#### DCPI 1232/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## **PERSONAL INJURIES NO 1232 OF 2012**

**BETWEEN**

KWOK KWAN LAM **Plaintiff**

and

LAI PO SING **1st** **Defendant**

YICK NGAI LOGISTICS COMPANY LIMITED **2nd Defendant**

(Discontinued)

##### Before: Master J. CHOW in Court

Date of Hearing: 21st February 2014

Date of Delivery of Judgement: 7th March 2014

## **J U D G M E N T**

**Introduction**

1. This is an assessment of damages hearing.
2. The Plaintiff was employed by the 1st Defendant as a labourer. The 2nd Defendant was the principal contract of the 1st Defendant. The Plaintiff sustained injury at work, he claims damages against both the 1st and 2nd Defendants.
3. The Writ of Summons was served on both the 1st and 2nd Defendants on 15th August 2012.
4. On 18th September 2013, interlocutory Judgment on liability was entered against the 1st and 2nd Defendants leaving damages to be assessed.
5. Both the 1st and 2nd Defendants were absent in all Checklist Review hearings. The Plaintiff’s solicitors have duly served to them all subsequent hearing documents together with notice of this assessment hearing. The 1st and 2nd Defendants failed to appear in the assessment of damages hearing.

**The Accident**

1. On 26th June 2009, the Plaintiff was instructed to work at the 2nd Defendant’s container yard in Yuen Long. The duties of the Plaintiff were to unload goods from one container and then to repackage and relocate them into other containers. At time of accident, while the Plaintiff was in the course of unloading goods from one container, he was being knocked down by a forklift on his right side. The Plaintiff’s left foot was subsequently run over by the forklift (“the Accident”).
2. The Plaintiff was sent to Tuen Mun Hospital immediately after the Accident, he was diagnosed to have suffered from tenderness on his chest and fractures of metatarsals with wound of the left foot (“the Injuries”).

**The Plaintiff’s Claim**

1. The Plaintiff pleaded the following heads of damages in his Revised Statement of Damages:
2. Pain, Sufferings and Loss of Amenities $400,000.00
3. Pre Trial Loss of Earnings $251,445.00
4. Loss of Earning Capacity $149,175.00
5. Medical Expenses $ 3,452.00
6. Travelling Expenses $ 2,700.00
7. Tonic Food $ 2,000.00

**$808,772.00**

**General Background & Injuries of the Plaintiff**

1. The Plaintiff was aged 28 years of age at time of the Accident and he is now 33 years of age.
2. The Plaintiff was granted sick leave from 26th June 2009 to 15th March 2010, approximately 8.6 months.
3. Dr. Chan Wai To of Tuen Mun Hospital stated in his report dated 13th September 2010, on initial admission to the A&E Department, the Plaintiff was found to have tenderness over right chest wall, an open wound and multiple fractures of all 5 metatarsal bones of the left foot. The Plaintiff was admitted to the orthopaedic ward for further treatment.
4. Subsequent diagnoses by the Orthopaedic and Traumatology Department of Tuen Mun Hospital, it was found that the Plaintiff’s muscle and tendons were intact and there was no neurovascular injury.
5. Wound debridement and split-thickness skin graft was done on 27th June 2009 and 5th July 2009 respectively. Left leg cast was applied for left foot metatarsal fracture. The Plaintiff was discharged on 10th July 2009, 15 days after the Accident.
6. The Plaintiff can only walk with a pair of crutches for a period of 6 months after discharge, and eventually with a single crutch. He had his wound dressed at Tin Shui Wai General Out-patient Clinic or by himself on a daily basis.
7. The Plaintiff attended follow up treatments at the Department of Orthopaedics and Traumatology of Tuen Mun Hospital until 15th March 2010. He was further referred to the Physiotherapy Department of Tuen Mun Hospital for treatments since 6th October 2009. The last physiotherapy treatment was performed on 26th February 2010.
8. The Plaintiff paid visits to a Chinese bonesetter for treatment in 4 occasions.
9. At present, the Plaintiff is suffering from the following residual disabilities:
   1. a 9 cm x 2.5 cm elliptical scar over the dorsum of the left foot;
10. a 12 cm x 3 cm scar from the skin graft over the medial aspect of the left thigh;
11. mild stiffness at the end range of extension of the 2nd to 5th toes and left ankle;
12. mild angulation in the united fracture of the 3rd metatarsal;
13. slight angulation at the fracture shaft of the left 5th metatarsal;
14. dull ache upon walking over 2 hours;
15. tiredness and ache in his foot upon standing over 3 hours; and
16. occasional spasm over the left foot extensor tendon lasting 30 seconds to 1 minute.
17. The Plaintiff was assessed by the Employees’ Compensation (Ordinary Assessment) Board on 21st June 2010 to have suffered from 1% loss of earning capacity and was reviewed upwards to 2% on 6th October 2010.
18. The Plaintiff adduced Dr. Arthur Chiang’s solo orthopaedic expert report dated 2nd September 2011 without oral evidence (“Dr. Chiang’s report”). Dr. Chiang opined that:
19. The diagnosis of multiple fractures of metatarsals with wound of the left foot was compatible with mechanism of injury described.
20. The factures were healed uneventfully. There appeared to have mild widening of the 1st metatarsal, and angulation in the 3rd and 5th metatarsals but is still compatible with a satisfactory alignment. The 2nd and 4th metatarsals healed in good alignment.
21. The period of sick leaves granted is agreeable.
22. The Plaintiff had suffered 4% impairment of the whole person and 4% loss of earning capacity.

