# DCPI 2741/2018

[2023] HKDC 855

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2741 OF 2018

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BETWEEN

LEE KWOK WAH Plaintiff

and

WONG SIU KWONG formerly trading

as KWONG KEE RESTAURANT Defendant

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 21-22 December 2022 and 18 January 2023

Date of Judgment: 7 July 2023

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JUDGMENT

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*INTRODUCTION*

1. This is a claim brought by the plaintiff against the defendant for negligence and/or breach of common duty of care and/or statutory duty of care resulting from a work-related accident on 20 June 2015 (“the Accident”).
2. Both liability and quantum are in dispute.

*BACKGROUND*

1. The defendant was the employer of the plaintiff at the time of the Accident and had hired the plaintiff as a cook to work at a restaurant at Shop A&B, Ground Floor of Hey Home, No. 155-161 Yee Kuk Street, Sham Shui Po, Kowloon, Hong Kong (“the Restaurant”).
2. According to the plaintiff’s case, the Accident occurred at or around 9:00 pm when the plaintiff was instructed to cook dishes in the kitchen of the Restaurant. At the material time, the plaintiff was carrying a cooked dish to a table placed near the entrance of the kitchen for another staff to convey the same to the dining area of the Restaurant. When the plaintiff was walking past the corridor in the kitchen, a co-worker in the kitchen accidentally spilled/splashed some dirty water (“the Dirty Water”) onto the plaintiff’s right leg. They are bloody water which came from gutting the raw seafood/fish at the seafood counter which the parties called 「水枱」 (“water table”) in Chinese (“the Water Table”).
3. Furthermore, according to the plaintiff, at the material time:-
   1. he had an open wound on his right leg which was caused by colliding with a cupboard in the kitchen a few days prior to the Accident (“the Wound”); and
   2. The plaintiff was wearing a pair of water boots but the Dirty Water managed to seep into his water boots and reached the Wound.
4. The fact that the plaintiff was employed by the defendant to work in the kitchen of the Restaurant as a cook on the day of the Accident is not in dispute.
5. However, the terms of his employment is disputed by the defendant. In particular, the defendant disputes whether he was paid on a monthly or daily basis and also on the commencing date of work.
6. How the Accident occurred is also disputed by the defendant. His primary case is that the plaintiff was not required to walk through the corridor in the kitchen for the delivery of the cooked dishes. The defendant says that as shown in the floor plan of the Restaurant, there was a food hatch situated next to the plaintiff’s working area and therefore it was not necessary for the plaintiff to walk past the corridor of the kitchen, in particular the Water Table where seafood was being prepared by another worker. The defendant goes as far as saying that the plaintiff was not allowed to deliver the cooked dishes through the kitchen corridor due to health and safety reasons.
7. The defendant further contends that even if the allegations in regard to the Accident are proved by the plaintiff, the defendant’s case is that he had not been in breach of his duty of care since (i) adequate and appropriate water-proof trousers and water boots had been provided to the plaintiff; and (ii) the Accident was not reasonably foreseeable in the circumstances.
8. The causation of the plaintiff’s condition is also in dispute. The defendant’s case is that the plaintiff’s condition is entirely pre-existing and was not caused by the Accident.
9. The amount of compensation, particularly in relation to the plaintiff’s income, both at the time of the Accident and after the Accident, is also disputed by the defendant.

