#### DCPI 1846/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1846 OF 2008

BETWEEN

LAU CHI KEUNG Plaintiff

and

WONG WAI KEI 1st Defendant

YAU LEE CONSTRUCTION 2nd Defendant

COMPANY LIMITED

##### Coram: Deputy District Judge Edward Shum in Court

Dates of Hearing: 27th and 30th November 2009

Date of handing down Judgment: 4th March 2010

Judgment

1. By this action, the Plaintiff claims against the 1st and 2nd Defendants damages for personal injuries arising out of an industrial accident at work which happened on 9th November 2006.

2. Liability was conceded at the beginning of the trial leaving the issue of quantum to be assessed.

*The Accident*

3. Briefly stated which happened is this: The Plaintiff and his colleague were instructed to remove certain panels that acted as noise barriers for air-conditioning units installed on the roof of Tseung Kwan O Police Station. The Accident happened when his colleague was passing a noise barrier panel to the Plaintiff and it slipped out of his hand and fell onto the Plaintiff’s right foot.

*The Plaintiff’s injuries, treatment received and permanent disabilities*

4. After the Accident, the Plaintiff immediately stopped working and returned home. But when he woke up on the next day, he still felt pain and his right was swollen. At first, the Plaintiff received treatment from a bonesetter. And yet, his right foot pain and swelling persisted.

5. On 16th November 2006, the Plaintiff attended Evangel Hospital for medical treatment. Upon physical examination, there was tenderness and mild swelling over dorsum of his right foot. X-rays of his right foot did not show any fracture or dislocation. However, apparent 5-8 mm nodular bony density with surrounding radiolucent “ring” was present over the superolateral corner of the navicular bone, suggesting changes of osteochondritis. Benign bony spur was also seen protruding from the superolateral part of his medial cuneiform bone. The diagnosis was right foot contusion injury and the prognosis was said to be good. He was treated with non-steroidal anti-inflammatory drug and was discharged home on the same day.

6. The Plaintiff continued to receive follow-up treatments from Evangel Hospital until 7th December 2006.

7. Owing to persistent right foot pain and swelling, the Plaintiff attended the Accident & Emergency Department of the United Christian Hospital (UCH) for treatment on 13th December 2006. Physical examination then revealed swelling over the dorsal region of his right foot with mild tenderness. X-rays of his right foot also showed a bony mass near the navicular bone. The Plaintiff was referred to the Orthopaedics & Traumatology Department of UCH for further management.

8. According to the medical report dated 15th May 2009 prepared by Dr. Cheng of the Department of Orthopaedics & Traumatology of UCH on the Plaintiff:-

“…*He was first seen on 31 January 2007 in our outpatient clinic. He complained of right foot pain after hit by heavy object while working on 9 November 2006. There was numbness of right foot. Physical examination revealed bony prominence over lateral aspect of the navicular bone of both feet. There was tenderness over the bony performance and there was numbness of right foot.*

*Radiological examination of both feet showed osteochondritis of navicular bony spur in both feet. There was an accessory navicular in the right foot.*

*The diagnosis was neuropathic pain of right foot. Other differential diagnosis included neuroma of the peroneal nerve.*

*He was treated conservatively with medication, physiotherapy and occupational therapy. The response was unsatisfactory.*

*He was referred to the Pain Clinic on 18 July 2008. The superficial and deep peroneal nerve block was given on 28 March 2008 with unsatisfactory response. Thus, the neuropathic pain was unlikely caused by the neuroma of peroneal nerve.*

*MRI scan of the right foot was performed on 7 August 2009 and showed that the bony prominence is found to be due to small ossicles. In fact, similar ossicles are also present on the left side. No other focal lesions are seen.*

*During the latest follow-up on 22 April 2009, there was still pain and numbness over the right foot. He could walk unaided for short distance. However, he needs a stick for long distance walking.*

*He was granted sick leave from 31 January 2007 to 4 October 2007 & 14 November 2007 to 3 January 2008 and 25 June 2008 to 17 June 2009. The patient did not require any continuous attention for performing the essential actions at life after the accident.*

*His condition is static for Medical Assessment*.”

