## DCPI 2474/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2474 OF 2013

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##### BETWEEN

LO PING KIN Plaintiff

### and

YUEN TSZ SHING trading as Defendant

WING TAO PROFESSIONAL RECYCLE

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Before : Deputy District Judge Lawrence Hui in Court

Dates of Hearing : 21 - 24 March 2016

Date of Judgment : 27 April 2016

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JUDGMENT

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*INTRODUCTION*

1. This is a personal injury action involving an employee, the plaintiff, in the employ of the defendant.
2. The plaintiff claims for a sum of just under HK$ 1 Million.
3. The trial was “uncontested” by the defendant.

*MATTERS AT THE TRIAL*

1. I was informed by counsel for the plaintiff and the solicitors for the defendant that the defendant had made an application for a bankruptcy order against himself. I was referred to a letter issued by the solicitors’ firm acting for the defendant, enclosing a debtor’s bankruptcy petition dated 3 March 2016.
2. I was also informed by the solicitors for the defendant that the defendant himself will not appear in this trial and shall only let the plaintiff prove his case.
3. Further, the solicitors for the defendant only have limited instructions. The fact that they are the solicitors on the court’s record required their appearance in the trial.
4. I was also told by the parties that on 21 February 2014, an award of employee compensation for HK$37,480 was made against the defendant as employer and in favour of the plaintiff as employee under DCEC 2016 of 2012.

*PLAINTIFF’S CASE ON PLEADINGS*

1. The plaintiff was born on 21 May 1962. He was aged 48 at the time of the accident on 22 January 2011.
2. Since September 2010, the plaintiff has been in the employ of the defendant. The defendant was the sole proprietor of a business in the recycling of materials.
3. The plaintiff worked as a driver and general worker.
4. On the day of the accident, at around 5 pm, the plaintiff received a telephone call from the defendant. The plaintiff was orally instructed to drive a medium sized goods vehicle of the defendant to collect materials for recycle at a location in Sheung Shui. The plaintiff was told to carry out the task with a Mr Chan Chor Yuen (“陳楚源”).
5. The plaintiff and Mr Chan arrived at the location at around 5:30 pm.
6. At around 6:30 pm on 22 January 2011, an accident happened when the plaintiff was working on the electric tail gate platform of the vehicle. When Mr Chan was raising the tail gate platform, the plaintiff’s right foot was trapped between the tail gate platform and the base of the goods compartment of the vehicle. Thus, injuries were caused to the plaintiff. The plaintiff has been unable to work ever since.
7. The defendant was present at the scene of the accident.
8. Since the plaintiff’s injuries and loss and damages were caused by the negligence of Mr Chan, who was in the course of employment with the defendant, the plaintiff contends that the defendant was vicariously liable.
9. Further, the plaintiff avers that his injuries and loss and damages arose out of the defendant’s breach of employment contract, breach of employer’s duty of care, negligence and breach of statutory duties under the Occupational Safety & Health Ordinance Cap 509, Occupational Safety & Health Regulations Cap 509A and Occupiers’ Liability Ordinance, Cap 314.

*DEFENDANT’S CASE ON PLEADINGS*

1. The defendant did not dispute the occurrence of the accident. He only denied that he had instructed the plaintiff and Mr Chan to collect the materials for recycle and that the plaintiff was employed by him.
2. The medium sized goods vehicle, which was owned by the mother of the defendant, was only borrowed by the plaintiff for the plaintiff’s own commercial activities.
3. The plaintiff was his own boss.
4. The defendant further averred that Mr Chan was under the employ of the plaintiff.
5. Alternatively, the plaintiff was in contributory negligence.

*EVIDENCE AT TRIAL*

1. The plaintiff gave evidence by adopting his witness statement as evidence-in-chief. He was hardly cross-examined by the defence.
2. The plaintiff’s witness, Mr Chan, also gave evidence by adopting his witness statement in as evidence-in-chief. He was not cross-examined by the defence.
3. Although the defendant filed a witness statement, he did not give evidence at trial. He did not call any witnesses either.

