kee Chuen v. Hong Kong & Yaumatei Ferry Co. Ltd. [1988] HKLY 412, 1.12.88, Master Perrior; Chung Kei v. So Yiu & another HCA 9864/83 [1986] HKLY 411, 15.1.86, Hunter J.

107. Clearly, this case is very similar to the Tang Shu Shek case, in view of the seriousness of the injury, the medical treatment, physiotherapy and occupational therapy record, the good progress with return to original occupation although there was residual pain. It was noted however that the injuried wrist in the Tang case related to non-preferred hand and in the present case, the preferred hand was injured.

108. In the Tang case, the PSLA awarded was $180,000.

109. Another case of assistance to this Court was the Wong Lai Kai Case. In the Wong Case, the injured, a waiter aged 36, had abrasions over the left elbow and right leg and superficial abrasions over the left thigh and a fracture of the head of the left fibula. He left hospital on the day but was readmitted later as he had avulsed posterior cruciate ligament of the left knee. Open reduction and screw fixation were performed. His left knee was put in plaster cast and he was discharged 3 days later. He was readmitted later due to swelling of the left calf and was suffering from deep vein thrombosis of the left leg. He was treated with anti-coagulants and was discharged after 12 days, receiving physiotherapy for further 2 to 3 weeks, oral medication for a month and he was given sick leave till nearly 5 years later. At trial, he still complained of swelling in the left leg after prolonged standing and walking and he was assessed to be suffering from 3% permanent disability and 5% loss of earning capacity. He could not return to job as a waiter. He was awarded $264,250 in 1999.

110. Obviously, the injuries in the Wong case were more serious. The period of sick leave, the nature of medical treatment & other therapy, the length of stay in hospital for these treatment are also more prolonged.

111. I find in the circumstances, the sum of $220,000 appropriate under the heading of PSLA.

Pre-trial loss of earnings

112. Parties had no dispute that the 22 months of sick leave was reasonable. The Defendant however submitted that the Plaintiff had the work pattern of not working over a period of time that perhaps the award should take that into account. At time of accident, the Plaintiff was unemployed and had been so for the last 10 months prior.

113. He alleged however that at time of accident, he was about to attend a job interview in a few days’ time.

114. The Plaintiff also claimed that the monthly wages of the Plaintiff at the time, having regard to his work experience and history is $13,000 per month.

115. It is noted that the Plaintiff in Court did say that the jobs in Hong Kong at the time only fetched $8,000 odd per month and that the salary of working in China is higher.

116. The Plaintiff also produced letter from HK Gold & Silver Ornament Workers & Merchants General Union dated 7th March 2005, which says skilled jewellery workers and 15 years working experience or more who worked in Hong Kong factories had average monthly salary of $13,500 between years of 2000 to 2004.

117. The salary of the injured at Shing Hing was $8,000 per month and that at Wellgold was $18,000 per month.

118. The Plaintiff used to earn $13,000 per month at Cheng and Cheng Fine Jewellery Ltd., his last job before the accident.

119. This Court finds in the circumstances, that $13,000 is the reasonable monthly salary fetched by the Plaintiff at the material time.

120. This Court having considered the evidence adduced accepts the submission by the Defendant regarding the frequent changing jobs pattern of the Plaintiff, as evidenced in his job application forms to Wellgold dated 7th May 2004, and the fact that he frequently remains unemployed over ‘the few years prior to the accident’, such as the 10 months prior to the accident. Accordingly this Court adjudged that the 22.4 months (i.e. 13th April 2002 to 24th February 2004) claimed by the Plaintiff would be adjusted to 18 months. Accordingly, the loss of earnings during the sick leave i.e. until 24th February 2004 would be $13,000 x 18 = $234,000.

121. Trial starts in late December 2005.

122. The Plaintiff explained that the reasons why he was dismissed shortly after he took up 2 jobs in jewellery factories after the expiry of the certified sick leave was because he still has suffered impairment which disallows him to return to his previous job as a jewellery skilled worker. It was noted that his stated complaints was either only first raised in Court or was not supported by any medical evidence, not even that of his own medical expert, Dr. Tsoi, save the weakened hand grip point and the slight loss in earning capacity.

123. The letters from the 2 employers were clearly made and intended for the use of the proceedings. This Court finds that the employer though found that there the standard of work done by the Plaintiff was not high enough to satisfy their requirement would not be in a position to certify the reasons therefore the reasons given by them was mere speculation.

124. In fact, the allegation that he cannot return to his previous occupation is contradicted by all medical experts opinions.

125. This Court prefers the evidence of the medical experts and finds that the Plaintiff can return to his previous job.

126. On his own admission, his job does not require continuous hammering for a long time and therefore the inefficiency expected by Dr. Tsoi will not affect his job performance.

