#### DCPI1228/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1228 OF 2007

BETWEEN

KO CHI KEI Plaintiff

and

FUNING PROPERTY Defendant

MANAGEMENT LIMITED

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

Dates of Hearing: 22-23 May 2008

Date of Delivery of Judgment: 26 May 2008

## J U D G M E N T

1. The plaintiff, Mr Ko, was injured at an industrial accident on 24 May 2005 at his place of work in Tsui Ning Garden, 2 Fung On Street, Tuen Mun. He was employed by the defendant, Funing Property Management Limited, as a building supervisor heading a team of 17 at $9,300 plus bonus a month.
2. At around 2.35 pm on 24 May 2005, he was instructed by his then senior manager to prune a tree in the estate. A branch fell on the ladder where he was standing for support, causing Mr Ko to lose balance and fell down from the top of the 12-foot ladder, sustaining injuries to his right ankle.
3. Before the trial commenced on 22 May 2008, the defendant admitted liability. Therefore, the issue for the hearing today is the quantum of damages.

The Plaintiff’s Injuries

1. Mr Ko was sent to the Tuen Mun Hospital by ambulance soon after the accident. He was found to have suffered from a fracture of his right os calcis (also known as the calcaneum). The doctors performed an operation of open reduction and fixation to stabilise his ankle with plate and nails on 31 May 2008 after the swelling of his right foot subsided. In spite of follow-up treatments at the Department of Orthopaedics at Tuen Mun Hospital, he suffered from continuous pain of the right foot.
2. On 7 August 2007, the implants in his right ankle were removed. Although the surgical wound healed well, Mr Ko was still suffering from pain in the right heel. He received 47 sessions of physiotherapy between 16 August 2005 and 4 April 2006. He further received occupational therapy right up to March 2008.
3. According to the joint medical report of Drs Jack W K Wong and David H F Cheng prepared in late December 2007, Mr Ko was suffering from right ankle swelling, right ankle pain at rest and at night. He would experience pain at the change of weather. After walking, he would experience further pain and pins and needles over his right foot. He can no longer stand on the right foot alone.
4. According to the Medical Assessment Board review of assessment dated 3 October 2006, the board confirmed that Mr Ko had suffered from right foot injury resulting in persistent stiffness and pain of right ankle. The loss of earning capacity permanently caused by the injury was assessed at 5 per cent. The sick leave granted was accepted to be from 24 May 2005 to 19 September 2006 which was the day of the review by the MAB.
5. After the MAB review, Mr Ko continued to seek treatments at the Yuen Long Jockey Club Health Clinic whenever he felt pain in his right foot and he would obtain between two to four days of sick leave each time until 7 August 2007 when he had the operation to remove the implants and he was given sick leave up to 16 March 2008.
6. In the joint medical report, Drs Wong and Cheng agree that Mr Ko’s symptoms to be consistent with the injury and genuine. They also agreed that his condition should become stable and he may need intermittent symptomatic treatments for pain, they do not think specific treatments and surgery would be necessary.
7. They further agreed that because of Mr Ko’s right ankle pain, stiffness and weakness, he will have discomfort, difficulty in excessive weight bearing including activities such as prolonged standing and walking, particularly for walking up and down stairs. They agreed the injury has rendered Mr Ko not suitable for vigorous sport activities. Though they agreed Mr Ko could return to his previous employment, he should be exempted from prolonged standing and walking and be allowed to rest at intervals to relieve pain. In their view, he is more suited to work at a sedentary job.
8. Dr Wong assessed Mr Ko to be suffering from 20 per cent lower limb impairment which is equivalent to 8 per cent whole person impairment. Drs Wong and Cheng in their supplemental medical report of 21 January 2008 agreed that Mr Ko should be able to resume his previous job as a building supervisor with some limitation. However, the latest work capacity evaluation report from the Occupational Therapy Department of the Tuen Mun Hospital dated 8 March 2008 assessed Mr Ko as not suitable to return to his previous job due to the requirements demanded in his previous job as the building supervisor.