*CONSIDERATION OF EVIDENCE*

1. In determining the credibility of a witness, I bear in mind the words of DHCJ Thomas Au (as he then was) in *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 where at paragraph 53, he stated:-

“(1) Whether the party’s case is inherently plausible or implausible.

(2) Whether the party’s case is, in a material way, contradicted by other evidence (documentary or otherwise) which is undisputed or indisputable.

(3) Where it is shown that a witness has been discredited over one or more matters to which he has given evidence using the above tests. This is relevant to the assessment of his overall credibility.

(4) The demeanour of the witness.”

1. I also bear in mind the words of Suffiad J’s observation in *Chong Ha Kui Tai v Multicon Engineering Company Limited (in liquidation) and Others* HCPI 1168 of 2002, where at paragraph 13, the learned Judge stated:-

“… in a civil matter, where the standard of proof is on balance of probabilities, it is very seldom if at all that cross-examination alone showing up minor discrepancies and inconsistencies would be sufficient for a court to wholly reject and to disregard the evidence given by a witness short of some major concessions made by the witness.”

1. Since the defendant did not give evidence at trial, there is nothing to rebut, dilute or contradict the evidence in the plaintiff’s case. I am only able to consider the evidence of the plaintiff’s case.
2. I accept the plaintiff’s and his witness’ testimony as evidence of fact, as there were no inconsistencies and no inherent improbability therein.
3. The evidence from the plaintiff’s witness does support and corroborate with the plaintiff’s case.
4. However, my evaluation of the plaintiff’s evidence, his case and claims would depend on their quality and reasonableness.

*ISSUES AT TRIAL*

1. Issue one: whether the plaintiff and Mr Chan were in the course of employment with the defendant?
2. Issue two: how did the accident occur and whether Mr Chan was negligent in operating the tail gate platform?
3. Issue three: whether the defendant shall be held vicariously liable for Mr Chan’s negligence?
4. Issue four: whether there was any contributory negligence on the part of the plaintiff?
5. Issue five: What is the appropriate quantum for the compensation to the plaintiff?

*ISSUE ONE: WHETHER THE PLAINTIFF AND MR CHAN WERE IN THE COURSE OF EMPLOYMENT WITH THE DEFENDANT?*

1. I find the answer to this question to be “yes”. Both of them were in the course of employment with the defendant.
2. The plaintiff stated in his witness statement that he began to be employed by the defendant in September 2010 as a driver and general worker. The monthly salary was HK$10,000. The plaintiff and Mr Chan were colleagues.
3. Mr Chan stated in his witness statement that Mr Chan himself began to work for the defendant in about October 2010 as a general worker. The plaintiff was not Mr Chan’s employer.
4. I accept their evidence for this issue.
5. I find that at the time of the accident, both the plaintiff and Mr Chan were in the employ of the defendant.

*ISSUE TWO: HOW DID THE ACCIDENT OCCUR AND WHETHER MR CHAN WAS NEGLIGENT IN OPERATING THE TAIL GATE PLATFORM?*

1. I find that the accident occurred as per the descriptions in the witness statements of the plaintiff and Mr Chan:-
2. At around 5 pm on 22 January 2011, the plaintiff received a telephone call from the defendant. The plaintiff was told to drive the defendant’s medium sized goods vehicle to collect materials for recycle at a location in Sheung Shui. The plaintiff was told to carry out the task with Mr Chan;
3. The plaintiff and Mr Chan arrived at the location at around 5:30 pm;
4. At around 6:30 pm, an accident happened when the plaintiff was working on the tail gate platform of the vehicle;
5. The accident happened when Mr Chan was raising the tail gate platform and when the plaintiff was standing on the tail gate platform. The plaintiff’s right foot was trapped between the tail gate platform and the base of the goods compartment of the vehicle;
6. Injuries were caused to the plaintiff; and
7. When the accident happened, the defendant was present.
8. Mr Chan had admitted in his witness statement his carelessness as follows:-
9. When the accident happened, he did not notice that the plaintiff was working on the tail gate platform;
10. Mr Chan’s vision vis-à-vis the presence of the plaintiff on the tail gate platform was blocked by a big metal cage;
11. When the accident happened, it was dark.
12. I find that Mr Chan was negligent, as readily admitted by him. Mr Chan should have reasonably foreseen and appreciated the risk of injuries to others and to his colleagues, especially to the plaintiff, in the course of raising the tail gate platform.
13. Hence, the negligent acts and omissions of Mr Chan had caused the accident.

