## DCPI 1187/2017

[2018] HKDC 1577

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1187 OF 2017

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BETWEEN

SHIU WING SIK Plaintiff

and

DICKSON YOGA COMPANY LIMITED Defendant

trading as DICKSON YOGA

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Before: His Honour Judge MK Liu in Court

Dates of Hearing: 12 and 18 December 2018

Date of Judgment: 24 December 2018

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JUDGMENT

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*INTRODUCTION*

1. In these proceedings, the plaintiff sues the defendant for damages in respect of the personal injuries sustained by the plaintiff in an accident (“the accident”) occurred on or about 4:30 pm on 4 January 2015 at the Shop LG2A, LG/F, Tsim Sha Tsui Centre, 66 Mody Road, Tsim Sha Tsui, Kowloon, Hong Kong (“the Yoga Studio”).
2. The plaintiff claims that he has received compensation pursuant to the Employees’ Compensation Ordinance in the sum of HK$58,271.13, and the plaintiff is prepared to deduct this sum from the damages awarded to him in these proceedings[[1]](#footnote-1). The defendant does not dispute these[[2]](#footnote-2). Notwithstanding this admission on pleading, the defendant was still disputing that the plaintiff was the defendant’s employee at the time of the accident (“the employee issue”). At the commencement of the trial, I asked Ms Katy Chung, counsel for the defendant, whether the defendant would pursue the employee issue at the trial. Ms Chung, after taking instructions, confirmed that the defendant conceded that the plaintiff was the defendant’s employee at the time of the accident. That being the case, there would be no need for the court to make any ruling on the employee issue in this judgment. It is common ground that the plaintiff was an employee working for the defendant at the time of the accident.
3. Both the liability and the quantum are at issue in this case.

*THE PLAINTIFF’S CASE*

1. The plaintiff’s case is that he was a general worker employed by the defendant and working in the Yoga Studio at the time of the accident. On 4 January 2015, an aerial yoga class in a room (“the Aerial Yoga Room”) in the Yoga Studio had just finished. The plaintiff was moving the yoga fabrics used in that room (“the yoga fabrics”) to another room (ie Room 4) to store the yoga fabrics in a cabinet in Room 4.
2. The plaintiff placed the yoga fabrics in a carton box with the dimensions of about 75 cm in length, 60 cm in width and 60 cm in height. The weight of the Box with the yoga fabrics inside was about 25 kg. When the plaintiff was carrying the Box to the Cabinet, the Box hit a loudspeaker (“the Loudspeaker”) in Room 4. The Loudspeaker fell down and hit on the plaintiff’s left foot, causing personal injuries to the plaintiff, including a fracture at the left big toe.
3. The plaintiff claims that the defendant has breached the duties owed by the defendant to the plaintiff under the employment contract, the Occupier’s Liability Ordinance, and the Occupational Safety and Health Ordinance. Further, the accident was caused by the defendant’s negligence. As a result, the defendant is liable to the plaintiff and have to pay damages to the plaintiff.
4. The plaintiff himself has given evidence to support his case at trial. The plaintiff has not engaged any medical expert to give expert evidence.

*THE DEFENDANT’S CASE*

1. The defendant denies that the accident was caused by the defendant’s negligence or breach of any duty on the defendant’s part. Further, the defendant claims that the accident was wholly caused or contributed by the plaintiff’s negligence, particulars of which are as follows[[3]](#footnote-3):-
2. Failing to take notice or heed the existence of the Loudspeaker;
3. Failing to seek assistance from other co-worker;
4. Placing the yoga fabrics in the Box for transporting, which the plaintiff knew or ought to have known that his view of the ground in front would be obstructed;
5. Failing to use a trolley while transporting the Box;
6. Failing to exercise due care whilst transporting the Box;
7. Failing to take any or any proper regard or reasonable care of his own safety, and/or exposing himself to a risk of injury or damage of which he knew or ought reasonably to have foreseen and/or known.
8. The defendant has called their manager, Ms Khan Faridah (“Khan”), to give evidence at trial.

*THE PRINCIPLES*

1. The starting point is that the plaintiff bears the burden to adduce evidence to prove his case. As said by Megaw LJ in *Ward v Tesco Stores Ltd*[[4]](#footnote-4):-

“It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault.”

1. In *Wat Kwing Lok v The Kowloon Motor Bus Company (1933) Ltd* [[5]](#footnote-5), Sakhrani J said at [17]:-

“The mere fact of the occurrence of the accident is not sufficient to give rise to a presumption of negligence on the part of the defendant. The burden of proof is on the plaintiff to show on a balance of probabilities that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault. If, and only if, the plaintiff proves that the unusual event is more consistent with fault on the part of the defendant than the absence of fault, the evidential burden then shifts to the defendant to show, on a balance of probabilities, that the accident happened without negligence on its part.”