Quantum

###### Whether the plaintiff can return to his previous duties and his previous job

1. Before assessing the quantum, the issue as to whether Mr Ko can resume his employment as a building supervisor must be examined. Mr Ko handed in his formal resignation from his employment with the defendant on 1 March 2008 when he was still on sick leave. His sick leave expired on 16 March 2008. He then found sedentary employment as a night-shift guard with a new employer on 16 March 2008 at a much reduced salary.
2. The reason given by Mr Ko of his resignation during his sick leave was that in spite of the previous good relationship with his colleagues at work, after his return to work in late September 2006, he was subject to ridicule by cleaners at the estate, the IOC members and one of his staff at the defendant company. After the second operation, he was put on sick leave in February 2008. He said that when he returned to submit his sick leave certificate to the new manager, Mr Lo, with whom he had only worked for a few days, gave him the impression that he was not welcome when he inquired if he could return to work after the sick leave period expired. He felt the working environment and the atmosphere at work had changed and since he could not perform his duties as before and since he was on no-pay leave, he decided to hand in his resignation.
3. According to Mr Ko, his duties previous to the accident as the building supervisor included a daily 12-hour shift in the daytime, he was required to work outdoors 50 per cent of the time. He would check on all six blocks of the estate. For each day of the week, he would thoroughly do a one-block high-rise patrol from ground to 36th floor. He would then stand guard for 20 minutes at the park of the estate. In addition, he would supervise his staff and perform indoor duties such as preparing roster for the 13 guard posts at the estate, receive complaints, supervise the CCTV surveillance and the sign-in record book. After his accident, he found he could no longer perform the outdoor duties and those duties had been delegated to his staff.
4. The defendant’s manager, Mr Lo Shun-bong, denied Mr Ko’s duties included 50 per cent outdoor work. He admitted there was no replacement hired to take over Mr Ko’s duties. When Mr Ko was on sick leave, his duties were shared amongst existing staff. After Mr Ko resigned in mid-March 2008, the assistant supervisor was promoted in April 2008 to fill his vacancy. Mr Lo insisted if Mr Ko had not resigned, he could have been permitted to stay in the defendant’s employ as the building supervisor.

Findings

1. I find Mr Ko an honest witness. I accept the truth of what he told the court of his former duties as a building supervisor at the estate. I am not persuaded that Mr Ko would be able to fulfil these 50 per cent outdoor duties and unless these outdoor duties were performed by someone else, he would not be able to fulfil the job requirement of a building supervisor. The outdoor duties involved high-rise surveillance of one block each day. As the estate has in total six blocks of residential flats, it stands to reason that a responsible building supervisor would be required to personally check one block thoroughly one day of the week, therefore making it a once-a-week check of each of the six blocks.
2. Mr Ko had been working at this estate for 16 years. He was happy with his job and, apparently, the defendant was happy with Mr Ko’s performance because he received an increase of salary steadily from $6,000 to $9,300 then to $9,500 (including bonus) each month. The fact that he was a diligent and conscientious building supervisor can be shown by his willingness to follow instructions and to take up the work which required sometimes special skills such as the tree-pruning duty which should have been delegated or contracted out to a tree-pruning company or specialist with the right skills and tools.
3. Mr Ko said in his witness statement that since the gardener had declined to do the pruning, his then manager required him to do the job. So he went up the 12-foot ladder to prune the protruding branch which should not have been part of his duties. This particular extra duty he performed was the cause of the accident.
4. Mr Lo, however, had only joined the defendant’s employ in September 2007, after Mr Ko’s second operation. He was not working with Mr Ko before Mr Ko’s accident. It is therefore possible that he was not aware of the extent of the duties taken up by Mr Ko before the accident when he was the building supervisor.
5. It is clear that Mr Lo hardly knew Mr Ko given that they had worked together for a few days between September 2007 and the end of February 2008. For this reason, I am not convinced that Mr Lo would have made any positive remarks to encourage Mr Ko or impress Mr Ko that he would accommodate Mr Ko’s reduced ability to carry out his duties as a building supervisor when it is clear that there had been and would be no extra persons employed to take up the outdoor duties during Mr Ko’s absence. Under such circumstances, I do not believe Mr Lo would react positively to Mr Ko’s enquiry as to whether he can continue as the building supervisor after his sick leave period expired.
6. I am satisfied from the evidence of Mr Ko that he was the subject of ridicule after the accident from the cleaners, some of the residents at the estate and some of his colleagues. These unfortunate remarks were unpleasant, and when questioned by Mr Lo of his likely return to work full-time after an interview with Mr Lo at Mr Lo’s request in February 2008, I am satisfied that Mr Ko felt that he was under pressure from the manager to make a decision whether to return to his previous job as a building supervisor, and because he felt and knew he would not be welcome to return to work as a building supervisor, he decided to resign.
7. Of course, under the law, the defendant cannot sack Mr Ko. But on a personal level, it had not stopped the defendant’s staff showing their displeasure towards Mr Ko. His resignation I find to be understandable. At the time, I accept he felt he had no choice but to find a job which would be less demanding on his physical abilities.

