DCPI 611/2015

**IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO.611 OF 2015**

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BETWEEN

|  |  |  |  |
| --- | --- | --- | --- |
| LEUNG YUNG CHEUNG | | Plaintiff | |
| and | | | |  | |
| FLY KING TRANSPORTATION | | Defendant | | | |

COMPANY LIMITED

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

Before : Deputy District Judge S.H. Lee in Court

Date of Hearing : 10 - 12 Jan 2017

Date of Judgment : 25 Aug 2017

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**JUDGMENT**

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1. The plaintiff, an employee of defendant, brought this action to recover damages for personal injuries he allegedly sustained in an alleged accident on 8 Oct 2013 (**the alleged accident**) while he was working at a cold storage warehouse at 5/F, Cathy Pacific Cargo Terminal, No.3 Chun Wan Road, New Territories (**the warehouse**).
2. On liability, the defendant puts plaintiff to strict proof of the alleged accident. Alleged breaches of duties are denied. Contributory negligence was asserted. On quantum, it disputes the amounts claimed by way of pain, suffering & loss of amenities (**PSLA**), loss of earnings and special damages.

*Background*

1. By way of undisputed background facts I accept, the defendant was a limited company that mainly engaged in transportation business. The plaintiff, who gave evidence before me, joined it as a warehouseman on 6 Aug 2013. On 1 Oct 2013, he was promoted to team leader responsible for, inter alia, loading and transporting planks of cargoes inside the warehouse, with a basic salary of $11,000.
2. The defendant was the proprietor of the warehouse, responsible for its management and control, and was its occupier within meaning of Occupiers Liability Ordinance, Cap.314 (**OLO**). The plaintiff was a lawful visitor to the warehouse within meaning of OLO.
3. On 8 Oct 2013, the plaintiff was assigned to transport planks of cargoes of frozen salmon inside the warehouse and he was required to work on transfer decks for delivering planks of cargoes from the warehouse to the conveyor belt for onward transport to planes. The transfer decks consisted of many wheels to reduce friction of and thereby aid the ease of plank[[1]](#footnote-1) of cargoes being pushed along their surface[[2]](#footnote-2).
4. On 10 Oct 2013 i.e. 2 days later, at about 1100 hours, the plaintiff attended Accident & Emergency Department (**A&E**) of North Lantau Hospital (**NLH**). On the same day, he spoke over the phone to Mr Cheung Kwok Wah (**Mr Cheung**), defendant’s safety officer. Mr Cheung was responsible for defendant’s safety and administrative matters. He was defence witness before me.
5. Later on the same day, at defendant’s office, plaintiff met Mr Cheung, submitted sick leave certificate to him, and started taking sick leave. On the same day, Mr Cheung prepared the contents of, and signed, an incident report (**the report**).
6. On 22 Oct 2013, Mr Cheung on behalf of Defendant filled in a Form 2 addressed to the Commissioner of Labour required under Employees’ Compensation Ordinance, Cap.282, giving information of the alleged accident (**Form 2**).
7. Between 13 Oct 2013 and 8 Sept 2014, the plaintiff re-attended A&E of NLH on another 67 occasions. On 2 Nov 2013, he first attended North Lantau Community Health Centre (**NLCHC**). He attended NLCHC thereafter from time to time until 1 Aug 2014. He had 9 sessions of physiotherapy at NLH between 25 Feb 2014 and 10 Jun 2014. And he received occupational therapy at NLH from 2 May 2014 to 29 Sept 2014.
8. On 25 July 2014, the plaintiff received MRI scan over his right ankle and right knee in China. Starting from 7 Oct 2014, he started consulting a private orthopedic specialist, Dr Lau Sing Ki Kentric (**Dr Lau**). No less than 19 consultations to Dr Lau were made by him up to 22 Sep 2015.
9. The plaintiff was also referred to Department of Orthopedics and Traumatology (**O&T**) of Princess Margaret Hospital (**PMH**). He had his first appointment there on 24 Feb 2015. He was last seen for follow-up on 30 Jun 2015. On 10 Apr 2015, private MRI scan of plaintiff’s right ankle and knee were performed in Hong Kong.
10. The plaintiff was given sick leave for 630 days almost continuously from the day of the alleged accident to 31 Oct 2015.
11. On 19 Aug 2015, the plaintiff was jointly examined by plaintiff’s orthopedic specialist Dr Fu Wai Kee (**Dr Fu**) and by defence orthopedic specialist Dr Ho Ching Lun Henry (**Dr Ho**). Their joint medical report dated 3 Nov 2015 (**the joint report**) was adduced into evidence without calling the makers.
12. On 30 Oct 2015, Employees’ Compensation (Ordinary Assessment) Board issued Form 7 (**Form 7**), certifying plaintiff to have suffered 4% loss of earning capacity permanently caused by the alleged accident.