127. Coming to the medical opinions of Dr. Tsoi and Dr. Chun, I prefer the opinion of Dr. Chun, in particular I accept that the Plaintiff did use submaximal effort in the hand grip test. There is no reason that his hand grips weakened as he recovers.

128. I do not find his complaints proved.

129. The Plaintiff had also failed to explain why he had only started to work 2 months after the sick leave expired, this again showed his lack of eagerness to return to work.

130. In Court, during the few days’ trial, this Court did not notice anything unusual about the movement of the right hand or the right wrist of the Plaintiff in handling the various heavy hearing box files of documents.

131. This Court does not accept the evidence of the Plaintiff he felt soreness and weakness when he applied strength with his right wrist and which affected his work performance and that therefore he could not return to his work.

132. Further, when the Plaintiff was giving evidence regarding the photos, originally intended to demonstrate his work as a jewellery worker, he had, as the Defendant had rightly pointed out, slipped his tongue and said he did work on his own materials, with his own tools on his own bench. He later changed his evidence on being cross-examined further. He even went further as to deny his knowledge of the value of precious materials he worked with for the last 15 years. This is totally not credible. This Court finds that the Plaintiff had referred to his job as a jewellery worker and worked on his own after the accident. Although when cross-examined the Plaintiff says that he had borrowed the used of the bench at his friend’s company’s workplace for taking the photos, he failed to tell this Court either the name or address of his friend’s factory. He also said the things on the bench in the photos was arranged in a way suited to him.

133. I find the Plaintiff less than full and frank when giving evidence, in particular regarding the alleged disability and continuing effect of the injuries after the accident.

134. Just to alleviate any doubt, the credibility of the Plaintiff, as this Court finds it, had already been considered and weighted when this Court arrived at the findings at to how the accident occurred earlier.

135. Accordingly, this Court accepts the Defendant’s submission that the Plaintiff had failed to prove that the effect of the injuries prevent him from returning his previous job.

136. There is therefore no award for loss of earnings for the period from 25th February 2004 till date of the trial. The total pre-trial loss is therefore $234,000.

137. Similarly, as the Plaintiff is found to be able to return to his previous job, there is no Post-trial loss of earnings.

138. For the sake of completeness, this Court will add in passing that after considering the volume of cases referred to this Court by the parties, the appropriate multiplier in this case is 11.

Loss of earning capacity

139. The Plaintiff claims the sum of $156,000 (i.e. $13,000 x 12 months) under this head. He agrees that if this Court finds that the Plaintiff has been fully compensated for his Post-trial loss, without suffering any further loss in being disadvantaged in the labour market, then obviously no award will be awarded. If not, the Plaintiff says that the Court can award an appropriate sum under this head. The Plaintiff says according to Dr. Tsoi, the accident slightly affect the Plaintiff’s capacity to work as a goldsmith and that the right wrist function from of the Plaintiff will never return to normal as before the accident. The Plaintiff says there is a slight loss in earning capacity.

140. The Defendant says according to Dr. Chun, there is no permanent loss of earning capacity and that even according to the Plaintiff’s medical expert Dr. Tsoi, the mild intermittent pain will only result in a slight loss in earning capacity which Dr. Tsoi is not willing to attach the loss of earning capacity in percentage form.

141. Having considered the medical evidence before me, I accept the evidence of Dr. Chun that there is no loss of earning capacity in this case and accordingly there is no award under this head. On evidence before this Court, this Court does not find an increase in risk in the Plaintiff being dismissed or unemployed in future and suffer disadvantage in the labour market.

Special Damages

142. Both parties agree $16,584 as special damages to be awarded to the Plaintiff.

Total

143. In summary, the awards I make in favour of the Plaintiff as follows: -

|  |  |  |
| --- | --- | --- |
| (a) | PSLA | $220,000 |
| (b) | Pre-trial Loss | $234,000 |
| (c) | Post-trial Loss | $0 |
| (d) | Loss of Earning Capacity | $0 |
| (e) | Special Damages | $16,584 |

Damages (Interest)

134. I also award interest claimed by the Plaintiff and as agreed by the Defendant at: -

2% on general damages from the date of the service to the date of Judgment; and

Half Judgment rate on special damages and the Pre-trial loss of earnings from the date of the accident to the date of Judgment and there will be interest on the Judgment sum at Judgment rate from today until payment.

Costs

138. As the Defendant asked to be heard on costs in the event that damages was awarded against them, the same is reserved pending the hearing on costs.

(K. Lo)

Deputy District Judge

Mr. Paul Wu instructed by Messrs. Simon Siu, Wong, Lam & Chan for the Plaintiff.

Mr. Nigel Kat instructed by Messrs. Munros for Defendant.