1. An employer has a duty to provide a safe system of work to his employee. However, in respect of simple tasks, it would be reasonable for the employer to expect that the employee would exercise common sense to perform the task without the need for the employer to give specific instruction or advice how the task should be performed. This has been made clear in the House of Lords’ decision in *Winter v Cardiff Rural District Council[[6]](#footnote-6)* and the Hong Kong Court of Appeal’s decision in *Fong Yuet Ha v Success Employment Services Limited*[[7]](#footnote-7).
2. In *Winter v Cardiff Rural District Council*, Lord Oaksey said[[8]](#footnote-8):

“ In my opinion, the common law duty of an employer of labour is to act reasonably in all the circumstances. One of those circumstances is that he is an employer of labour, and it is, therefore, reasonable that he should employ competent servants, should supply them with adequate plant, and should give adequate directions as to the system of work or mode of operation, but this does not mean that the employer must decide on every detail of the system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. … where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workmen on the spot.”

1. In *Fong Yuet Ha v Success Employment Services Limited*[[9]](#footnote-9), Kwan JA said:

“17. There is no quarrel with the principle that an employer’s duty to provide a safe system of work is a personal and non-delegable duty. It was not the holding of the judge that where an employer is under an obligation to provide a safe system of work, such a duty could be shifted to the employee so that the employee could be expected to discharge this duty of providing a safe system of work for the employer. The general principle on the duty to prescribe a safe system of work may be found in this passage in *Charlesworth & Percy on Negligence*, 12th ed, para 11-67:

“It is a question of fact whether or not there is need for a system of work to be prescribed in any given circumstances. In deciding it, regard ought to be had to the nature of the work, that is whether properly it requires careful organisation and supervision, in the interests of safety of all those persons carrying it out; or it can be left by a prudent employer confidently to the care of the particular man on the spot to do it reasonably safely. There was no failure to provide a safe system where an employee was faced with a “one-off” task requiring the exercise of common sense and it was difficult to see what relevant instruction could have been given to him. But an employer is under a duty to prescribe a system of work, even where the operation is a single one, if it is necessary in the interests of safety.”

1. I note also that the last sentence in this passage in an earlier edition of this work was quoted by the Court of Final Appeal in *Cathay Pacific Airways Ltd v Wong Sau Lai* (2006) 9 HKCFAR 371 at para 15, a case relied on by Mr Wong to contend that a system of work should be devised by Success regarding the retrieval of items from the hanging cabinets.
2. As the passage quoted has made clear, it is a question of fact in each case whether it is necessary for the employer to devise a system of work for the task in hand. The judge decided that in the circumstances of this case, the need for a system of work to be prescribed was not made out. In paragraph 38 of the judgment quoted above, the judge referred to *Winter v Cardiff Rural District Council* and some of the cases in Hong Kong that applied this case. They were all situations where the court held on the facts that the operation was simple and it was reasonable that the employee could be trusted to exercise his common sense to carry out the operation without the need for the employer to prescribe a system of work or give specific instruction or advice how the task should be done.
3. The operation in *Cheung Suk Wai v Attorney General* was to put bags of refuse into refuse bins. It was held that it was for the cleaning worker to decide on how to carry out the operation in a way most suitable to her physical ability, including the weight of the bags she should carry at one time. In *Tsang Yin Yuk v Nini Maternity Fashion Co Ltd,* the shopkeeper stood on a stool to push a bag of clothing onto a shelf which was 4 feet deep. It was held that the task of putting bags containing clothing onto the shelf was not inherently dangerous, that the decision of how this should be done had to be taken frequently, and it was reasonable and natural that the decision be left to the employee on the spot, especially in light of the instruction given not to overfill the bags. In *Chan Wai Ming v Tai Lee Café & Cake Shop*, a chef tilted a heavy pot of boiled soup to pour the contents into a container, instead of using a ladle. The court held that this was a simple task that a chef of the plaintiff’s experience should require no guidance. *Ng Kong v Golden Caterers Ltd*, HCPI 206/2004, 3 February 2005, cited by the judge in the earlier parts of the judgment, was another case concerning a chef, who tried to pull a plate of fish out of a steaming oven, which he had done many times. The plaintiff complained that a stool was not provided for his use so he had to stand tiptoe. The judge found that a stool was provided but the plaintiff did not use it as it was handier to do without it and further observed that the plaintiff must know without specific instruction if he found he could not reach or comfortably reach a certain height required for his work and it was all a matter of common sense.
4. The judge was correct in holding that in the circumstances of this case, there was no need for the employer to prescribe a safe system of work or give specific advice for such an everyday act that could reasonably be trusted to the common sense of the employee to carry out the task safely. The retrieval of items on the upper shelf was simply not an inherently dangerous act ……”
5. In respect of assessing evidence given by factual witnesses, a valuable guidance has been given by DHCJ Eugene Fung SC in *Hui Cheung Fai v Daiwa Development Ltd[[10]](#footnote-10)*, in which the learned judge said:-

“77. Generally speaking, contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility: *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at 431 (Lord Pearce) ...