*Plaintiff’s case*

1. Plaintiff gave evidence, at about 0730 hours on 8 Oct 2013, he and 3 co-workers were required to deliver 6 planks of frozen salmon (**the 6 planks**) from the warehouse to the conveyor belt for onward transport to planes. The transfer deck they stood on had gaps (**the gaps**). Each of the gaps was, he said, as much as about 1.5 feet in width and about 1 feet in depth.
2. Each of the 6 planks they had to deliver weighed as much as over 4 tons and measured 6 x 6 x 6 feet. On the route to the conveyor belt, there were two of the gaps and the four had to push the 6 planks with force together to cross over such two gaps.
3. At about 0810 hours, the 4 of them were about to push the 5th plank across the 1st of the two gaps (**the** **1st gap**)[[3]](#footnote-3). His colleagues pushed the 5th plank towards his direction. It suddenly and violently hit his right ankle and right knee, causing him to lose balance. His left foot skidded on one wheel of the transfer deck and fell into the 1st gap[[4]](#footnote-4). He thereby sustained injuries to both ankles and right knee. He produced a photo exhibited as “LYC-1” showing a similar gap of the transfer deck.
4. The plaintiff now complains of persistent right ankle pain, stiffness and weakness, occasional left ankle pain and weakness, occasional right knee pain, right lower limb weakness requiring use of a stick, and poor sleep. He can no longer enjoy hiking. He cannot return to his pre-accident job as he can no longer stand for long or push heavy objects as he used to.

*Defence case*

1. Mr Cheung gave evidence of his receiving a call from plaintiff on 10 Oct 2013. Over the line, plaintiff said he strained his left ankle due to over-exertion while pushing cargoes (推貨時，由於用力過度拉傷左腳眼位) with one casual co-worker inside the warehouse at about 0810 hours on 8 Oct 2013. Plaintiff applied for leave from 10 to 13 Oct 2013. Mr Cheung approved it and, afterwards, reduced what plaintiff told him into writing on the report, produced as annex 1 to his witness statement.
2. Mr Cheung also produced alleged photos of the warehouse as annex 2 to his witness statement[[5]](#footnote-5), with photos 2 & 3 thereof showing a gate between transfer decks. In order to allow the gate to be raised up and down, there was only gap, he stressed, with width as small as 2 to 3 inches between two transfer decks, and not as much as 1.5 feet as plaintiff claimed.
3. The defendant was, Mr Cheung explained, engaged by Cathay Pacific Services Limited (**Cathay**) to perform frozen cargo delivery at the terminal, which service had already ended as from Oct 2014. The warehouse and its facilities belonged to Cathay and not defendant. All warehousemen on joining defendant are required to attend induction safety training designed by Cathay on safety matters to be noted at the terminal, including safety guidelines to work on transfer decks and avoid slipping etc. Mr Cheung produced records of plaintiff attending such induction safety course on 5 Aug 2013 to his witness statement.

*Analysis*

1. Mr Victor Gidwani of counsel (**Mr Gidwani**) appeared for the defendant while Mr Chase Pun of counsel (**Mr Pun**) appeared for the plaintiff. I have fully considered all evidence, submissions and authorities put forward at this trial. I have also carefully observed the demeanor of witnesses giving evidence before me.

***Liability***

*Plaintiff to prove the alleged accident*

1. The plaintiff bears the burden of proof to establish the alleged accident on the balance of probabilities. In opposition, Mr Gidwani cross-examined him on the account in the report, which was relied upon by Mr Pun as his fallback position.

*Plaintiff only eye-witness*

1. Mr Cheung did not witness the alleged accident. No other alleged eye-witness was called. I am left with evidence of plaintiff, whose credibility and reliability is crucial to his case.

*Inherent probabilities*

1. In assessing the rival accounts of parties and witnesses’ credibility, I start with inherent probabilities.

*Manual handling duties*

1. Firstly, Mr Cheung agreed with Mr Pun that it was possible for planks as heavy as 4 tons for plaintiff and his co-workers to deliver at the warehouse. It is, of course, not uncommon for workers performing manual handling duties to over-exert and injure themselves. But, had plaintiff over-exerted himself with only one co-worker to assist him in “pushing” plank of cargo as allegedly recorded in the report, he was, I think, more likely to injure himself in lower back than other parts of the body such as ankles now recorded in plaintiff’s medical reports and records before me.