*The plaintiff’s case*

1. The plaintiff submits that the defendant is liable for:-
   1. failing to keep a safe place of work, in particular, the plaintiff was exposed to the Dirty Water and consequent bacterial infection; and
   2. failing to provide a safe system of work and failing to warn the plaintiff as to the risks of danger, in particular, the dangers of the Dirty Water, and/or in terms of the kitchen layout where the Dirty Water was spilled towards the corridor rather than the side of the kitchen.
2. Mr James Lung, the plaintiff’s counsel, submits that the Food Hygiene Code (“the Code”) issued by the Food and Environmental Hygiene Department (“FEHD”) warns of the risk of pathogens in waste water. Hence, he submits that water from the seafood counter in a kitchen containing necrotising fasciitis is a “known risk” with significant adverse health consequences. He submits that the defendant ought to have known of such risk and taken reasonable precautions against it. The plaintiff further submits that while the risk cannot be eliminated completely, as it would be impossible for a kitchen to have no waste water at all, the defendant could have arranged the layout of the kitchen in a way that minimizes such risk.
3. It is therefore submitted by the plaintiff that the gutting of raw seafood/fish and disposal of Dirty Water should have taken place at the side of the kitchen, rather than facing towards the kitchen corridor where many workers could have been exposed.
4. At the very least, Mr Lung submits that the defendant should have warned his employees, including the plaintiff, about the risk of waste water containing bacteria which could cause significant bodily injury if it come into contact with an open wound. If the plaintiff were warned of such risk, he could have taken extra precautions or called in sick when the Wound at his leg had not healed completely.

*Legal principles involved*

1. It is trite that as the employer of the plaintiff, the defendant owes a general duty to take reasonable care of him. This is explained in *Cathay Pacific Airways Limited v Wong Sau Lai* (2006) 9 HKCFAR 371 when Bokhary PJ stated:-

“Of course the duty of care owned by employers to employees at common law is a single duty to take reasonable care for his employees’ safety. This is so even though it is convenient to think of the duty as involving the provision of safe co-workers, a safe place of work, safe equipment, a safe system of work, proper instructions and supervision and (where called for) adequate training. As Lord Keith put it in *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at p. 165 “[t]he ruling principle is that an employer is bound to take reasonable care for the safety of his [employees], and all other rules or formulas must be taken subject to this principle”.

1. In *Stokes v Guest Keen & Nettlefold (Bolt & Nuts) Ltd* [1968] 1 W.L.R. 1776 at 1783, Swanwick J. described the position as follows:-

“From these authorities I deduce the principles, that the overall test is still the conduct of the *reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know*; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent”. [emphasis added]

1. In *Lai Wah Wai v Castco Testing Center Ltd* [1996] 2 HKC 44 Cheung J (as he then was) held that:-

“The standard of an employer’s duty towards his employee is to see that reasonable care is taken; the scope of that duty extends to the provision of safe fellow employees, safe equipment, safe place of work and access to it and a safe system of work. (*Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57)”.

1. At 48F, the learned judge continued to explain that a system of work is the term used to describe:-
   1. the organization of the work;
   2. the way in which it is intended the work shall be carried out;
   3. the giving of adequate instructions (especially to inexperienced workers);
   4. the sequence of events;
   5. the taking of precautions for the safety of the workers and at what stages;
   6. the number of such persons required to do the job;
   7. the part to be taken by each of the various persons employed; and
   8. the moment at which they shall perform their respective tasks.

*Issues to be determined by the court*

1. Hence, the issues that required the court’s determination in this case can be summarised as follows:-
2. whether the Accident did happen as claimed by the plaintiff;
3. if the Accident is established by the plaintiff, whether the defendant has breached his duty of care owed to the plaintiff;
4. if so, whether the plaintiff’s condition of necrotizing fasciitis was entirely pre-existing or caused, either entirely or partially, by the alleged spillage of water onto his unhealed wound;
5. if causation is proved, whether any apportionment for pre-existing condition should be given considering the plaintiff’s pre-existing unhealed wound;
6. whether the plaintiff is liable in contributory negligence; and
7. quantum of damages to be awarded to the plaintiff, if any.
8. I shall deal with the above issues individually in light of the documentary and oral evidence produced by the parties during the trial.

*LIABILTIY*

1. *Whether the Accident did happen as claimed by the plaintiff?*

1. Both the plaintiff (PW1) and the defendant (DW1) gave evidence at the trial. The defendant also called Mr Yu Sai On (“Yu”) who was working as a supervisor at the Restaurant as DW2 to give evidence.
2. Before going into their evidence and my findings thereon, I remind myself of the often cited principles in assessing factual witnesses’ evidence as stated by Deputy High Court Judge Eugene Fung SC in *Hui Cheung Fai v Daiwa Development Limited*, unreported, HCA 1734/2009 (8 April 2014; DHCJ Eugene Fung SC) at §§ 77 to 82:-

[77] Generally speaking, contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility: *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at 431 (Lord Pearce).  It is right to point out, however, that some of the documents in this case are alleged by the Son to be shams and those documents obviously cannot be used to assess the credibility of the parties.