78. In deciding whether to accept a witness’s account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events: eg *Lam Rogerio Sou Fung v Tan Soon Gin George* (unreported, HCA 2576/2005, 5th May 2011) §39 (Chu J).

79. In determining a witness’s credibility, I have also attached importance to the consistency of the witness’s evidence with undisputed or indisputable evidence, and the internal consistency of the witness’ evidence. The latter type of consistency is often tested by a comparison between the witness’ oral testimony and his or her witness statement.

80. I have cautioned myself against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses: *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 at §§36, 37 (Bokhary PJ).

81. The practical approach to assessing credibility of witnesses in a case such as the present may have best been summarised by the words of Robert Goff LJ, as he then was, in *The Ocean Frost* [1985] 1 Lloyd’s Rep 1 at 57:-

“Speaking from my experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.”

82. Whilst these words were spoken in the context of a fraud case, I believe they are applicable to any case where a witness’ credibility features prominently in the court’s determination …...”

1. The reminder given by Sir John Dyson in *MA (Somalia) v Secretary of State for the Home Department* [2011] 2 All ER 65 on the effect of lies by a witness on a central issue is also instructive:-

“31. ...... where a claimant tells lies on a central issue, his or her case will not be saved by general evidence unless that evidence is extremely strong. It is only evidence of that kind which will be sufficient to counteract the negative pull of the lie. But much depends on the bearing that the lie has on the case. ......

32. Where the appellant has given a totally incredible account of the relevant facts, the tribunal must decide what weight to give to the lie, as well as to all the other evidence in the case, including the general evidence. ......

33. ...... where the appellant tells lies on a central issue in the case, the [tribunal] may conclude that they are of great significance. ...... It will be a matter for the [tribunal] to decide whether the general evidence is sufficiently strong to counteract what we have called the negative pull of the appellant’s lies.”

*THE EVIDENCE*

*The plaintiff*

1. The essence of the plaintiff’s evidence is as follows:-
2. On 4 January 2015, he collected all the yoga fabrics in the Aerial Yoga Room and put them inside the Box. He then placed the Box on a blue trolley (“the small trolley”) same as the one shown in the 1st photo annexed to Khan’s supplemental witness statement[[11]](#footnote-11).
3. While he was working for the defendant, he had not seen the trolley as shown in the 2nd photo annexed to Khan’s supplemental witness statement (“the big trolley”) in the Yoga Studio[[12]](#footnote-12).
4. He used the small trolley to move the Box to the entrance of Room 4.
5. The layout inside Room 4 is shown in the plan annexed to the plaintiff’s supplemental witness statement (“the plan”)[[13]](#footnote-13). For ease of reference, a copy of the plan is annexed to this judgment. The plan was prepared by an officer in the Labour Department. The plaintiff has put his signature on the bottom of the plan to confirm the correctness of the same on 10 June 2015.
6. After arriving the entrance, the plaintiff placed the Box on the floor and pushed the same towards the stage. He then put the Box on the stage. The location of the Box on the stage is the one as shown on the plan. After placing the Box on the stage, he went to open the door of the 2nd mirror cabinet (“the cabinet”). And then the plaintiff went back to the stage, lifted up the Box and walked towards the cabinet. The plaintiff intended to place the Box inside the cabinet. When he was walking towards the cabinet with the Box, the Box hit the right loudspeaker. While the Loudspeaker was falling, the plaintiff tried to use his left foot to stabilize the Loudspeaker but was unsuccessful. The Loudspeaker eventually fell on the ground and hit the plaintiff’s left foot.
7. The plaintiff said that when he was trying to move the Box inside Room 4, there were many students sitting on the yoga mats. The width of the passageway between the yoga mats and the stage was about 30 cm. He asked the students to give way to him, but some students just ignored him.
8. A female worker 環姐 (“Wan”) was working with him on that day. In Room 4, he did ask Wan to help him to move the Box, but Wan ignored his request and left.
9. When he was moving the Box from the stage to the cabinet, there were many students walking in the area between the stage and the cabinet, and thereby obstructing his way.
10. In my judgment, the plaintiff was not telling the truth in saying that he did ask Wan to offer him assistance in Room 4. At the very beginning of these proceedings, the defendant has raised the issue that the plaintiff had failed to seek assistance from other co-worker and therefore there was negligence on the plaintiff’s part. The plaintiff did not file a reply raising the episode of seeking assistance from Wan. The plaintiff is legally represented at all times in these proceedings. The plaintiff’s legal representatives know the rules governing pleadings[[14]](#footnote-14). If there is any truth in the episode of seeking assistance from Wan, the plaintiff must serve a reply raising the same. Otherwise, the plaintiff would take the defendant by surprise. Without giving any prior notice of this point, the defendant would be deprived of an opportunity of adducing evidence[[15]](#footnote-15) to rebut the point being taken by the plaintiff.
11. The episode of seeking assistance from Wan has never been raised by the plaintiff on pleadings. This episode has not been mentioned in all the statements given by the plaintiff to the Labour Department. This episode has also not been mentioned in the plaintiff’s witness statements filed in these proceedings. This episode was only mentioned by the plaintiff for the first time when the plaintiff was giving evidence in the witness box. In my judgment, the episode is a recent invention made up by the plaintiff and is not the truth.
12. I am also of the view that the plaintiff was not telling the truth when he said that there were students walking in the area between the stage and the cabinet while he was moving the Box from the stage to the cabinet, and his way was obstructed by the students. A central issue in these proceedings is why the accident occurred. This is also the crucial issue in the Labour Department’s investigation[[16]](#footnote-16). What happened while the plaintiff was moving the Box from the stage to the cabinet is a matter of paramount importance. The episode of obstruction caused by moving students between the stage and the cabinet has never been raised by the plaintiff on pleadings, in any statement given to the Labour Department, and in any of his witness statements filed in these proceedings. If there is any truth in this episode, no doubt the plaintiff would have mentioned this on pleadings and in his statements. I hold that this episode is also a recent invention made up by the plaintiff and is not the truth. The plaintiff created this episode to try to make his case more persuasive.
13. The plaintiff has lied on the aforesaid central and important issues. He was also an evasive witness. In my judgment, the plaintiff is not an honest and reliable witness. I reject his evidence in its entirety.