1. According to the psychiatric report prepared by Dr. Lai Yi Lam of Department of Psychiatry of UCH on the Plaintiff dated 28th October 2008:-

“…*Mr. LAU was diagnosed adjustment disorder on his first consultation to our out-patient clinic on 19.08.2008, while he presented with insomnia, irritable mood and frequent argument with his wife. He had preserved concentration and memory but no anhedonia. He was given psychological support and referred to clinical psychologist with psychotic medication needed.*

*Last follow up on 29.09.2008 revealed lowish mood and anxiety. He was started on low dose antidepressant.*

*In summary, patient was diagnosed adjustment disorder and was on low dose antidepressant, with no sick leave certificate given by our department. Prognosis would be multifactorial and could not be predicted by now…*”

1. And according to the psychiatric report prepared by Dr. Cheung of the Department of Psychiatry of UCH on the Plaintiff dated 11th June 2009:-

“…*Mr. LAU was known to the Mental Health Service on 19th August 2008. He reported that he had an injury while on duty on 9th November 2006. He complained of persistent right foot pain afterwards. He had low mood, irritability and poor sleep. He also reported to have fair relationship with his wife. He was diagnosed to suffer from adjustment disorder.*

During the follow up consultation, Mr. LAU expressed that he felt hopeless to his physical condition and had low mood. He also expressed problem in his sex life. This caused him additional distress. He was prescribed antidepressant treatment and he reported fair medication compliance.

*Mr. LAU was last seen on 6th May 2009. He had been receiving acupuncture therapy from pain clinic and he thought his pain condition had not improved. He had fair sleep and occasional irritability, which were worse if the pain got severe. He reported to have no major problem in his daily living. He went out to do shopping for the daily necessity in the daytime on his own. He reported that he had tried to find a job as a driver in the Government but was not offered the job. He previously refused antidepressant treatment and he was prescribed sertraline 25mg daily and zopiclone 7.5mg bedtime prn in the last consultation.*

*No sick leave was granted by this department.*

*Further treatment and compliance were needed before assessment of the recovery of his mental condition can be made. One poor prognostic factor is the persistence of pain over the right foot after injury.*

*Since the antidepressant treatment was resumed only recently, further period of treatment is needed before assessment of the impairment due to his mental condition, if any, can be commented*…”

*Expert Medical Evidence*

11. The Plaintiff’s orthopaedic conditions were jointly assessed by Dr. Hung Siu Lun Tony and Dr. Lam Kwong Chin. Both experts agreed that whilst the Plaintiff’s complaint of right foot pain and numbness could be consistent with a foot injury but the severity and the persistent nature of the pain could not be fully explained medically. Having viewed the surveillance recordings of the Plaintiff’s activities in August 2007, December 2007 and April 2008, both experts further agreed that there was no apparent restriction in his walking tolerance within the span of recordings. They also agreed that any residual right foot pain and numbness would be slight. And thus, both experts agreed from an orthopaedic point of view that the Plaintiff should be able to resume his pre-accident occupation as a waterproof engineering worker in almost full capacity.

*Surveillance*

12. At the beginning of the trial, I also had the benefit of viewing the surveillance recordings. Although the Plaintiff was shown to be carrying a walking stick at all times, I noticed that he had no difficulty at all in negotiating through the crowd and he could walk with ease in and out of a wet market. The surveillance recordings also showed that the Plaintiff has a good walking tolerance. In particular, the Plaintiff was shown to be strolling around in Mongkok for more than one and half hours on 30th April 2008. When being cross-examined by Mr. Chan, Counsel for the Defendant, the Plaintiff initially tried to explain this away by saying that he had taken medication. And then he further explained that he was walking with his heels not his toes.

13. But then again, the truth is that the Plaintiff showed no signs of pain in his facial expression in any of the surveillance recordings. And indeed, the Plaintiff was seen to be walking normally with his heels on and off the ground as he strolled around. I have no hesitation therefore in finding that the Plaintiff was exaggerating his pain condition and physical disabilities.

*Discussion*

14. As I pointed out to Mr. Clough, Counsel for the Plaintiff, in the course of trial, the medical evidence on the Plaintiff’s pain condition is circular in the sense that on the one hand orthopaedic doctors were unable to explain it by way of objective clinical findings but on the other hand psychiatrists sought to attribute the poor prognosis on the ground of persistent pain over his right foot. In this connection, Mr. Clough took exception to my use of the words “psychological overlay” and he went so far as to saying that I only have to be satisfied on the evidence that the Plaintiff’s pain condition is genuine.

15. In his closing submission, Mr. Clough further argued that the Plaintiff needs not prove the correct diagnosis. Mr. Clough also said that all the Plaintiff has to establish is that the loss he claims is attributable to the Accident. If it is attributable, he said, there is a causal connection between the Accident and the loss claimed. With due respect, I think this really begs the question. It is true that I am not concerned with “clinical cause” in the sense that medical practitioners would look for proof beyond reasonable doubt or perhaps beyond any doubt. There must however be something in the medical evidence to show on the balance of probabilities that the Accident was a substantially contributing cause of the Plaintiff’s psychiatric problems. Also, I am somewhat left in the dark by the lack of evidence of the present psychiatric condition of the Plaintiff. In particular, I have no idea as to when his adjustment disorder would be healed.