[78] In deciding whether to accept a witness’ account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events: eg Lam Rogerio Sou Fung v Tan Soon Gin George (unreported, HCA 2576/2005, 5 May 2011) §39 (Chu J).

[79] In determining a witness’ credibility, I have also attached importance to the consistency of the witness’ evidence with undisputed or indisputable evidence, and the internal consistency of the witness’ evidence. The latter type of consistency is often tested by a comparison between the witness’ oral testimony and his or her witness statement.

[80] I have cautioned myself against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses (Ting Kwok Keung v Tam Dick Yuen (2002) 5 HKCFAR 336 at §§36-37 (Bokhary PJ)), or from the assessment of the witnesses’ character (Esquire (Electronics) Ltd v HSBC [2007] 3 HKLRD 439 at §135 (Stock JA)).

[81] The practical approach to assessing credibility of witnesses in a case such as the present may have best been summarised by the words of Robert Goff LJ, as he then was, in The Ocean Frost [1985] 1 Lloyd’s Rep 1 at 57:

Speaking from my experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.

[82] Whilst these words were spoken in the context of a fraud case, I believe they are applicable to any case where a witness’ credibility features prominently in the court’s determination…”

*The plaintiff’s evidence*

1. I find that the Accident did happen in the way as described by the plaintiff in his witness statement (“P’s WS”)[[1]](#footnote-1) and his supplemental witness statement (“P’s Supp WS”)[[2]](#footnote-2) which were both written in Chinese and the contents of which have been adopted by the plaintiff as his evidence-in-chief.
2. On the Accident itself, I accept that the Accident happened on a particularly busy day as it was the Dragon Boat Festival which traditionally family would go out to eat together. I also accept the plaintiff was carrying a cooked dish across the narrow corridor of the kitchen in order to place it on a table near the door of the kitchen for the waiters to serve it to the customers in the dining area. In doing so, the plaintiff had to walk past the Water Table where a worker would station at the water table. The worker’s main task was to gut and prepare live fish and other seafood items. I further accept the plaintiff’s case that while he was walking past the Water Table, his co-worker while pouring the bloody water from the plastic bucket on the side of the table accidently spilled the Dirty Water onto the right leg of the plaintiff.
3. I accept that the plaintiff had an open wound on his right leg at the time. I further accept that the Wound was sustained a few days prior to the Accident when the plaintiff bumped into the edge of a cabinet inside the kitchen in the course of his employment, which is a fact I find the defendant knew about.
4. At the time when the Accident happened, the plaintiff could feel that the Dirty Water had seeped through to the area around the Wound. The Wound was located just above the top of the water boots and below his knee. The plaintiff’s original intention was to clean up the wetted area around the Wound before continuing with his work. However, as it was a festival and there were a lot of customers dining at the Restaurant, the plaintiff was under a lot of pressure to pass the cooked dishes to his colleagues at the front of the house and hence he did not have time to clean up the Wound.
5. I also accept the plaintiff’s allegation that by around 10:30 pm in the same evening when the Restaurant became less busy, he started to experience nausea and sickness as well as severe pain on his right calf. After he had relayed this to the defendant, he was asked to take a rest in the dining area of the Restaurant. After there was no improvement on his condition, the plaintiff was asked to go home to rest.
6. By the next morning at about 6:00 to 7:00 am when there was still no improvement on his condition, the plaintiff went to see a doctor in private practice. Upon seeing his right leg condition, the doctor immediately called for an ambulance taking the plaintiff to the hospital.
7. I note the fact that during cross-examination, the following material facts have been accepted by the defendant and Yu:-
   1. that the workers in the kitchen, including the plaintiff, from time to time may have to walk past the Water Table in the kitchen;
   2. there was a risk that the workers walking past the Water Table may be spilled/splashed by dirty water;
   3. there was a risk of infection if the workers in the kitchen come into contact with any dirty water;
   4. the defendant did not provide training or instructions to the staff at the seafood counter as to the disposal of any of the dirty water;
   5. the defendant did not supervise the staff at the seafood counter as to the disposal of the dirty water; and
   6. the defendant did not warn the plaintiff of the particular risks of danger of dirty water and possible bacterial infection.
8. Since the defendant has acknowledged the risks in (ii) and (iii) above under cross-examination, I find such risks must have been clearly foreseen by the defendant.
9. In the premises, based on the plaintiff’s evidence and the defendant’s evidence as admitted by him and Yu at trial, I find the defendant is liable for, *inter alia*, the following:-
   1. failing to keep a safe place of work, in particular, during the preparation of live fish and raw seafood, proper disposal of the Dirty Water should have been taken place at the side of the kitchen, rather than facing towards the kitchen corridor where the workers, including the Plaintiff could have been exposed;
   2. failing to provide a safe system of work, in particular, failing to warn the Plaintiff as to the risks of danger in coming into contact with the Dirty Water, and/or in terms of the kitchen layout where the Dirty Water would spill　towards the corridor rather than the side of the kitchen, and the risks of consequent bacterial infection; and
   3. failing to provide any sufficient training, instruction and supervisions to the staff at the seafood counter for the safe and proper disposal of the Dirty Water.