*Risky uneven surface*

1. On the other hand, the environment of the warehouse, as was admitted by Mr Cheung under cross-examination and to be detailed below, poses, I think, plausible risk of slipping and/or tripping injuries to one’s ankles as was suggested on plaintiff’s case and recorded in his medical reports and records.
2. In this respect, Mr Cheung completely “reversed” his evidence at latter part of paragraph 2, and paragraph 3, of his supplemental witness statement to concede the aforesaid risk after cross-examination.
3. Mr Cheung originally claimed by reference to photos of all gaps of the warehouse produced as annex 4 (**annex 4 photos**) that they were all at *same* level with surface of the transfer decks, thus posing no risk of tripping/slipping to workers.
4. After cross-examination by Mr Pun, Mr Cheung admitted that annex 4 photos were taken by him and his colleagues in 2016, by then the gaps had been *filled up* in Oct 2014 with *steel* plates (**the fill-up**) (such that they were at *same* level with the surface of the transfer decks). But nowhere did Mr Cheung mention of such material facts of the fill-up in his 2 witness statements.

*Width of the gaps*

1. Before the fill-up, Mr Cheung agreed that annex 4 photos showed the gaps having width ranging *as much from 8 to 13 inches* (on his measurements shown in annex 4 photos)[[6]](#footnote-6). Hence, his claim at paragraph 5 of his witness statement that the gaps had their width as small as only 2 to 3 inches was plainly incorrect and a gross under-estimation.

*Depth of the gaps*

1. Mr Cheung further agreed with Mr Pun that the gaps before the fill-up had their depth as that of the transfer decks i.e. *at least 7 inches deep*[[7]](#footnote-7); hence their bottom were at a level *lower* than the surface of the decks. He agreed that upper photo at p.E7 and lower photo at p.E8 showed what the gaps were like at the time of the alleged accident. But for the fill-up, there was, Mr Cheung conceded in the box, risk of slipping and/or tripping to workers at the time of the alleged accident.

*Diameter of wheels*

1. Mr Cheung also admitted that plaintiff and his co-workers had no choice but to stand working on the transfer decks, whose surfaces were equipped with many wheels. These many wheels measures *4 inches in diameter* on photo No.4 in annex 4 photos, he agreed, and any worker stepping and skipping on them is *liable* to slip or fall.
2. All in all, I give full weight to all such admissions of Mr Cheung above. The divers measurements of the wheels and the gaps of the transfer decks as admitted by him make it likely, I think, that plaintiff could have his left foot skipped on one wheel of the deck and fallen into the 1st gap as alleged.

*Mr Cheung unreliable*

1. By reason of the same matters identified above, I was driven to conclude that Mr Cheung had set out in his supplemental witness to mislead this court on material facts. I do not find him a trustworthy or reliable witness at all. Save for such admissions made by him above, I reject all his evidence.

*The course of the alleged accident*

1. Turning to the course of the alleged accident itself, Mr Gidwani submitted that, considering the heavy weight of the 5th plank and that plaintiff was “one step away” on its left before the alleged impact, it is implausible for the 5th plank to move “fast” to have “vigorously” hit plaintiff as alleged. I disagree.
2. It must, I think, be recalled that the wheels were there on the surface of the transfer decks to reduce friction and to facilitate the movement of the plank. On plaintiff’s evidence in the box, as many as two of his co-workers were standing at the back of the 5th plank pushing it towards his direction. And the 5th plank had not crossed the 1st gap by the alleged accident. As such, his two co-workers must exert *sufficiently strong* force *together* to *get it over* the 1st gap.

*Plaintiff’s alleged reaction*

1. Mr Gidwani further submitted that it is implausible for plaintiff not to make report on the day of alleged accident and to continue working until 10 Oct 2013 when he first attended A&E of NLH. Again, I disagree.
2. On this point, I think such reaction of plaintiff as he explained at paragraph 11 of his witness statement and paragraph 3 of his supplemental witness statement was understandable and possible. By all means, the injuries he sustained were not, I think, as serious as to stop him altogether from working immediately. As he added in the box, he did not encounter cargo as heavy as the 5th plank for the rest of the day or next day. He applied herbal oil on returning home hoping not to absent from work. And he was told he could only report to superior with medical certificate as proof.