*Khan*

1. The gist of Khan’s evidence is as follows:-
2. She was on leave on 4 January 2015 and did not witness the accident.
3. At the time of the accident, there were 2 kinds of trolleys in the Yoga Studio, ie the small trolleys and the big trolleys. The workers might use these trolleys in doing their jobs.
4. There were also some carton boxes in the Yoga Studio. Some carton boxes were smaller than the Box. The workers might also use these boxes to help them to move things inside the Yoga Studio.
5. She did not give any instruction to the workers as to how to move the yoga fabrics from the Aerial Yoga Room to the cabinet in Room 4. No such instruction was given by the defendant to the worker.
6. I am of the view that Khan is a simple and straightforward witness. I accept her evidence.

*LIABILITY*

1. Since I have rejected the plaintiff’s evidence in its entirety, there is no evidence showing why the accident occurred on 4 January 2015. There is no evidence showing the cause of the accident. In the circumstances, the plaintiff’s claim must come to an end and must be dismissed.
2. I observe that even based upon the plaintiff’s own evidence, the plaintiff has failed to make out a case against the defendant. Moving the yoga fabrics from the Aerial Yoga Room to the cabinet in Room 4 is a simple task. It would be reasonable for the defendant to trust that the plaintiff would exercise common sense in performing this simple task. There would be no need for the defendant to prescribe a system of work for this. There were trolleys and boxes in the Yoga Studio, which the plaintiff might use in doing the job. According to the plaintiff, he was not required to do that task at 4:30 pm on 4 January 2015, and he might do this at any time on that date. He was also not required to move the yoga fabrics to the cabinet in one go. The plaintiff could choose to move the yoga fabrics to Room 4 at a time when there were not many students in Room 4. He could also travel between the Aerial Yoga Room and Room 4 for more than once and move yoga fabrics to the cabinet by several trips. Further, in his statement given to the Labour Department on 29 May 2015[[17]](#footnote-17), the plaintiff admitted that it would be much safer to use a trolley to move the yoga fabrics to the cabinet. It is an undisputed fact that there were trolleys in the Yoga Studio at that time.
3. On any view, the plaintiff must fail on liability.