**Evidence of the Plaintiff**

1. The Plaintiff adopted and relied on his witness statement. He further clarified in the assessment of damages hearing today that he is still walking with minor discomfort. He has pain on his left foot occasionally. His present complaints rendered him unable to work as efficient as before.

**Analysis**

**Pain, Suffering and Loss of Amenities (“PSLA”)**

1. I accept Dr. Chiang’s opinion. The injuries were healed with mild residual symptoms. X ray revealed satisfactory alignment in all fractures of the left foot only that the Plaintiff’s is left with stiffness. The Plaintiff has reached a stage of maximum medical improvement, no further treatment is required.
2. The opinion of Dr. Chiang tallies with the Plaintiff’s evidence. He stated in his witness statement that there was stiffness when he stretched his toes. He experienced pain with prolonged standing and walking.
3. Mr. Leong, solicitor for the Plaintiff referred me to the following authorities:
4. *Leung Chung Ngar Christover v. Yeung Man Wai & Anor* [HCPI 63 of 1999], the Plaintiff, a hairdresser, sustained fracture of the metatarsal neck of the 3rd and 4th toes, and dislocation of the 5th metatarso-phalangeal joint when his left foot was run over by a motor car outside his work place. Close reduction and K-wires were performed. Hospitalised for three days. K-wires were removed 6 weeks later. Mal-union of the 4th metatarsal. No post-traumatic arthritic change but with residual pain on prolonged weight-bearing. Some restriction in his work but no indication that he could not return to his previous job as hairdresser. Not able to go ice-skating with his children. Mr. Justice Seagroatt on 20th December 2000 awarded $200,000 on PSLA.
5. *To Ying Wa v. Cargo-Land (warehouse) Development Limited* [HCPI 441 of 2000], the Plaintiff suffered from fractures of the 4th and 5th metararsals of the right foot. Operation of close reduction and K-wire fixation was carried out. He was administered a plaster cast at the site of injury. He had to walk about with crutches for a while after removal of the plaster of Paris and the K-wire. His healing progress was uneventful and considered satisfactory. He would have to take rest in prolonged walking and complains of occasional discomfort at the site of his injury. He was granted sick leave from 19th May 1997 to 6th August 1997. Master de Souza on 22nd January 2001 awarded $200,000 on PSLA.
6. *Ho For Sang v. Lau Sun Choi and Chiu Kam Fat* [HCPI 584 of 2001], the Plaintiff, a car park attendant, sustained foot injuries when a forklift truck ran over both his feet, rendering him unconscious. Suffered dislocation of the left 2nd, 3rd and 4th distal interphalangeal joints of the toe with compound fracture of the left 5th metatarsal bones and fracture of the right 2nd metatarsal bones. Underwent surgery and skin grafting. Continued using crutches for about a year and attended follow-up treatment about 20 times and Chinese bonesetter treatment for about 15 sessions. The Plaintiff complained of ache and numbness on both feet and was not able to stand or walk for longer than 30 minutes. The Plaintiff unlikely to return to work force. The medical expert assessed his physical disability at 15% and loss of earning capacity at 30%. Master Levy on 6th December 2002 found that the Plaintiff’s injuries fall within the “serious injury” category and awarded $450,000 on PSLA.
7. *Chow Tai Loi v. Leung Kam Hung and L H Godown Limited* [HCPI 320 of 2002], the Plaintiff was hit by a truck which ran over his left foot, causing fractures of the 1st and 2nd metatarsals. He also suffered a minor chest injury. Wore a short leg cast for three weeks and had physiotherapy. He also consulted bonesetter for his left foot problem. Permanent impairment of foot assessed at 5%, 2% permanent impairment of the whole person. Master Jeffries on 24th December 2003 awarded $225,000 on PSLA.
8. Mr. Leong particularly drew my attention to *Ho For Sang* and *Chow Tai Loi*. He submitted the Plaintiff’s injuries falls between the both cases. In *Ho For Sang*, the plaintiff had fractures over his 2nd, 3rd and 4th distal inerphalangeal joints and compound fractures of his right 2nd and left 5th metatarsal bones. The plaintiff is unlikely to return to workforce. Whereas in *Chow Tai Loi*, the plaintiff had 1st and 2nd metatarsals fracture only, with relatively minor residual problem. Both awards were distinct.
9. I accept Mr. Leong’s submission, in fact, the extent the Plaintiff’s injuries is more affiliated to *Leung Chung Ngar Christover*, *To Ying* Wa and *Chow Tai Loi*. In *Ho For Sang*, the plaintiff suffered injuries on both his feet and was unable to return to the workforce. His condition was more serious with an impact, this is not the case here.
10. I also take into account of the Plaintiff’s relatively long sick leave period and the residual disabilities, I find an award relatively higher than *Ho For Sang* is appropriate. Taking into account of the inflation, I award $280,000.00.