*Contemporaneous documents*

*The report*

1. I move next to contemporaneous documents. Mr Gidwani laid much stress on the contents of the report to attack plaintiff’s credibility, rebut his account of the alleged accident and buttress defence account as recorded in the report.
2. I first note that, under cross-examination, the plaintiff “retracted” his evidence claimed at paragraph 4 of his supplemental statement that he had made a telephone report to Mr Cheung with contents consistent with plaintiff’s case. On further probing, he changed to answer not recalling what he said over the phone.
3. I should say that I have fully taken into account the above significant departure from his evidence in assessing plaintiff’s credibility below (there were various other departures, retractions and contradictions of plaintiff’s evidence in the box which I do not reproduce herein but I have equally taken them into account).
4. At the same time, I do not find Mr Cheung’s taking of the report satisfactory either. It was not a simultaneous or a verbatim account of plaintiff’s words. It was, admitted by him, a summary or precis prepared by him of what the plaintiff orally told him earlier during a 10-minute-long call but, at the end of the day, he only wrote 4 short lines of Chinese on it.
5. Despite the report was in the form of a report by “the worker concerned”, when Mr Cheung met the plaintiff later the same day, he did not seek plaintiff’s confirmation of its contents by e.g. reading over to him and/or securing his signature. And that was the case notwithstanding it was Mr Cheung’s concession that plaintiff’s communication skills were limited and that plaintiff had turned to some so-called alleged “irrelevant” matters during the call.
6. I have also had doubts over the accuracy of the contents of the report. Its reference to injury to “left” ankle only of plaintiff differs from “*bilateral*” ankle injury found at A&E of NLH two days after the alleged accident[[8]](#footnote-8). Under cross-examination, Mr Cheung also recalled of plaintiff saying to him “*hit*” during the call but such important word was nowhere found in the report.
7. Of course, in numerous reports and entries of records from A&E of NLH before me, the plaintiff was recorded to have complained of suffering from ankles pain after “pushing” or “lifting” or “moving” heavy objects. However, he was not their authors and cannot be in a position to answer questions on them. Many of these came from his *treating* doctors and nurses, whose focus was, I think, more likely to be plaintiff’s injuries than the course of the alleged accident.
8. Moreover, the choice of words by such doctors and nurses in such entries might not, I think, be as accurate as one requires in a court of law. For example, by no means was plaintiff required to engage in “lifting” of planks of cargoes at the warehouse, if such word is taken *literally*. Neither did plaintiff “push” the 5th plank *the moment* before the alleged impact, but, at the same time, his duties could generally be described as “pushing” or “moving” the planks along the surface of transfer decks to conveyor belts.
9. All things considered, including my adverse assessment of the credibility of Mr Cheung at paragraph 35 above and his unsatisfactory taking of the report at paragraphs 43 to 45 above, I decide to give no weight to the contents of the report and I disregard the report. As such, there is no issue of fallback position for Mr Pun either.

