#### DCPI 1930/2011

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 1930 OF 2011

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BETWEEN

LI CHI SING（李志成） Plaintiff

and

EQUAL LINK LIMITED（彩衡有限公司） Defendant

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##### Before: His Honour Judge Alex Lee in Court

Date of Hearing: 6 March 2013

Date of Judgment: 6 March 2013

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JUDGMENT

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*Introduction*

1. This is a slip and fall case. The plaintiff claims damages from the defendant for negligence at common law and breach of statutory duty of care as occupier.
2. The defendant is absent and unrepresented today. Apart from having filed a defence and an affirmation appointing a representative to appear on its behalf, it has filed nothing. Moreover, the defendant had been absent from pre-trial proceedings. I am satisfied that the defendant is voluntarily absent and that it is proper to proceed with the trial in its absence.

*Issues*

1. The issues in this case are whether the defendant was negligent or was breached its statutory duty of care as occupier; whether the plaintiff was contributorily negligent; and what damages the plaintiff should be awarded.

*The incident*

1. The plaintiff had patronized HIT CLUB, a pub in Tsimshatsui operated and occupied by the defendant, on many occasions before. On the last occasion on 31 May 2010, the plaintiff found that the floor outside the male toilet was wet and slippery. There was water leakage from the toilet onto the stone steps leading to the toilet and also the area nearby. He complained about the matter to the Manager. Afterwards, when the plaintiff was stepping out from the toilet, he slipped and fell onto the floor, hurting his left ankle. At the time, he found that the floor was slippery because of the presence of water and oil.
2. As a result, the plaintiff was taken to the Queen Elizabeth Hospital in the small hours of 1 June 2010. There, it was found that the plaintiff suffered distal fibula fracture at his left ankle. He received an operation for open reduction and internal fixation with plate and screws and was hospitalized for 3 days. The accident left him with an 11 cm scar at his left malleolus. He was followed up at the Department of Orthopaedics & Traumatology of the same hospital and also received 14 sessions of physiotherapy from 15 June 2010 to 12 August 2010.
3. Before the accident, the plaintiff was employed as a bartender. After the accident, he was granted sick leave by the hospital from 1 June 2010 through to 3 October 2010 and after that by a private medical practitioner from 4 November 2010 through to 1 December 2010. The total length of sick leave was therefore 166 days. During his sick leave, his received no income from his employer.
4. On 2 December 2010, the plaintiff resumed his employment as a bartender and continued up to 31 January 2011when he found that, as a result of his injury, he could not cope with the job demand which required him to stand for hours. Therefore, he resigned from that employment and took a month off in February 2011. However, on 1 March 2011, he went back to work for the same employer as a bartender and remained so employed until 1 August 2011 when the employer closed business.

*Liability*

1. Based on the evidence before me, I have no hesitation to find that the plaintiff has proved, on balance of probabilities, that the defendant was negligent at common law and also breached its statutory duty of care as the occupier by: (i) failing to keep visitors reasonably safe from injury because of the slippery floor; (ii) failing to clean up the floor in time; and (iii) failing to give any warning or to place any barrier around the slippery area.
2. Although the plaintiff said he had consumed one or two bottles of beer at the time, he was not drunk and could walk normally at the time. In the absence of any evidence from the defendant and based on the available evidence before me, I find that the defendant has failed to discharge its burden of proof on balance of probabilities that there was contributory negligence on the part of the plaintiff.
3. As such, I enter judgment for the plaintiff against the defendant on liability.

*Quantum*

*The plaintiff’s present medical conditions*

1. As to his present medical condition, the plaintiff still complains of intermittent left ankle pain, occasional left ankle wound numbness and stiffness.
2. Dr. James Kong, the plaintiff’s expert in Orthopaedics & Traumatology, says that during his examination of the plaintiff, the plaintiff was in good health. The plaintiff walked, sat and stood normally. He could stand on single leg on both sides normally, walk on either tiptoes or heels normally and squat fully. The range of motion of hip and knees was full. Furthermore, Dr. Kong says that no obvious deformity or muscle spasm was noted. There was no CRPS (complex regional pain syndrome), no tenderness and the skin colour was normal. Neurological examination shows that the plaintiff’s motor power of both ankles was good, the sensation and reflexes were normal. Radiological examination shows that the fracture of left distal fibular has healed with good alignment with plate and screws. No abnormal soft tissue calcification or swellings were noted and the ankle joint was normal.
3. Dr Kong says that, orthopaedically, the plaintiff has impairments of mild residual left ankle pain and stiffness and mild left ankle weakness and left ankle muscle wasting. The plaintiff prognosis is good. Dr. Kong opines that the plaintiff can resume his previous occupation as a bartender and that the sick leaves granted to him up to 1 December 2010 are reasonable. Purely for reference, Dr. Kong suggests that the plaintiff suffers a 3% impairment of the whole person as a result of the accident.

*General damages*

*PSLA*

1. In assessing damages under this head, I take into account the plaintiff’s age, his overall injuries and disabilities, his medical conditions and loss of amenities and suffering. I remind myself that, in doing so, previous authorities serve as a reference and not as a straitjacket.
2. The plaintiff was aged 47 at the time of the accident and is now aged 50.
3. Ms Yuen, counsel for the plaintiff draws my attention to *Chan Sik Pan v Wylam’s Service Limited & 2 Ors*, HCPI 648/1995 (unreported), where Suffiad J noted, at para. 111, that the range of awards for ankle fracture, depending on the resulting disability, could vary from $150,000 to $400,000.
4. Ms Yuen also refers me to the following cases which she says are comparables, namely *Hau Kit HO v* *Starway International Development Limited trading as Tao Heung Super 88*, DCPI 329/2002; *Chan Ming and Wayfine Investment Limited (trading as Wayfair Warehousing Company)*, HCPI 148/1997; and *To Ying-wa v Cargo-Land (Warehouse) Development Limited*, HCPI 441/2000. In all these cases, the claimants had suffered injuries similar to those of the plaintiff in nature and extent. The sums awarded for PSLA were all at $200,000. As these cases were decided about 10 years before, Ms Yuen invites me to award a sum of $250,000, taking into account the inflation.
5. Having considered all the relevant evidence and the circumstances of the plaintiff, I award a sum of $220,000 under this head.