*ISSUE THREE: WHETHER THE DEFENDANT SHALL BE HELD VICARIOUSLY LIABLE FOR MR CHAN’S NEGLIGENCE?*

1. At common law, the employer owed a duty to the employee to take reasonable care for his safety and such duty entailed, among other things, the provision of a safe system of work, see *Cathay Pacific Airways Ltd v Wong Sau Lai* (2006) 9 HKCFAR 371, at paragraph 34.
2. As to what is meant by the term “system of work”, *Charlesworth & Percy on Negligence*, 13th Ed at paragraph 11-67 stated:-
3. the organization of the work;
4. the way in which it is intended the work shall be carried out;
5. the giving of adequate instructions (especially to inexperienced workers);
6. the sequence of events;
7. the taking of precautions for the safety of the workers and at what stages;
8. the number of such persons required to do the job;
9. the part to be taken by each of the various persons employed; and
10. the moment at which they shall perform their respective tasks.

Further:-

“it includes … or may include according to circumstances, such matters as the physical layout of the job – the setting of the stage, so to speak – the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.”

per Lord Greene M R in *Speed v Thomas Swift & Co Ltd* [1943] KB 557 at 563, 564.

1. On the other hand, irrespective of whether the duty of the employer arises in tort or out of a contract of employment, the employer’s duty for the provision of a safe system of work is not an absolute one. The employer’s duty does not require the former to decide on every detail of the system of work or mode of operation. 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. In *Winter v Cardiff Rural District Council* [1950] 1 All ER 819, at pages 822-823Lord Oaksey said:-

"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 an 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. As to when an employer should prescribe a system of work for his employees, *Charlesworth & Percy on Negligence* 13th Ed stated at paragraph 11-68:-

“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.”

1. In the Court of Appeal case of *Fong Yuet Ha v Success Employment Service Ltd* CACV 100 of 2012, it was emphasized that 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 at hand.
2. There was no evidence, in the least, that any of the following was provided to the plaintiff and Mr Chan to eliminate the risks of the accident in the defendant’s business’ system of work:-
3. Sufficient information, instruction, training, supervision;
4. Sufficient lighting; and
5. Personal protective equipment, such as industrial safety shoes, reflective vests etc.
6. The failure of the defendant to provide a safe system of work in the present case was, more likely than not, a cause contributing to the occurrence of the accident which in turn resulted in the plaintiff’s injuries: See *Lee Kin-kai*, *a patient by his father and next friend* *Li Wah v Ocean Trumping Co Ltd t/a Ocean Trumping Workshop* [1991] 2 HKLR 232, 235J-236E and *Lam Tam Luen v Asia Television Ltd* [2008] 5 HKLRD 5.
7. These duties owed by the defendant employer to the plaintiff employee are non-delegable.
8. In my opinion, the defendant owed a statutory duty, which has been breached, to provide a safe system of work to the plaintiff which included: (a) failing to provide proper general and specific instructions concerning the operation of the tail gate platform; (b) failing to make preliminary assessment of the work place and the work concerned and failing to give adequate warning of the attendant risks of working in potentially dangerous environment like the tail gate platform; (c) failing to supervise the plaintiff in his work; and (d) failing to provide relevant regular training.
9. Having considered the House of Lords case of *Lister v Hesley Hall Ltd* [2001] 2 WLR 1311 and the Hong Kong Court of Final Appeal Case of *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* (2002) 5 HKCFAR 569 and in all circumstances, I find that the accident was closely connected with the employment of Mr Chan invoking vicarious liability. For further discussion on vicarious liability, see *Tort Law and Practice in Hong Kong* 3rd Ed (Hong Kong Law Library), Chapter 3, paragraphs 3.001 to 3.006 and 3.041 to 3.042.
10. Mr Chan was clearly the servant of the defendant and was discharging his duties in the course of his employment. Mr Chan was operating a tail gate platform, a mechanical device, that is *prima facie* dangerous. It would only be fair and just to hold the defendant employer vicariously liable for the loss and damages suffered by the plaintiff employee due to the lack of a sufficient system of work.
11. In addition, the defendant’s failure to issue any directive or warning in the circumstances of the present case was a dereliction of the duty of care the defendant owed to its employees, putting the defendant in breach of his employment contract with the plaintiff, see *So Chung Kwong v Ho Kuen & Another* [2000] 3 HKLRD 241.
12. By the same token, although academic, I also find that the defendant had breached the common law duty of care.
13. In the present case, I find the answer to this question to be “yes”.
14. Accordingly, I find the defendant to be vicariously liable for the negligent acts or omissions of Mr Chan.