###### Pain, Suffering, Loss of Amenities

1. Miss Loh, counsel for the defendant, referred to a number of authorities in support of her suggestion that an award of $200,000 is appropriate under this head. The first case of *Chan Cheuk Ki & Another v Man Yung Hoi* HCA9146 of 1991, an award by Master Jones on 26 October 1995 was $190,000 based on the 2nd plaintiff’s disability assessed by the doctor to be 4 per cent while the MAB’s assessment was 3 per cent on the loss of earning capacity.
2. In the case of *Choy Wai Chung v Chun Wo Construction & Engineering Company Limited* CPI605 of 1999, Beeson J’s award on 16 December 2003 was $250,000 to the former construction site worker who sustained injury to his ankle. He had a three-day hospitalisation and had arthroscopy to repair his ankle.
3. The third case of *Cheung Hei Kwong v Kwong Key Construction & Engineering Company Limited* HCPI1260 of 1999, a judgment by Nguyen J on 13 March 2003, the sum of $200,000 was awarded to the plaintiff who suffered a simple fracture of the fibula of the ankle.
4. These and the other cases referred to were cases where the plaintiffs’ injuries were not as prolonged and the degree and disability not as high as Mr Ko in this case. In spite of the fact that Mr Ko’s injury was diagnosed and treated as soon as possible, he had undergone two operations, 47 sessions of physiotherapy. He was hospitalised for 15 days after the first operation. He is still suffering from frequent pain on his right foot. He felt he cannot rely on his right foot to date or to stand due to the pain. He is also deprived of his sporting activities that involved running, jumping or hopping. He sleeps badly because he would experience pain at night.
5. For these reasons, I think the appropriate award should be $280,000.

Pre-trial Loss of Earnings

1. The parties agreed Mr Ko’s average monthly earning was $9,338.38. The loss of earnings should be based on the average monthly income and from the day of the accident to the end of the sick leave granted by his doctors at Tuen Mun Hospital, that is, 15 March 2008. Therefore, I accept a total of 748 days of sick leave plus the MPF of 5 per cent. The calculation is $9,338.38 x 748 days / 30 days x 1.05, and the figure comes to $241,210.34.

###### Post-sick-leave period

1. This is the period after 16 March 2008 when he took up employment with a security company as a night-shift guard at $5,500 per month, inclusive of allowances. I accept that with the limitation of his right foot, he would not be able to find a better-paid job. Therefore, I accept that he suffered a loss of earnings each month of $9,338.38 minus $5,500 which equals to a monthly loss of $3,838.68. For the period before the trial and the sick leave expired on 16 March 2008, it is two months and seven days, including the 5 per cent MPF, the pre-trial loss after 16 March 2008 is $9,000.99.

Future Loss of Earnings

1. Mr Ko would receive $3,838.68 less each month should he remain in his present job earning $5,500 a month. The plaintiff also asked for a multiplier of 5 because he claimed he would have been able to work until the age of 65. He was born in 1952. According to the law and according to Mr Ko’s licence as an ambulatory security guard, he was licensed to work until the age of 65. Admittedly, at the defendant’s company, it is subject to approval after a staff reaches the age of 60 but given Mr Ko’s previous good record, I believe he would be able to obtain an extension to the age of 65. His future loss therefore is $3,838.68 x 12 x 5 x 1.05 totalling $241,817.94.

Loss of Earning Capacity

1. Since Mr Ko is awarded a full multiplier of 5, I do not think this item is applicable and I make no award under this head.

Special Damages

1. The item of medical expenses, travelling expenses have been agreed at $11,238 by the parties. As to tonic food, Mr Ko asked for $8,000 in total. He claimed he spent about $2,000 per month on his tonic foods. However, this claim is not supported by any medical evidence in support for the spending of $2,000 a month on tonic food and what kinds of tonic food. I would, however, allow a global award of $3,000 based on the common local belief that tonic food would benefit and help to improve the health of a convalescing patient.

Summary

1. PSLA: $280,000.00

pre-trial loss of earnings between

24 May 2005 to 15 March 2008: $241,210.34

between 16 March 2008 to 26 May 2008: $9,000.99

future loss of earnings: $241,817.94

special damages: $11,238.00

tonic foods: $3,000.00

total $786,267.27

less ECC $185,570.97

The remaining sum is $600,696.30

Interest

1. Interest on general damages at 2 per cent p.a. from the date of writ to the date of judgment; interest on special damages at half judgment rate from the date of accident to the date of judgment, thereafter at judgment rate.

Costs

1. Costs to the plaintiff, to be taxed if not agreed, with certificate for counsel.

(Discussion re costs)

1. Leave to the plaintiff to obtain payment partly from the defendant’s payment-in of $422,000 and the balance to be paid within 21 days hereof.

# (H C Wong)

# District Court Judge

Mr Kevin Poon, instructed by B Mak & Co., for the Plaintiff

Ms Phillis Loh, instructed by Clyde & Co., for the Defendant