*QUANTUM*

1. For the sake of completeness, I would set out my opinion on quantum in the paragraphs below.
2. The plaintiff was born in 1968 and was at the age of 46 at the time of the accident. The plaintiff claims damages under the following heads in the revised statement of damages:-
3. PSLA
4. Pre-trial loss of earnings
5. Loss of earning capacity
6. Special damages
7. As said before, there is no expert evidence from the plaintiff in support of his claim. The plaintiff has only produced some medical notes and records, which show the following:-
8. After the accident, on 4 January 2015 at about 9:18 pm, the plaintiff attended the Accident & Emergency Department of Queen Elizabeth Hospital (“QEH”) for emergency treatment. Medical examination revealed left big toe wound and bleeding, and X-ray of left big toe showed fracture. The clinical diagnosis was open fracture of left big toe. He was admitted into the Orthopaedic ward for further management.
9. The plaintiff was managed by the Department of Orthopaedics & Traumatology of QEH. Physical examination found mild bruise at left big toe, a 3 cm laceration over the left big toe nail, oozing from the wound, and reduced sensation over medial side of left big toe. X-ray of left big toe showed fracture of distal phalanx.
10. On 5 January 2015, the plaintiff received an operation of repair of nail bed, and surgical toilet and suturing.
11. The plaintiff was discharged on 6th January 2015 with sick leave and follow up appointment.
12. The plaintiff attended the Orthopaedic clinic of QEH on various occasions since 20 January 2015 for follow up. It was noted that the wound was healing, and with residual pain, and bone and nail deformity. Further periods of sick leaves were given.
13. The plaintiff was referred to and attended Tuen Mun Clinic on various occasions since 2 February 2015 for wound dressing.
14. The plaintiff was referred to and attended the Department of Physiotherapy of Tuen Mun Hospital (“TMH”) for physiotherapy treatments from 7 May 2015 to 8 June 2015 for a total of 4 sessions. He was discharged on 8 June 2015 due to his static condition.
15. The plaintiff was referred to and attended the Department of Occupational Therapy of QEH for work rehabilitation from 5 May 2015 to 10 June 2015 for two sessions per week.
16. Certificate of Review of Assessment (Form 9) dated 27 July 2016 certified that the plaintiff suffered left big toe fracture resulting in left big toe pain and nail deformity. The loss of earning capacity permanently caused by the injury was assessed to be 0.5%.
17. In total, the plaintiff was given sick leave continuously from 4 January 2015 to 16 June 2015 for a total of 164 days.
18. Although the plaintiff has been granted sick leave for a total of 164 days, in assessing the quantum of damages, I am not bound by the sick leave certificates. I am entitled to look at the evidence before me as a whole and come to a conclusion on the appropriate quantum of damages. This has been said by the Court of Appeal in *Tam Fu Yip Fip v Sincere Engineering & Trading Co. Ltd.*[[18]](#footnote-18). Although the Court of Appeal was addressing pre-trial loss of earnings there, I am of the view that the same principle also applies in respect of the claims under other heads of damages. In that case, Le Pichon JA said (Cheung JA and Reyes J concurring):-

“18. Since the plaintiff’s pre-trial loss of earnings is ascertained by reference to the period during which the plaintiff was prevented by the injuries sustained from returning to work, what has to be ascertained and identified is the length of that period.  In my view, that is an exercise that would not require evidence to suggest or imply that those who had granted sick leave to the plaintiff did so improperly.  Logically, if the finding is that the plaintiff could have gone back to work after three months, that is the period that is relevant to the assessment and award of pre-trial loss of earnings and no other.  Sick leave certificates are no more than a piece of evidence that has to be evaluated in the light of all the available evidence including medical evidence before the court.  As Rogers VP observed in *Choy Wai Chung v Chun Wo Construction & Engineering Company Ltd*, unreported, CACV 172/2004, 15 July 2005 at § 9, the judge cannot be bound by the mere issue of sick leave certificates: the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiff.”

1. I am also not bound by the assessment stated in the Certificate of Review of Assessment (Form 9). The assessment in the certificate is a piece of evidence to be taken into account, but I have to look at all the evidence as a whole in assessing the damages. In the light of the matters set out in paragraph 30(2) to (6) below, I am of the view that the assessment in the certificate carries minimal weight.
2. In assessing the quantum of damages, I bear in mind that:-
3. The burden of proving the sum claimed under every head is on the plaintiff.
4. The plaintiff’s evidence has been held by this court as untruthful and unreliable.
5. In the Discharge Summary prepared by QEH[[19]](#footnote-19), it is recorded that the plaintiff was discharged from QEH on 6 January 2015 with “wound well, minimal pain”.
6. In the Consultation Note prepared by the QEH dated 20 January 2015[[20]](#footnote-20), the doctor opined that the wound pain of the plaintiff was “minimal”.
7. As recorded in the medical report of QEH dated 12 February 2016[[21]](#footnote-21), the plaintiff was only showing “mild residual pain” on 16 June 2015.
8. Further, after the accident on 4 January 2015, the plaintiff could start walking unaided on 20 January 2015 (ie 16 days after the accident) and he was “walking well unaided” as shown in the consultation notes prepared by various doctors on 20 January, 14 April and 16 June 2015[[22]](#footnote-22).