*The defendant’s evidence*

1. The defendant’s evidence can be briefly summed up as follows:-

1. The plaintiff was employed as a substitute chef from 19to 21 June 2015 (3 days only) with a daily wage of HK$500;
2. The plaintiff was provided with work uniform and his right shin was covered by both *waterproof* trousers and water boots;

1. The plaintiff was only required to work at the stoves area and he did not need to deliver cooked dishes to customers. He only needed to place the cooked dishes onto the food hatch area which was on the left of the stoves and other staff at the front of the house would deliver the dishes;
2. The plaintiff did not need to walk past the Water Table area. In fact, he would not be allowed to do so whilst carrying cooked dishes;
3. The plaintiff did not inform the defendant that he had injured his leg; and
4. At around 10:00 pm on 20 June 2015, the plaintiff told the defendant he had been feeling unwell since that morning.
5. Yu, the supervisor in the kitchen and the co-worker of the plaintiff’s evidence can be summed up as follows:-
6. The plaintiff was employed by the defendant as a substitute chef for 3 days with a daily wage of HK$500;
7. The plaintiff was only required to place cooked dishes onto the food hatch right next to the cooking area for other staff to deliver the dishes to customers. The plaintiff was not required to deliver cooked dishes by walking through the corridor of the kitchen;
8. The plaintiff was employed as a substitute chef and his duty did not include delivering dishes;
9. Yu did not allow any chef to walk past the sink for handling fishes whilst carrying cooked dishes for health and safety reason. He never saw any staff, including the plaintiff, doing the same;
10. The plaintiff was wearing work uniform at work. His right shin was covered by long waterproof trousers and water boots at the same time. Therefore, it was impossible for the Accident to happen;
11. The plaintiff never informed Yu that he had injury at his leg; and
12. At around 4:00 pm on 20 June 2015, the plaintiff already told Yu that he was not feeling well.

*Findings of the court in relation to the Accident*

1. I find the plaintiff as an unsophisticated, honest and straightforward witness. I find that on the material aspects of his evidence, they are consistent with the contemporaneous documents produced by the parties; inherently more probable than the accounts given by the defendant and his witness; in line with the operation of that of a small scale restaurant like that run by the defendant; and matched with the injuries sustained by him in the Accident. Thus, where there is any difference between the evidence given by the plaintiff and the defendant (and his witness Yu), unless stated otherwise, I would prefer the evidence of the plaintiff.