*ISSUE FOUR: WHETHER THERE WAS ANY CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF?*

1. In considering whether the plaintiff was contributorily negligent where his claim is, *inter alia*, based on the employer’s breach of statutory duty, the underlying policy of the legislation is a factor to be considered. In some instances an allegation of contributory negligence simply points to a breach of the employer’s duty to take reasonable care to protect employees from their own inadvertence. See *Clerk & Lindsell on Torts*, 21st Ed at paragraph 13-78.
2. An employee, undertaking an activity in the course of his employment, owed a duty of care to himself and would be liable to a reduction of any award if found in breach. Pursuant to *So Chung Kwong v Ho Kuen & Anor* [2000] 3 HKLRD 241 at 249F-I, whilst each case must be founded on its own facts, factors for consideration included:-
3. the level of skills and experience the employee had attained;
4. the degree of pressure imposed upon an employee by his employer to maintain or increase output at the expense of caution; and
5. the degree of familiarity the employee had with that activity which put his own safety at risk.
6. However, a momentary lapse in attention or inadvertence by an employee does not mean that he was guilty of contributory negligence, *Clerk & Lindsell on Torts*, 21st Ed, at paragraph 13-79. Further, where the defendant’s breach of statutory duty resulted in the plaintiff employee not being able to adopt a safe method to carry out his work and was a substantial cause of the injury, the court would not easily hold that the plaintiff employee was contributorily negligent: see *Mak Woon King v Wong Chiu* [2000] 2 HKLRD 295, at 302C-I. The situation would be different if the worker consciously chose and adopted a work method which was not safe but, to an extent, voluntarily assumed the risk, see *Lam Cheuk Leung v Erawan Co Ltd & Others* [2004] 1 HKLRD 778, at 797B-D.
7. Although the burden of proving contributory negligence was on the defendant, it could be inferred from the evidence adduced on the plaintiff’s behalf or from the primary facts found by the court, on a balance of probabilities.
8. The defence of contributory negligence shall be proved by the defence on a balance of probabilities. Saied J in the judgment of *Lee Chan Wing v Lee Wing Ping* HCA 2475 of 1987, (which was upheld by the Court of Appeal in CACV 143 of 1989) stated:-

“The burden of proving contributory negligence is on the defendant and it is not for the plaintiff to disprove it. It is for the defendant to prove first that the plaintiff failed to take ordinary care of himself… I keep in mind also that in order to discharge his burden of proof it is not necessary for the defendant to give evidence about such matters, because contributory negligence can be inferred from the evidence adduced already on the plaintiff’s behalf or from primary facts, so found by the court on a balance of probabilities.”

1. For further legal basis and discussion on contributory negligence, see section 21(1) of the Law Amendment and Consolidation (Reform) Ordinance, Cap 23 and *Chung Kei v So Yiu* [1987] 1 HKC 373 at paragraph 16.
2. In the present case, the collection of materials for recycle *per se* was not hazardous work. The plaintiff was merely a driver and general worker rather than a skilled or experienced worker. Whilst the failure by the defendant to provide a safe system of work was a cause of the accident leading to the plaintiff’s injuries, there may or may not be degree of carelessness on the part of the plaintiff. This is a fact-sensitive matter.
3. Pausing here, I do note that the plaintiff had made “comments” in relation to the cause of the accident.
4. The plaintiff stated in his witness statement that the causes of the accident were:-
5. A big metal cage was placed on the tail gate platform blocking the vision of Mr Chan;
6. The plaintiff was having a conversation with the defendant; and
7. It was dark.
8. Nonetheless, I find that the plaintiff’s “comments” were rather equivocal as to whether he was guilty of being careless leading to contributory negligence. His comments did not, I think, amount to admissions. On balance, plugging all relevant issues and consideration into the contributory negligence legal formula, I am unable to find that the plaintiff was contributorily negligent.
9. Hence the plaintiff was not in contributory negligence.