16. Mr. Clough also drew my attention to the Court of Appeal’s decision in *Lee Kin Kai, a patient by his father and next friend Li Wah v Ocean Tramping Co. Ltd. t/a Ocean Tramping Workshop* [1991] 2 HKLR 232 and which he said “gives very clear guidance as to the correct approach” to the question of legal causation. It is true that a judge when considering causation is not entitled, but is bound, to use his common sense. However, I must look at the evidence as a whole. To my mind of more direct relevance to the Plaintiff’s case here is this dictum of Hunter JA appearing at 236F of his judgment:-

“*In my view therefore the judge was not only entitled but was sensible to start with facts. When considering that evidence he was not confined to those matters which the doctors may individually have picked out in their consulting rooms…*”

17. Here it is important to note from the medical evidence that no psychiatric complaint was reported in any of the medical notes and records kept on the Plaintiff during his consultations and treatments at UCH prior to January 2008. Indeed, the Plaintiff first complained of “sleep disturbance due to pain” during his visit to the Pain Clinic of UCH on 7th January 2008. At that time, neuropathic pain over right dorsum of foot was suspected. However, when neuropathic pain due to neuroma of peroneal nerve was ruled out after right peroneal nerve block was done on 28th March 2008, albeit with unsatisfactory response, referral was then made on 2nd July 2008 for the Plaintiff to consult psychiatrists at UCH for possible adjustment disorder.

18. As I have said, the surveillance recording captured on 30th April 2008 clearly showed that the Plaintiff was strolling around Mongkok with no signs of pain in his facial expression. If the Plaintiff was genuinely suffering from chronic right foot pain, I wonder why he would suddenly be in such a good mood as to stroll around Mongkok for one and half hours. In any case, the very fact that no sick leave was granted by the Department of Psychiatry of UCH to the Plaintiff indicates in my view that his psychiatric problems should after all be mild.

19. Taking into consideration the relevant medical notes and records, the surveillance recordings and the joint medical report of Dr. Hung and Dr. Lam, I am far from being convinced that the Plaintiff’s pain condition is genuine. In this connection, unlike the *Ocean Tramping* case (supra.) where there was no question of malingering, the Defendants here are not only taking issue on whether the Plaintiff’s pain condition actually comes from his psychiatric problems but also on whether there is a sufficient causal connection with the Accident. Although I am prepared to give the Plaintiff the benefit of the doubt by finding that there existed a causal relationship between the Accident and Plaintiff’s adjustment disorder, I am unprepared to find on the medical evidence that the Plaintiff’s pain condition is as serious as he claims.

*My Findings*

20. I accept the joint medical opinion of Dr. Hung and Dr. Lam that the Plaintiff sustained a soft tissue contusion injury to the dorsum of his right foot. It is common ground between the experts that the Plaintiff has attained maximal medical recovery and no further treatment is required. I also accept that the Plaintiff’s neuropathic pain is unlikely to be caused by the neuroma of his peroneal nerve. Moreover, I find that the Plaintiff has exaggerated the actual degree of pain experienced by him. And I certainly prefer the medical opinion of Dr. Lam that any residual disability should be minimal but I accept that the Plaintiff may have mild residual pain on prolonged standing or weight bearing. Although the medical evidence adduced by the Plaintiff on his psychiatric problems is far from being satisfactory, I am prepared to give him the benefit of doubt by finding that he does suffer from a mild adjustment disorder as a result of the Accident.

*PSLA*

21. The Plaintiff says that this should be in the region of $300,000. Surprisingly, Mr. Clough did not find it necessary to refer me to any authorities in support of his contention. Mr. Chan, on the other hand, argued by comparison with the cases of *Fung Tak Yau v Chow Wah Tim* (unreported) HCPI No.973 of 2006; Mr. Recorder J Fok SC; 13th May 2008; *Wong Wai Hung v Loo Kin* (unreported) DCPI No.643 of 2006; Deputy Judge W C Li; 30th February 2007; *Lee Sze Wai v Law Chi Kin* (unreported) DCPI No.144 of 2001; Deputy Judge R Yu; 10th May 2002; and *So Cho Yin v MTR Corporation Ltd.* (unreported) HCPI No.755 of 2001; Judge Leung; 7th April 2008) that any award under this head should not exceed $100,000.