*PSLA*

1. Mr Tim Wong, counsel for the plaintiff, submits that the award under this head should be HK$250,000.00. Ms Chung submits that the award should be no more than HK$60,000.00.
2. In the revised statement of damages[[23]](#footnote-23) and his witness statements[[24]](#footnote-24), the plaintiff claims that he is still suffering residual left big toe pain and nail deformity, which severely and adversely affect his working ability and daily life. Since I have rejected the plaintiff’s evidence, all these should not be taken into account.
3. Just 16 days after the accident, the plaintiff could walk unaided and the wound pain was minimal. These clearly indicate that the injury sustained by the plaintiff was not serious. The injuries involved in the authorities cited by Mr Wong[[25]](#footnote-25) were far more serious than that of the plaintiff. Those authorities cannot shed light on the appropriate amount for PSLA in this case. Ms Chung refers me to some authorities[[26]](#footnote-26), in which the court awarded between HK$150,000.00 and HK$90,000.00 for PSLA. In my view, while the injuries involved in those cases are more similar to that sustained by the plaintiff, the injuries in those cases are still more serious than that of the plaintiff.
4. In my judgment, taking all the evidence accepted by this court into account, the appropriate sum for PSLA should be HK$60,000.00.

*Pre-trial loss of earning*

1. In the revised statement of damages, the plaintiff claims HK$125,222.78 under this head. However, Mr Wong in his submissions has reduced the sum to HK$82,620.66.
2. In the answer to the revised statement of damages, the defendant states that the award under this head should not exceed HK$50,741.60. However, Ms Chung in her submissions put forward a position that there should be no award under this head, for there is no reliable evidence in support of a claim for pre-trial loss of earning.
3. In my view, reading the answer to the revised statement of damages as a whole, the defendant has not admitted therein that the plaintiff should have HK$50,741.60 under this head. The defendant in fact requires the plaintiff to prove the matters in support of the claim for pre-trial loss of earning. Further, the defendant has expressly said that the award under this head *should not exceed* (not should be) HK$50,741.60. The defendant is entitled to argue that the plaintiff should get a sum less than HK$50,741.60.
4. Based upon the evidence accepted by this court, I am of the view that the plaintiff should be able to return to work no later than 20 January 2015. From that day onwards, he could walk unaided. Since the plaintiff is not a truthful and reliable witness, the sick leave certificates issued based upon the subjective symptoms reported by the plaintiff to the doctors do not carry much weight.
5. From the list of earnings produced by the defendant in the employees’ compensation proceedings, the plaintiff’s monthly salary in January 2015 should be about HK$10,000.00. In my view, the sum under this head should be:-

HK$10,000.00 x 16/30 x 1.05[[27]](#footnote-27) = HK$5,600.00

*Loss of earning capacity*

1. A claim for loss of earning capacity must be proved by evidence showing that the claimant would have a risk that as a result of the injuries, he may lose his job at a time in future. In *Lo Hing Kin Nelson CA v Personal Representative of Lam Yuk Wan (deceased)*[[28]](#footnote-28), in delivering the judgment of the Court of Appeal, Godfrey Lam J said:-

“32. It was submitted on behalf of the plaintiff that if no award is made for future loss of earnings, then damages should be awarded for loss of earning capacity in view of the plaintiff's residual disabilities resulting from the accident.

33. As the Privy Council stated in *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176, 183B-D, this head of damages is not a conventional award made in the abstract but **a specific mode of compensation that has to be based on evidence**:

A claim for loss of future earning capacity usually arises where the claimant is in employment at the time when the claim falls to be evaluated. **The claim is to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk**: see *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132, 140 where Browne LJ dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant's age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant's earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment.” (Emphasis added)

1. There is simply no reliable evidence on this point. There should be no award under this head.

*Special damages*

1. The plaintiff claims the following:-
2. Medical Expenses HK$1,351.00
3. Travelling Expenses HK$1,000.00
4. Tonic Food HK$5,000.00
5. The defendant does not dispute items (1) and (2). In respect of tonic food, the defendant says that only HK$2,000.00 should be allowed.
6. The plaintiff has not produced any receipt in support of his claim for tonic food expenses. Further, the injury sustained by the plaintiff is not very serious in nature. I agree with the defendant and would only allow HK$2,000.00 for tonic food.