*ISSUE FIVE: WHAT IS THE APPROPRIATE QUANTUM FOR THE COMPENSATION TO THE PLAINTIFF?*

1. The overriding principle of compensation is to restore the plaintiff to the position he would have been if the negligence had not occurred.
2. In the Amended Revised Statement of Damages dated 21 March 2016, the plaintiff claimed for the following sums, plus interest:-

(HK$)

1. Pain, suffering and loss of amenities (“PSLA”) 300,000
2. Pre-trial loss of earnings 485,000
3. Pre-trial loss of MPF 24,250
4. Future loss of earnings 132,000
5. Future loss of MPF 6,600
6. Loss of earning capacity 60,000
7. Future costs of medical expenses 10,000
8. Medical expenses (agreed by the defence) 2,800
9. Travelling expenses (agreed by the defence) 5,500
10. Tonic food (agreed by the defence at HK$8,000) 10,000

Less employee compensation under DCEC 2016/2012 (37,480)

Total 998,670

1. The only medical report available before me was the one issued by the Department of Orthopaedics & Traumatology of the North District Hospital dated 11 March 2013, which confirmed that:-
2. The plaintiff was admitted to the hospital’s accident and emergency department on 22 January 2011 after his right foot was crushed resulting in
3. Big toe: open fracture of distal phalanx with nail bed laceration and nail place detachment;
4. Second toe: subluxation of proximal interphalangeal joint (PIPJ); and
5. 3rd, 4th and 5th toes: fracture at shafts of proximal phalanges.
6. Wound debridement, operative reduction and fixation, nail bed repair were performed on the same day. He started on non-weight bearing walking post-operatively and was discharged on 25 January 2011 with physiotherapist arranged.
7. Upon follow-up at the specialist out-patient clinic, his condition improved with decrease in pain. The metal wire was removed at the 8th week. X-ray showed fracture union.
8. At the 7th month after the operation, he still had mild residual pain and stiffness. Clinically, there was no deformity and he was able to stand on tiptoe. Regular follow-up was then stopped.
9. Other medical certificates confirmed that the plaintiff was granted sick leave from 22 January 2011 to 31 August 2011.
10. The certificate for assessment issued by the Employees’ Compensation (Ordinary Assessment) Board dated 11 March 2013 showed that the loss of permanent earning capacity was 5% and the plaintiff was on further sick leave from 14 to 16 November 2012.
11. I shall now deal with each heads of the claim.

*PSLA*

1. Principles pertaining to the assessment of damages for PSLA are stated in *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd.* [1988] 2 HKLR 650, Acting Chief Justice Cons said at page 653:-

“The starting point is a comparison of the injuries in the case in question with injuries in similar cases in which awards have already been made by the court. Consideration must next be given to any special feature or features which might influence the award in the particular case and only then, when a tentative conclusion will have been reached, should attention be turned to the established guidelines.”