*Medical reports and records*

1. Moreover, Mr Gidwani has cross-examined the plaintiff on contents of various medical reports and records before me meticulously and demonstrated how plaintiff’s case allegedly differed from them. I do not find it necessary to reproduce herein every such alleged inconsistency he had demonstrated. Suffice to say that I have carefully and fully considered each of them.
2. In this context, I have equally borne in mind plaintiff’s limited communication skills as conceded by Mr Cheung, plaintiff’s limited education as he explained in paragraph 2 of his witness statement[[9]](#footnote-9) and paragraph 7 of his supplemental witness statement[[10]](#footnote-10), and the limitation of such medical reports and records I have identified at paragraphs 46 & 47 above.
3. Nevertheless, among such alleged inconsistencies, the most striking of all is, I think, that plaintiff made no complaint of *right knee* injury or pain (and received no treatment or investigation for his alleged *right knee* injury) at A&E of NLH, NLCHC, physiotherapy and occupational therapy departments of NLH until July 2014[[11]](#footnote-11) despite he claims he suffered from alleged *right knee* injury in the alleged accident in Oct 2013. Prior to that, his complaint, investigation, prognosis and treatment received at NLH and NLCHC were all confined or referred to his “ankles”.
4. At paragraph 7 of his supplemental witness statement, Plaintiff explained to have orally told doctors at A&E of NLH that he suffered from pain in both “legs”, which he meant to include *right knee* pain but had not expressed himself clearly. He further produced medical documentation from NLH dated 30 Dec 2013 as exhibit “LYC-2” as proof.
5. However, I do not accept the above explanation.
6. First, under cross-examination, plaintiff claimed that, on 10 Oct 2013, doctor at A&E of NLH had examined (including *touching*) not only his ankles but also his *right knee*, which allegedly showed *redness*. But medical report from A&E of NLH gave no such alleged examination or alleged redness of his right knee.
7. Indeed, even taking into account plaintiff’s limited education and communication skills and assuming he could not express himself clearly by words, a simple gesture of pointing at his *right knee* could, I think, clearly and earlier convey to doctors at A&E of NLH, doctors at NLCHC, physiotherapists and occupational therapists of NLH that he had health problems with his *right knee*.
8. As were recorded in medical reports before me, the plaintiff apparently complained specifically to Dr Lau about his *two knees*. In medical report of O&T of PMH, when he was *first* seen on 24 Feb 2015, the plaintiff also complained of right “leg” pain after injury on 8 Oct 2013 and complained of persistent right “knee” and right “ankle” pain after the injury. Apparently, he could afterwards distinguish the different body parts and complained separately.
9. In any event, I do not believe any alleged misunderstanding as allegedly explained by plaintiff could have lasted as long as close to 9 months and not corrected by plaintiff with so many different doctors and medical staff of NLH on so many sessions.
10. Furthermore, plaintiff’s account of the alleged accident does not fit well with contents of medical report of NLCHC before me, where it was recorded that plaintiff said that he had his “both” ankles “strained” after “pushing” heavy object on 8 Oct 2013. The word “strained” should particularly be noted. Right ankle “sprain” was also put down as the reason for referral to O&T in letter of referral issued to plaintiff dated 30 Dec 2013 by A&E of NLH.
11. By contrast, it was by his *first* appointment on 24 Feb 2015 at O&T of PMH that the plaintiff was recorded to have belatedly used the word “hit” for the *first* time by saying that “his *right* leg was hit by load of frozen salmon during the injury”.

*Plaintiff not credible either*

1. All in all, having carefully considered the aforesaid material inconsistencies between medical evidence before me and plaintiff’s evidence, and various departures and contradictions etc. of plaintiff’s evidence, including that at paragraphs 41 & 42 above, notwithstanding the inherent probabilities of plaintiff’s case, I conclude that plaintiff is not credible either. Neither did he impress me as a reliable witness. I do not find it safe to act on his evidence and he does not discharge his burden of proof of the alleged accident.

*Plaintiff’s claim dismissed*

1. On my conclusion above, I am obliged to dismiss plaintiff’s claim and I so order.

*If plaintiff is to be believed at all*

1. In the event the matter is taken further and I am held to have concluded wrongly above, I briefly indicate below my conclusions on the remaining issues and my reasons for them.

*Breaches of duties by defendant*

1. If not in breach of its statutory duty[[12]](#footnote-12), I think the defendant was, at the time of the alleged accident, in breach of its common duty of case and/or employer’s duty of care in a) failing to provide a reasonably safe working place; b) failing to arrange for the gaps to be filled up; and c) failing to warn plaintiff about the presence of the gaps. And such breaches caused and/or contributed to the alleged accident.
2. In this connection, I have warned myself against being wise after the event. I have also reminded myself that the standard is one of reasonable care only. Nevertheless, having considered all circumstances prevailing at the time of the alleged accident, the presence of the gaps and wheels (on such measurements I found above) on the surface of the transfer decks did pose, I think, a real and foreseeable risk of serious injury to defendant’s workers pushing heavy planks of cargoes at the warehouse.
3. Such gaps ought, in my view, to have been filled-up before or at the time of the alleged accident. Mr Cheung originally claimed in his witness statement that defendant at no time received any complaint or opinion from workers concerning the aforesaid risk. And Cathay would not allow *wooden* plates or blocks to be so placed on the gaps as it would obstruct passage of goods.
4. However, Mr Cheung conceded under cross-examination the fill-up using *steel* plates do not obstruct passage of goods. Granted that the fill-up was done, Cathay apparently consented to the fill-up or allowed it to be done. I think Mr Cheung just made up excuses to mislead this court and I hold that the fill-up could be arranged before the alleged accident despite defendant was not the owner of the warehouse or its facilities.
5. Equally, on being cross-examined with lower photo at p.E13, Mr Cheung agreed that the horizontal line area marked by the colours of yellow and black[[13]](#footnote-13) was one of the gaps but he insisted that such *coloured labelling* was, at the time of the alleged accident, already there on all the gaps to provide warning due to complaint or opinion given by workers to Cathay.
6. But, surprisingly, Mr Cheung made no reference of such *coloured labelling* at all in his 2 witness statements (neither was it pleaded in Defence at all). Were they already there on the day of the alleged accident, I see no good reason not for him to have raised it earlier (and not for defence to have pleaded it). I do not believe in him on this point and find the position to be otherwise. The gaps ought, I think, to have been so marked up by coloured labels before the alleged accident to serve as warning to defendant’s workers at the warehouse.
7. For the sake of completeness, I have also taken into account that plaintiff had admittedly attended 2-hour safety awareness training on 5 Aug 2013. But Mr Cheung was not directly involved in such training. Neither was plaintiff cross-examined about their *detailed* *contents*. The mass of “safety induction” materials of Cathay before me[[14]](#footnote-14) was not put to plaintiff either, let alone its version date was Feb 2004[[15]](#footnote-15) i.e. *after* the alleged accident. In any event, I do not think any allegation of insufficient training, instructions and/or supervision, if made out at all, caused and/or contributed to the alleged accident.