*Pre-trial loss of earnings*

1. Based on the record of the Inland Revenue Department, the plaintiff’s average monthly income before the accident was $9,500. Ms Yuen asks that the plaintiff be awarded a compensation for his loss of earnings not only for 166 days sick leave but also the 28 days in February 2011 when the plaintiff was unemployed after he had resigned from his employment as a bartender because of his injury.
2. I am prepared to allow the plaintiff an award for the 166 days sick leave. However, I note that the 28 days in February 2011 were not covered by any sick leave certificate. Moreover, Dr Kong, who examined the plaintiff in June 2012, says only that the sick leaves granted up to 1 December 2010 are reasonable. Dr Kong has not commented on the necessity or reasonableness any other periods. On the evidence before me, I am not satisfied that the plaintiff should be compensated for his unemployment in February 2011. Therefore, taking into account the plaintiff’s Mandatory Provident Fund (“MPF”) entitlement which would have been 5% of his income, the sum I award the plaintiff under this head is as follows:

$9,500 x 166/30 x (1+5%) = $55,195

which I round up to $55,200.

*Post-trial loss of earning*

1. As the plaintiff found another job in June 2012 and is now working again as a bar-tender, Ms Yuen has fairly abandoned the claim under this head.

*Loss of earning capacity*

1. The relevant legal principles are set out in *Moeliker v A Reyrolle and Co Ltd* [1977] 1 WLR 132 and also *Chan Chi Shing v Tsang Fook Metal Engineering & Anor*, CACV 238/1999.
2. I note that the plaintiff is now working as a bartender again. Based on the medical evidence, he has recovered well and his prognosis is good. In court, he gave evidence that he had no problems coping with the present job.
3. Nevertheless, Ms Yuen asks that the plaintiff be awarded compensation under this head on the basis that he will undergo an operation removing his implant of plate and screws. Therefore, the plaintiff will need time to recover from the operation and may as a result lose his present job. The plaintiff is now aged 50. He has received education up to F.1 and has been a bartender for 20 years. He possesses no other skills and it would be difficult for him to find another job should he be thrown into the labour market.
4. I note that Dr Kong in his report recommends the plaintiff to remove the implant and his view is that the operation will provide some improvement of his residual pain and stiffness. Dr Kong estimates that the plaintiff would be required to stay in the hospital for 2 to 3 days for the operation and after that it would take about 2 weeks for recovery. The chance of success of the operation is very likely.
5. Based on Dr Kong’s report, it is optimistic that the plaintiff’s condition will be better than the present and hopefully, the plaintiff’s working capacity will increase after the operation. That said, there may still be a real risk that the plaintiff may lose his present case because of the operation and the time it will take for him to recover from it. From the evidence given by the plaintiff, it does not appear to me that the plaintiff will face any great difficulties in finding a job as a bartender. Doing the best I can, my assessment is that an amount equivalent to about 3 months of his average salary would be appropriate. Thus, the sum I award is as follows:

$9,500 x 3 = $28,500

which I round up to $30,000.

*Special damages*

*Medical expenses*

1. The plaintiff is able to produce receipts for the medical expenses incurred as a result of the accident. I allow his claim for $3,930 in full.

*Traffic expenses and tonic food*

1. The plaintiff is only able to produce some of the receipts for taxi. There is no receipt for tonic food. The plaintiff gave evidence that his girl friend had purchased milk powder for him after the accident as calcium supplement and had also purchased special food for making soups.
2. I adopt the approach in *Mui Ling Kwan v Wong Yin Wah* [1973] HKLR 45. I will allow a reasonable sum for traffic expenses and tonic food which the plaintiff believed to be helpful to his recovery in the absence of the relevant receipts or evidence as to their advisability or suitability.
3. In my judgment, the sum of $1,000 for traffic expenses and $2,000 for tonic food are reasonable. I allow them in full.

*Future medical expenses*

1. The plaintiff seeks a sum of $3,000 for the proposed operation to remove the implant. Dr Kong estimates that the operation will cost about $30,000 in private hospital and another $3,000 for rehabilitation. Although the plaintiff says that he would like to have the operation done in private hospital, Ms Yuen is seeking only $3,000 under this head. This is the sum I award.

*Award*

1. The total award for damages is as follows:

PSLA $220,000

Loss of earning (including MPF) $55,200

Loss of earning capacity $30,000

Medical expenses $3,930

Traffic expenses $1,000

Tonic food $2,000

Future medical expenses $3,000

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Total: $315,130

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1. I also allow the plaintiff’s claim for interest on the award for general damages at the rate of 2% per annum from the date of service of the writ to the date of judgment and interest on special damages at half of judgment rate from the date of accident to the date of judgment. The award, both for the general damages and the special damages, will carry interest at the judgment rate from the date of judgment.
2. I make an order nisi that costs of the action be paid by the defendant to the plaintiff, to be taxed if not agreed, with certificate of counsel. The plaintiff’s own costs are to be taxed in accordance with legal aid regulations.

# ( Alex Lee )

# District Judge

Ms Yue Pui Sze, Percy, instructed by Fairbairn, Catley, Low & Kong, assigned by the Director of Legal Aid, for the plaintiff

The defendant, in person, absent