1. Moreover, notwithstanding the fact that comparable cases are used as the yardstick for assessing damages for PSLA, cases only provide a guideline or range of awards. They can do no more than indicating a range of views taken in respect of different plaintiffs, of different ages and sexes usually with a different combination of injuries. Each case must be considered in the light of its own unique circumstances. See *Hong Kong Personal Injury Service*, by Michael Turnbull & Others II [751,752].
2. Counsel for the plaintiff referred me to different cases including: *To Ying Was v Cargo-land (Warehouse) Development Limited* HCPI 441 of 2000, *Chow Tai Loi v Leung Kam Hung & Another* HCPI 320 of 2002, *Lam Chor Mun, a minor by her next friend Lam Pik Kam v Ho Tin Wah & Another* DCPI 1093 of 2005, *Yeung Kin Chung Joseph v H K Scafform Supplies Limited & Another* DCPI 1332 of 2005, *Sin Fu Yau v Cheung Kwok Leung Keith & Others* DCPI 1081 of 2005, *Lung Siu Wing v Lo Wai Ming & Others* DCPI 1134 of 2009 and *Lam Kam Ching v Anytime China Express Company Limited & Another* DCPI 1202 of 2013.
3. Having carefully considered all circumstances, I find that the injuries and aftermath effects suffered by the plaintiff to be just below or at the lower end of the spectrum of the “serious injury” category as thoroughly discussed in cases of *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657, *Lau Che Ping v Hoi Kong Godown Company Limited* [1989] 2 HKLRD 650 and *Leung On & Others v Chan Pui Ki (an infant)* [1996] 2 HKC 565.
4. Taking into account inflation and the age of the plaintiff, I think HK$300,000 is a generous, fair and just amount for the PSLA.

*Pre-trial loss of earnings*

1. The accident happened on 22 January 2011.
2. The plaintiff was granted sick leave:-
3. from 22 January 2011 to 31 August 2011, and
4. from 14 to 16 November 2012.
5. The plaintiff confirmed that he had received his full monthly salary of HK$10,000 for January 2011.
6. The plaintiff also confirmed that he received HK$8,000 (ie HK$2,000 short of his full monthly salary) for the months of February to August 2011 (ie total 7 months).
7. The plaintiff also testified that:-
8. When he looked for employment after August 2011, the potential employers asked him whether he had suffered any industrial injuries. As the plaintiff had answered them in the positive, he was told to just wait for return phone calls and was not successful in seeking employment;
9. Since the accident, even until trial, he has been unemployed;
10. He is now financially being taken care of by his son;
11. The plaintiff still feels numbness and pain on his injured foot; and
12. If he were to work again as a driver for industrial vehicles, because most industrial vehicles would only have manual drive gear boxes, it would be difficult for the plaintiff to operate them due to his foot injury.
13. Whilst I appreciate the occurrence of the unfortunate accident and the plaintiff’s assertion that there was no positive feedback from the potential employers, there was no evidence and particulars about what efforts the plaintiff had ever made to look for similar employment or alternative employment, including perhaps working as taxi driver, security guard, cashier or waiter at restaurants etc. More importantly, based on his medical report, the plaintiff appeared to have recovered well as early as by the end of August 2011. I refrain from considering the unreasonable attitude of those potential employers and the passive attitude of the plaintiff in looking for employment as factors in my assessment for his pre-trial loss of earnings.
14. Hence, I would allow pre-trial loss of earnings until the end of November 2012 (ie the end of the 2nd sick leave period instead of September 2011 being the expiration of the first sick leave period), which I consider to be a very generous award. This is because I find that the plaintiff should reasonably be able to return to the workforce by December 2012.
15. Thus the sum for pre-trial loss of earnings is HK$164,000, which is calculated as follows:-

(HK$)

February 2011 2,000 (ie 10,000 – 8,000)

March 2011 2,000 (ie 10,000 – 8,000)

April 2011 2,000 (ie 10,000 – 8,000)

May 2011 2,000 (ie 10,000 – 8,000)

June 2011 2,000 (ie 10,000 – 8,000)

July 2011 2,000 (ie 10,000 – 8,000)

August 2011 2,000 (ie 10,000 – 8,000)

September 2011 10,000 (full monthly salary)

October 2011 10,000 (full monthly salary)

November 2011 10,000 (full monthly salary)

December 2011 10,000 (full monthly salary)

January 2012 10,000 (full monthly salary)

February 2012 10,000 (full monthly salary)

March 2012 10,000 (full monthly salary)

April 2012 10,000 (full monthly salary)

May 2012 10,000 (full monthly salary)

June 2012 10,000 (full monthly salary)

July 2012 10,000 (full monthly salary)

August 2012 10,000 (full monthly salary)

September 2012 10,000 (full monthly salary)

October 2012 10,000 (full monthly salary)

November 2012 10,000 (full monthly salary)

Total 164,000

*Pre-trial loss of MPF*

1. Based on the pre-trial loss of earnings I allowed, I shall consequently allow HK$8,200 for pre-trial loss of MPF (ie HK$164,000 x 5%).