*Summary on quantum*

1. For the reasons above, if the plaintiff succeeds in establishing liability, I am of the view that the quantum of damages would be as follows:-

PSLA HK$60,000.00

Pre-trial loss of earning HK$5,600.00

Loss of earning capacity Nil

Special damages HK$4,351.00

Less: Employee’s compensation (HK$58,271.13)

received by the plaintiff

Total HK$11,679.87

1. Further, if I am with the plaintiff on liability, I would award the following interests:-

(1) For PSLA, there would be interest at 2% pa from the date of the writ until the date of this judgment.

(2) For pre-trial loss of earnings and special damages, there would be interest at half of the judgment rate from the date of the accident, ie 4 January 2015, until the date of this judgment.

1. However, since I have ruled against the plaintiff on liability, the plaintiff’s claim should be dismissed.

*DISPOSITION*

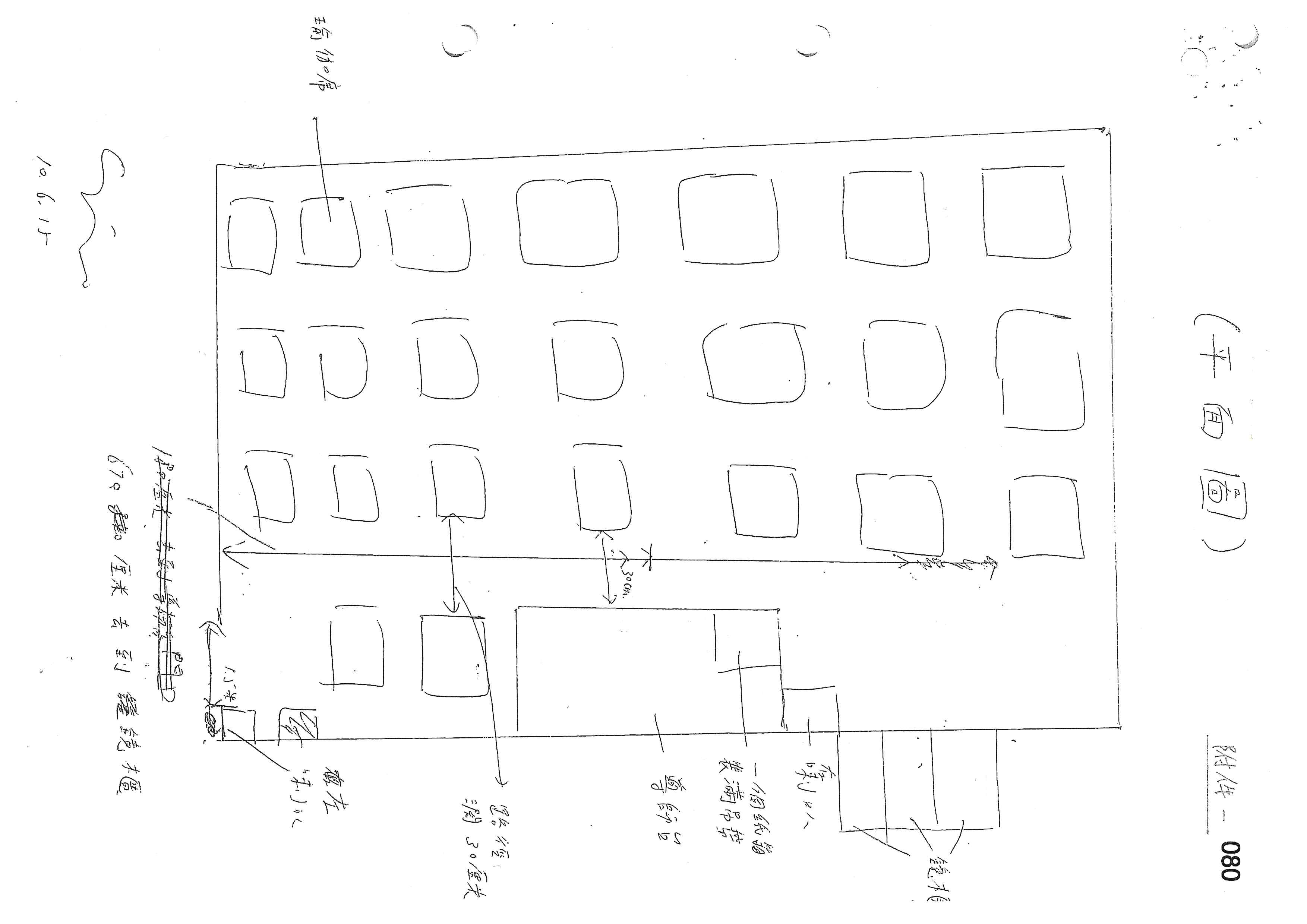
1. I dismiss the plaintiff’s claim.
2. Before the commencement of the trial, the defendant tried to pursue the employee issue. The defendant only conceded at the beginning of the trial that the plaintiff was an employee. By that time, the parties have already spent some time on the employee issue. Bearing the principles in *Re Elgindata Ltd (No 2)[[29]](#footnote-29)*, notwithstanding that the defendant is the successful party in these proceedings, I am of the view that the defendant should be deprived of 10% of the costs in these proceedings because of their failure on the employee issue. There be a costs order nisi that 90% of the costs of these proceedings (including all costs reserved, if any) be to the defendant, with a certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
3. I thank counsel for the assistance rendered to the court.