*Injuries caused by the breaches*

1. Mr Gidwani had submitted that the existence of the 1st gap did not cause the alleged injuries of the plaintiff. *Whether the 1st gap existed or not*, the plaintiff was, he argued, *hit* by the 5th plank pushed by his two colleagues. At best, *only* injuries to his *left* ankle were caused by the 1st gap as only his *left* foot fell into it. I disagree.
2. I repeat paragraph 37 above herein. *But for the existence of the 1st gap*, plaintiff’s two co-workers would not, I think, have exerted *strong* force together to push the 5th plank to *get it over* the 1st gap that it hit him *vigorously*, causing him to lose balance, skip his left foot on one wheel and fall into the 1st gap.
3. However, due to lack of *early* medical finding of *right knee* injury recorded at NLH and NLCHC I have identified at paragraph 51 above[[16]](#footnote-16), I find that plaintiff suffered *only* from injuries to his *ankles* in the alleged accident due to defendant’s breaches of duties (i.e. he was only hit on his *right* ankle by the 5th plank and his *left* ankle got injured by skidding and falling into the 1st gap). His *right knee* was, I find, not hurt in the alleged accident.
4. For the same reason above, I give no weight to the contrary opinion of the *treating* orthopedic i.e. Dr Lau or the different assessment in Form 7. In particular, the partial tear in anterior cruciate ligament and tear of medial meniscus of *right knee* suffered by plaintiff (and shown on MRI scan) has, I find, nothing to do with the alleged accident.

*No contributory negligence*

1. While plaintiff agreed with Mr Gidwani that he was hasty and ought to have paid more attention to his co-workers pushing the 5th plank before the alleged accident, I agree with Mr Pun that it was no more than momentary inattention by an employee and does not amount to contributory negligence.

***Quantum***

*PSLA*

1. On the common opinion by Dr Fu & Dr Ho on this point in the joint report, and on the same diagnosis of NLCHC, I find that plaintiff suffered *only* “soft tissue” injuries to “both ankles” in the alleged accident as a result of defendant’s breaches of its duties.
2. Regarding material difference of opinion between the 2 experts in the joint report, I prefer Dr Ho’s assessment to those of Dr Fu. I find that the plaintiff should have recovered well from his ankles injuries in the alleged accident. He should not be suffering disabling symptoms. His symptoms are mild at the very most. He should have no difficulty in his activities of daily living. The appropriate sick leave should be no more than 3 months. And plaintiff should be able to return to his pre-accident job. The impact of the alleged accident on his working ability should be very mild.
3. My reasons are these. First, the injuries recorded at A&E of NLH on 10 Oct 2013 were indeed minor. X-ray right ankle showed no fracture. Both ankles of plaintiff were found tender and swollen only. The provisional diagnosis was “both ankles pain”.
4. By joint examination before Dr Fu and Dr Ho on 19 Aug 2015, plaintiff claimed to have numbness involving whole right leg from right knee down to right foot and his left ankle. A soft tissue injury without obvious external wound should not, I agree with Dr Ho, result in such diffuse lower limb numbness.
5. This is not to mention that, according to Dr Ho, the cogwheel weakness of plaintiff’s joint examination suggests *suboptimal* effort by him during strength testing of his lower limbs. By the same token, I decide to give no weight to result of work rehabilitation assessment carried out by occupational therapist at NLH, or to the excessive length of sick leave given to him.
6. All in all, I find it unbelievable that plaintiff needs to rely on a walking stick as he claimed in the box due to such minor injuries in the alleged accident.