22. I agree with Mr. Chan that the physical injuries to the dorsum of the Plaintiff’s right foot are closely similar that involved in the *Fung Tak Yau* case (supra.). However, the Plaintiff’s pain condition here is complicated by his psychiatric problems. I think a proper award under the head of PSLA is $150,000.

*Loss of Earnings*

23. It is common ground that the Plaintiff was earning on the average $17,300 a month at the time of the Accident. Although the Plaintiff was given on and off sick leaves from the date of the Accident to 2nd December 2009, I agree with Mr. Chan that I am not bound by the sick leave period as stated on the sick leave certificates [see: *Choy Wai Chung v Chun Wo Construction & Engineering Co. Ltd.* (unreported) CACV No.172 of 2004; Rogers VP; Le Pichon JA & Stone J; 15th July 2005].

24. Taking into consideration everything in the medical evidence and in particular the joint medical report of Dr. Hung and Dr. Lam, I am of the opinion that the appropriate length of sick period in this case should not extend beyond 2nd January 2009 when the Plaintiff was being assessed by the two medical experts. Accordingly, the Plaintiff’s loss of earnings and MPF benefits from the date of the Accident viz. 9th November 2006 up to the 2nd January 2009 would be:-

$17,300 x 1.05 / month x 25.8 months = $468,657

25. Both Mr. Clough and Mr. Chan agreed that a deduction of 2.5% should be made to reflect the Plaintiff’s tax liability. Accordingly, the award under this head would be reduced to $456,941.

26. As to the Plaintiff’s claim for future loss of earnings, I am not convinced on the available evidence that he is prevented by reason of his injuries and permanent disabilities from returning to his pre-accident occupation as a waterproofing worker. I would therefore make no award under this head.

*Loss of Earning Capacity*

27. The Plaintiff also claims that there is a real risk that he will be handicapped in the general labour market by reason of his injuries and permanent disabilities. The Plaintiff therefore claims a lump sum of $80,000 as damages under this head in his Revised Statement of Damages.

28. The leading cases on this subject are **Smith v Manchester City Council** (1974) 118 Sol Jo 597 and **Moeliker v A Reyrolle & Co. Ltd.** [1977] 1 WLR 132 where the correct approach were explained. And in the latter case, Browne LJ had this to say (at p.14):-

“Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether there is a “substantial” risk or is it a “speculative” or “fanciful” risk… If the court comes to the conclusion that there is no “substantial” or “real” risk of the plaintiff losing his present job during the rest of his working life, no damages will be recoverable under this head.”

29. Translating this legal principle into the facts of the present case, I need to ask myself if this is anything in the Plaintiff’s medical evidence to suggest that there is any real risk that the Plaintiff may suffer a disadvantage in the labour market by reason of his injury and the permanent disability that he is now left with. However, I fail to find anything in the medical evidence to support his claim. In this connection, I fully endorse the joint medical opinion of Dr. Hung and Dr. Lam that the Plaintiff should be able to resume his pre-accident occupation as a waterproofing worker in almost full capacity. Accordingly, I would make no award under this head.

*Special Damages*

30. In his Revised Statement of Damages, the Plaintiff claimed $3,620 as medical expenses, $3,000 as travelling expenses and $5,000 for tonic food. In my view, the Plaintiff’s claims under this head should be allowed in full. The total award of special damages would therefore be $11,620.

*Summary*

31. The total award is:

(1) PSLA : $150,000

(2) Loss of Earnings : $456,941

(3) Special Damages : $11,620

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Total : $618,561

32. Against this sum, the Plaintiff would have to give credit for the sum of $207,464 received by him as employees’ compensation.

*Interest*

32. I also award interest at 2% per annum on general damages from the date of the writ to the date of judgment and thereafter at judgment rate. As for the damages for pre-trial loss of earnings and special damages, interest would be awarded on these damages at half judgment rate from the date of accident to the date of judgment and thereafter at judgment rate.

*Costs*

33. The Plaintiff will have the costs of the action but in view of the amount of the award it seems to me that there must be on the District Court scale. Accordingly, I make an order *nisi* that the Defendants do pay to the Plaintiff the costs of this action to be taxed on the District Court scale if not agreed.

# (Edward Shum)

# Deputy District Judge

Legal Representation

Mr. Neal Clough, instructed by Messrs. B. Mak & Co., for the Plaintiff.

Mr. Samuel Chan, instructed by Messrs. Clyde & Co., for the Defendants