( MK Liu )

District Judge

Mr Tim Wong, instructed by B Mak & Co, assigned by the Director of Legal Aid, for the plaintiff

Ms Katy Chung, instructed by Cheung & Yeung, for the defendant



1. Revised Statement of Damages, [25] [↑](#footnote-ref-1)
2. Answer to the Revised Statement of Damages, [16] [↑](#footnote-ref-2)
3. Defence, [8] [↑](#footnote-ref-3)
4. [1976] 1 WLR 810 at 815, applied by Mayo VP in *Cheung Wai Mei v Excelsior Hotel (Hong Kong) Ltd* (CACV 38/2000, 22 November 2000). [↑](#footnote-ref-4)
5. HCPI 936/2005, 20 November 2007, [17] [↑](#footnote-ref-5)
6. [1950] 1 All ER 819 [↑](#footnote-ref-6)
7. CACV 100/2012, 28 December 2012 [↑](#footnote-ref-7)
8. At pages 822 and 823 [↑](#footnote-ref-8)
9. Recently applied in *Liu Kin Pong v Kee Wah Food Production Limited* (HCPI 632/2014, 6 July 2017); *Leung Hoi Wai v Po Leung Kuk* [2018] HKCFI 356 [↑](#footnote-ref-9)
10. HCA 1734/2009, 8 April 2014 [↑](#footnote-ref-10)
11. Trial Bundle A, p.99 [↑](#footnote-ref-11)
12. Trial Bundle A, p.100 [↑](#footnote-ref-12)
13. Trial Bundle A, p.80 [↑](#footnote-ref-13)
14. Rules of the District Court, Order 18, rule 3(1) and rule 8 [↑](#footnote-ref-14)
15. For example, producing a witness statement of Wan and calling Wan to give evidence at trial [↑](#footnote-ref-15)
16. The Labour Department has conducted an investigation in relation to the claim under the Employees’ Compensation Ordinance. [↑](#footnote-ref-16)
17. Trial Bundle A, pp.128-129 [↑](#footnote-ref-17)
18. [2008] 5 HKLRD 210 [↑](#footnote-ref-18)
19. Trial Bundle B, p.250 [↑](#footnote-ref-19)
20. Trial Bundle B, p.244 [↑](#footnote-ref-20)
21. Trial Bundle A, p.102 [↑](#footnote-ref-21)
22. Trial Bundle B, pp.244-246 [↑](#footnote-ref-22)
23. Revised Statement of Damages, [12] [↑](#footnote-ref-23)
24. Plaintiff’s witness statement, [20] – [22]; Plaintiff’s supplemental witness statement, [19] [↑](#footnote-ref-24)
25. *Yan Sung Bik Yu v Liu Ching Man t/a wa Fai Marble Co* (DCPI 423/2006, 19 March 2008); *Tsang Ching Fei v Mo King Guo* (DCPI 2136/2006, 2 April 2008); *Chan Chan Ping v Colliers Jardine Management Limited* (DCPI 145/2000, 13 August 2003); *Leung Chung Ngar Christover v Yeung Man Wai* (HCPI 163/1999, 20 December 2000); *Wong Siu Pui v Lau Tak Chi* (DCPI 2711/2013, 31 December 2015); *Ho Yee Mui v Liu Hon Loong* (HCPI649/1999, 20 July 2000) [↑](#footnote-ref-25)
26. *Singh Chamkaur v Ricahrd Ethan Latker* (DCPI 1323/2009, 31 May 2012); *Leung Hoi Wai v Po Leung Kuk* (unrep., HCPI 999/2015, 14 February 2018); *Wong Yuk Foon v Nice Property Management Ltd* (DCPI 1025/2006, 8 November 2007) [↑](#footnote-ref-26)
27. Taking the MPF factor into account [↑](#footnote-ref-27)
28. [2017] 3 HKLRD 294 [↑](#footnote-ref-28)
29. [1992] 1 WLR 1207 [↑](#footnote-ref-29)