*Future loss of earnings*

1. As I do not have evidence before me of what genuine efforts, if any, had the plaintiff made to look for employment, in the absence of other medical evidence to demonstrate the degree of disadvantage of the plaintiff in the labour market, I will not allow any claims under this head.

*Future loss of MPF*

1. In rejecting the claim of future loss of earnings, this head of claim is inapplicable.

*Loss of earning capacity*

1. I bear in mind the following passage from the judgment of the Privy Council in the case of *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176:-

“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…”

1. Having already considered, *inter alia*:-
2. The case of *Lam Kam Ching v Anytime China Express Company Limited & Another* DCPI 1202 of 2013;
3. The medical report issued by the Department of Orthopaedics & Traumatology of the North District Hospital dated 11 March 2013;
4. The certificate for assessment issued by the Employees’ Compensation (Ordinary Assessment) Board dated 11 March 2013; and
5. the testimony of the plaintiff,

similarly, as I do not have evidence before me of what genuine efforts, if any, had the plaintiff made to look for employment, in the absence of other medical evidence to demonstrate the degree of disadvantage or handicap of the plaintiff in the labour market, I will also not allow any claims under this head.

1. In passing, I should mention that during the final submissions stage, when I enquired with counsel for the plaintiff as to the existence and quality of evidence to support the claims of future loss of earnings and loss of earning capacity, counsel for the plaintiff faintly indicated to make an application to re-open the plaintiff’s case and invite the plaintiff to give evidence again. However, counsel for the plaintiff had ultimately sensibly decided not to proceed with such an application.

*Future costs of medical expenses*

1. The plaintiff testified that he still suffers from foot pain and numbness from time to time and that he is required to see a bone setter (鐵打) and to buy ointment to sooth his pain. To that extent, his testimony is somewhat supported by the medical report dated 11 March 2013, which stated he had “mild residual pain and stiffness”.
2. The claim of HK$10,000 appears to be reasonable. I allow it.

*Medical expenses*

1. The claim of HK$2,800 as agreed by the defence and appears to be reasonable. I allow it.

*Travelling expenses*

1. The claim of HK$5,500 as agreed by the defence and appears to be reasonable. I allow it.

*Tonic food*

1. The claim of HK$10,000 was reduced to HK$8,000 upon the agreement between the plaintiff and the defence. The claim of HK$8,000 appears to be reasonable. I allow it.

*CONCLUSIONS*

1. The award to the plaintiff is as follows, plus interest:-

(HK$)

1. Pain, suffering and loss of amenities (“PSLA”) 300,000
2. Pre-trial loss of earnings 164,000
3. Pre-trial loss of MPF 8,200
4. Future loss of earnings 0
5. Future loss of MPF 0
6. Loss of earning capacity 0
7. Future costs of medical expenses 10,000
8. Medical expenses 2,800
9. Travelling expenses 5,500
10. Tonic food 8,000

Less employee compensation under DCEC 2016/2012 (37,480)

Total 461,020

1. The defendant is thus liable to the plaintiff for HK$461,020.
2. I make an order nisi that there be interest on general damages at 2% per annum from the date of the service of the writ to the date of this judgment and interest on special damages at half judgment rate from the date of the accident to the date of this judgment. From the date of this judgment onwards, the damages, general and special, will carry interest at the judgment rate.
3. I also make an order nisi that the plaintiff’s costs be paid by the defendant, to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs be taxed according to the Legal Aid Regulations. This costs order shall be made absolute 14 days after the handing down of this judgment.
4. I think counsel for the plaintiff had dutifully done his best for his lay client.
5. Lastly, I thank counsel for the plaintiff and the solicitors for the defendant for their assistance.

( Lawrence Hui )

Deputy District Judge

Mr Andy Lam, instructed by Ivan Tang & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Jerry Jim, instructed by Jim & Co, for the defendant