1. I have carefully considered all PSLA comparables drawn to my attention by both counsels and compared them against such injuries and symptoms of plaintiff I find above to have been caused by the alleged accident.
2. Among them, I find it useful to refer to the following 3 authorities cited by Mr Gidwani as reference i.e. a) *Chan Kam Pui v Wong Siu Hung*, unreported, DCPI 1920/2006, 28 Sept 2007; b) *Cheung Man Fu v Grate Vantage Development Ltd*, unreported, DCPI 1165/2005, 7 Mar 2007; and c) *Wong Wai Hung v Loo Kin*, unreported, DCPI 643/2006, 30 Mar 2007.
3. Bearing in mind, among others, that plaintiff suffered only soft tissue injuries to both ankles and that he was 59 on the day of the alleged accident, the appropriate PSLA award, I agree with Mr Gidwani, should be no more than **$100,000** had I found for plaintiff on the liability issue.

*Loss of earnings*

1. I think plaintiff’s monthly earnings at the time of the alleged accident can be assessed at $12,000 as suggested by Mr Gidwani in his closing submission[[17]](#footnote-17). This was the monthly earnings figure for the last month before the alleged accident put down in Form 2 which plaintiff himself agreed in cross-examination.
2. On being cross-examined on paragraph 4 of his witness statement, plaintiff admitted that he did not receive diligent allowance as much as $2,580 stated therein at the time of the alleged accident, on top of basic salary of $11,000. Hence, he himself did not support the monthly earnings figure of $13,580 suggested by Mr Pun.
3. While plaintiff confirmed on re-examination that the amounts of diligent allowance, *overtime* allowance, *special* allowance and *medical* allowance for the month of Sept 2013 in List of Earnings filed in employees’ compensation proceedings do add up to the total of $2,580 put down in his witness statement, the latter 3 allowances by their names would, I think, suggest that they are relatively uncertain and/or unstable[[18]](#footnote-18), all the more so plaintiff was just promoted on 1 Oct 2013 and his new earnings pattern needed more time to get established.
4. Notwithstanding the length of sick leave given to plaintiff[[19]](#footnote-19), on the basis of my acceptance of Dr Ho’s opinion in paragraph 76 above, I am only prepared to award him 3 months’ loss of earnings plus related MPF loss i.e. $12,000 x 3 months x 105% = **$37,800**, and would have declined to award him any further loss of earnings, including any future loss of earnings, had I found for plaintiff on the liability issue.
5. Equally, for the same reason, I fail to see any basis to suggest that plaintiff suffers any disadvantage in the labour market as a result of the alleged accident. He could return to his pre-accident job despite it. And there is no evidence of his facing real difficulty in finding alternative employment in the labour market as he never attempted doing so after expiry of his excessive sick leave.
6. I also decline to make any award of loss of earning capacity.

*Special damages*

1. By defence written closing submission, Mr Gidwani agreed with $9,775 claimed for consultations at NLH and $100 claimed for consultation at PMH. He also agreed with travel expenses in sum of $3,000. I make these awards as agreed.
2. While still taking issues with them in his written closing submission, including if any portion thereof was spent on his right knee injury unrelated to the alleged accident, Mr Gidwani finally in his oral address agreed with the 2 sums of $15,460[[20]](#footnote-20) and $400[[21]](#footnote-21) for bonesetters, and another sum of $2,150 for right ankle MRI scan done at Centrum MRI Centre. Again, I allow them as agreed.
3. Granted that Dr Lau treated plaintiff for both ankles and right knee injuries, I agree with 50:50 apportionment of his fees totaling $14,250 as suggested by Dr Gidwani. I therefore make an additional award of $7,125 here.
4. Finally, even though no receipt is produced, I am prepared to award the reasonable sum of $3,000 for tonic food and nourishing soup as claimed by plaintiff.
5. Had I found for plaintiff on the liability issue, total special damages allowed by me would be **$41,010**.

*Total award*

1. Hence, total damages payable to plaintiff had I found for him on the liability issue would be **$178,810** i.e. $100,000 + $37,800+ $41,010. Giving credit for employees’ compensation in the sum of **$295,181.57** he has received, plaintiff recovers nothing[[22]](#footnote-22) even if he succeeds on liability in this common law action. This action should not be brought in the first place.