**Pre-Assessment Loss of Earnings**

1. The Plaintiff earns piece rate income. The more the work he was able to complete, the more he would have earned in a month. The rate for completing each container was $1,700.00. On average, the Plaintiff and other 15 workers could have completed 6 containers in each working day. The Plaintiff’s average daily share of income would be $1,700.00 x 6 containers / 16 workers = $637.50. The Plaintiff worked 26 days per month, his average monthly salary prior to the Accident should be $637.50 x 26 days = $16,575.00.
2. In the Plaintiff’s employees compensation claim hearing (DCEC No.8 of 2011), the Court has confirmed the Plaintiff’s average monthly earnings of $16,575. I accept this is an accurate figure.
3. The Plaintiff was granted sick leave from 26th June 2009 to 15th March 2010, i.e. 249 days. Dr. Chiang opined the period of sick leave is agreeable. I accept damages in respect of sick leave should be awarded.
4. The Plaintiff stated in his witness statement, for the residual pain, he has difficulty in looking for a new job immediately after expiration of sick leave. He attempted to but was in vain.
5. The Plaintiff has two successful employments. He worked as a product promoter for the period of 13 months from 1st November 2010 to 29th November 2011. He earned $34,320.00 during this period, on average, $3,120 per month. Subsequently for a period of 12.5 months, from 30th November 2011 to 12th December 2013, as a temporary warehouse attendant. He was paid $300 per day and on aggregate, he had earned $54,000.00, i.e. on average $4,320.00 per month.
6. The Plaintiff explained, he could not have worked on a permanent basis because he could not cope with work.
7. Dr. Chiang’s opinion is consistent with the Plaintiff’s evidence. Dr. Chiang said the Plaintiff might be unable to work with full capacity in the pre-injury job at time of expiry of sick leave. Nevertheless, he should be able to work in other manual jobs free from “climbing up and down activities”, e.g. as cleaner, security guard, or shopkeeper. The Plaintiff’s physical limitation should be improved with time. As the soft tissue around the fracture sites of his left would further consolidate, the Plaintiff could resume physical activities as he could have performed prior the Accident. Dr. Chiang estimated the Plaintiff could work as a labourer without limitation one year after the expiry of sick leave period.
8. Having considered the Plaintiff’s actual income after the Accident, Mr. Leong has fairly submitted an appropriate figure of the Plaintiff’s expected monthly income should be $7,500.00 after expiration of sick leave period.
9. Based on Dr. Chiang’s opinion, the Plaintiff pleaded in paragraph 4(f)(ii) of his Revised Statement of Damages, the period of pre assessment loss of damages covers the period from expiry of sick leave to 15th March 2011 only. I therefore award the Plaintiff’s pre-assessment loss of earnings up to the date of assessment today as follows:
10. the period from date of Accident to date of expiry of sick leave period:

$16,575.00 x 12 months x 249 days / 365 days =$135,688.00; and

1. the period from expiry of sick leave period until date of assessment:

($16,575.00 – $7,500.00) x 12 months =$108,900.00.

1. The Plaintiff’s total pre-assessment loss of earnings should be **$244,588.00**.

**Loss of Earning Capacity**

1. The Plaintiff’s work performance was affected by his residual symptoms. Although the Plaintiff managed to secure job as a warehouse attendant, his working ability was limited by the residual pain and could assume work on a temporary basis. I accept he would be disadvantaged or handicapped in the labour market. I award he Plaintiff damages on loss of earning capacity in sum of 6 months’ pre trial salary, i.e. ($16,575.00 x 6 months) **$99,450.00.**

**Special Damages**

*(i) Medical Expenses*

1. I accept medical expenses by the Plaintiff are incidental to the Accident, I award HK$3,452.00 as damages as particularized below:

(a) Tuen Mun Hospital $1,680.00

(b) 註冊中醫師招順雄 $1,090.00

(c) Wai Yuen Tong $311.00

(d) Tin Shui Dispensary $371.00

*(ii) Tonic Food*

1. The Plaintiff claims a sum of $2,000.00 being his expenses for tonic food. In *Tsang Hing Yuen v. Nishimatsu Kumagai Joint Venture & Anor* [2000] 1 HKLRD 196, Suffiad J decided,

***“the court have always been ready to award a reasonable amount for tonic food, even where no documentary poof has been produced”.***

This is fair amount and I could not criticize the Plaintiff’s sum of expenses to be unreasonable. I award $2,000.00.

1. *Travelling Expenses*
2. I also accept the amount claimed is a fair amount of travelling expenses. I award $2,700.00as his travelling expenses for attending medical treatments.
3. The aggregate damages for Special Damages should be **$8,152.00**.

**Employees Compensation**

1. In DCEC 8 of 2011, the Plaintiff was awarded employees’ compensation in sum of $137,249.00. The Plaintiff also received a sum of $44,170.00 from the 1st Defendant as periodical payments. I shall give credit to both sums.

**Summary on Quantum**

1. The summary of damages are as follows:
2. Pain, Suffering and Loss of Amenities $280,000.00
3. Pre Assessment Loss of Earnings $244,588.00
4. Loss of Earning Capacity $ 99,450.00
5. Special Damages $ 8,152.00
6. Less Employees Compensation & periodic payment $181,419.00
7. Total **$450,771.00**

**Interest & Costs**

1. I award interest to the Plaintiff at 2% per annum on the damages awarded in *Pain, Sufferings and Loss of Amenities* and *Loss of Earning Capacity* from the date of the Writ of Summons until judgment. Half judgment rate on damages awarded in *Pre Assessment Loss of Earning* and *Special Damages* from the date of Accident to the date of judgment.
2. I make a costs order *nisi* that the costs of this action, including the hearing on assessment of damages, be payable by the 1st and 2nd Defendants to the Plaintiff, taxed if not agreed. The Plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations. The cost order nisi shall be made absolute after 14 days from the date hereof.

# (J. CHOW)

# District Court Master

Mr. LEUNG Chun-cheung Jeff of Messrs. Cheung, Chan & Chung, assigned by Director of Legal Aid for the Plaintiff.

The 1st and 2nd Defendants, unrepresented, absent.