*Disposition*

1. Accordingly, the plaintiff’s claim must be dismissed for both liability and quantum reasons and I so order.

*Costs*

1. I make order nisi that the costs of the action, including all costs reserved, be paid by the plaintiff to the defendant, together with certificate of counsel for this trial, to be taxed if not agreed, and that plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations. It shall become absolute failing any application to vary within 14 days from the date of this judgment.
2. Finally, it remains for me to thank both counsels for their assistance.

(LEE Siu-ho)

Deputy District Judge

Mr Chase Pun, instructed by Messrs. Lawrence Y. W. Ng & Co., for the plaintiff

Mr Victor Gidwani, instructed by Messrs. Deacons, for the defendant

1. The plank itself was made of metal, according to plaintiff, as shown together with cargo in p.E7 lower photo. [↑](#footnote-ref-1)
2. The bottom of the plank did not touch the surface of transfer decks but touched the wheels, according to plaintiff. [↑](#footnote-ref-2)
3. Plaintiff identified the 1st gap by highlighting copy p.E13 lower photo in red and producing it as Exh.P1. [↑](#footnote-ref-3)
4. Plaintiff said his left foot reached the bottom of the 1st gap with its surface at his ankle level. [↑](#footnote-ref-4)
5. Mr Cheung said in the box that they were taken in mid-2015. [↑](#footnote-ref-5)
6. I prefer such admission of Mr Cheung as supported by annex 4 photos to plaintiff’s inconsistent evidence on the same under cross-examination. [↑](#footnote-ref-6)
7. Mr Cheung said he never measured it. Again, I prefer Mr Cheung’s admission to inconsistent evidence of plaintiff on the same point under cross-examination. [↑](#footnote-ref-7)
8. The word “right” was later added to the words “ankle injury” in Form 2 after defendant’s personnel department related it to Mr Cheung afterwards, according to him. See Exh.D1 for Form 2 without any cover-up. [↑](#footnote-ref-8)
9. He has not received any formal education in China. He cannot read or write Chinese, except writing his Chinese name. [↑](#footnote-ref-9)
10. He grew up as a fisherman with limited education and is illiterate. [↑](#footnote-ref-10)
11. According to A&E Clinical Documentation Form of NLH at pp.G19 & 20, on plaintiff’s attendance at A&E of NLH on 17 Jul 2014, the symptoms reported were “persistent ankles pain similar as before *radiate to knees* pain on walking no further injury on occu pending Ortho 2/2015”. Physical examinations showed “…ankles – both lateral maelleoli T, no swelling, no redness *knees* – mild T over joint line, no effusion, APROM full but *pain*” (italics supplied). And, belatedly, plaintiff had *first* MRI taken of his *right knee* in China on 25 Jul 2014. [↑](#footnote-ref-11)
12. Occupational Safety and Health Ordinance, Cap.509, and Occupational Safety and Health Regulations thereunder [↑](#footnote-ref-12)
13. This was the same area Plaintiff had highlighted in red in Exh.P1 to mark the 1st gap. [↑](#footnote-ref-13)
14. pp.E14-E135, which were not distributed to employees, according to Mr Cheung. [↑](#footnote-ref-14)
15. p.E14 [↑](#footnote-ref-15)
16. The 2 forensic orthopaedic experts i.e. both Dr Ho and Dr Fu could not find the same either. [↑](#footnote-ref-16)
17. Defence case in Answer was in fact $10,590, the average monthly earnings figure put down in Form 2 for the last 12 months’ (or entire employment) period. [↑](#footnote-ref-17)
18. Indeed, plaintiff made no special allowance or medical allowance for the month of Aug 2013, and had his overtime allowance reduced in the month of Sept 2013, in the List of Earnings. [↑](#footnote-ref-18)
19. Which certificates are no more than a piece of evidence that has to be evaluated in the light of all available evidence including medical evidence before me. This court cannot be bound by their mere issue: *Tam Fu Yip Fip v. Sincere Engineering & Trading Co. Ltd.* [2008] 5 HKLRD 210, 215-6 [↑](#footnote-ref-19)
20. for 江氏祖傳骨科跌打醫館 [↑](#footnote-ref-20)
21. for祿盛堂陳昭烱骨傷科 [↑](#footnote-ref-21)
22. Even if such interest, if any, payable at all has been taken into account. [↑](#footnote-ref-22)