1. On the other hand, I do not find the defendant and Yu’s evidence convincing or consistent at all.
2. The following are some of the reasons why I prefer the plaintiff’s evidence and reject those given by the defendant and Yu.
3. First, the defendant tried to convince the court the water boots and trousers provided by him to the plaintiff were suitable for the purpose and they were specially catered for the plaintiff’s needs which would prevent any dirty water from seeping into the plaintiff’s trousers and therefore reaching the Wound.
4. On the trousers provided to the plaintiff, I accept the plaintiff’s evidence that it was an ordinary pair of cotton trousers with no waterproof lining in them. The one shown in a photo provided by the defendant[[3]](#footnote-3) was undated and not supported by any independent evidence (for example, like photos of staff wearing them or purchase receipts) that they were the same as those provided to the plaintiff on the day of the Accident. I find that most likely they were only provided by the defendant after the Accident or after the current litigation came into existence.
5. In his evidence, the defendant mentioned that he had purchased the trousers in bulk and therefore always would have stock in the Restaurant for the alleged temporary substitute workers like the plaintiff to use. He would only buy size L for the male workers to wear. However, the plaintiff was not able to produce any receipts or photos for the stock of trousers with waterproof lining like the single undated photo he has produced in the trial bundle.
6. As for the water boots wore by the plaintiff on the day of the Accident, the plaintiff agreed that the same type of boots as shown in the photo provided by the defendant[[4]](#footnote-4) were supplied by the defendant to him while he was working at the Restaurant. However, he disagreed that the boots provided were able to cover the Wound which was located just above the calf and below his knee. I accept his evidence on this as the pair shown in the photo reveals that they were boots of normal/medium length and would not be able to cover the entire calf up to the knee.
7. In my judgment, the defendant’s evidence that he would only purchase L size water boots for all workers to use is unconvincing as one size would clearly not be able to fit all the kitchen workers employed by him. Obviously, if the water boots are too big, it would easily allow water to seep through even with the trousers tucked into the boots as claimed by the defendant. In his witness statement, the contents of which have been adopted as part of his evidence-in-chief, the defendant stated that the water boots provided were *“high boots with long inlays (up to just below the knee length)”* and as such water would not easily be able to seep through, particularly with the trousers tucked in. I would reject his evidence on this as it is clearly not consistent with the only photo produced by the defendant which shows the water boots were of medium length only.

1. As for the alleged yellow polo shirt “uniform” with the name of the Restaurant, 「江記」 (“Kong Kee”), embroidered on its front, the plaintiff denied that the same was provided to him. While this is not something directly relevant to the cause of the injury or issue of liability, the only photo produced by the parties showing the plaintiff in the Restaurant was on the occasion when his siblings visited him and dine in the Restaurant. I note that he was not wearing the yellow polo shirt in that photo but a white T-shirt instead.

1. Second, in relation to the layout of the kitchen, I accept the plaintiff’s evidence that there was no functioning food hatch in the wall between the stoves and the seating area of the Restaurant being used at the time of the Accident.
2. The plaintiff during cross-examination agreed that there was a built-in food hatch at the wall between the kitchen and the sitting area of the Restaurant. However, he disagreed that there was a small table connected to the hatch. He said, at the place where the hatch was (which he accepted that it was originally designed to pass dishes), the defendant used that space behind the wall to place fish tanks and therefore the hatch was blocked and prevented dishes to pass through. When asked by the defendant’s counsel how did he know that, the plaintiff answered directly that he could see that because he “worked there”. He added that he could see that from the first day when he started to work for the defendant which was on 1 April 2015. I accept his evidence on this.
3. On the contrary, the defendant in his evidence alleged that there has always been a food hatch at the wall between the stoves/cooking area of the kitchen and the seating area of the Restaurant. He claims that no changes had been made to the food hatch since the Restaurant opened in 2010. In order to support his claim on this, the defendant produced a layout plan dated 30 October 2010 prepared by a consultancy company which was used for the purpose of applying for a restaurant licence with the FHED. In this layout plan, it is true that there was a food hatch shown in the wall in between the two above mentioned areas. However, we are talking about a gap of almost 5 years between the date of the layout plan and the Accident itself. A lot of things, including the layout, could have changed during that time. I am of the view that the plaintiff’s claim that the food hatch was being blocked by fish tanks is entirely plausible, given the small size of the Restaurant and the location of the hatch itself.
4. Furthermore, given the fact the Restaurant was in operation between March 2010 and February 2018, the defendant could have easily altered the layout of the Restaurant by blocking the area where the food hatch was located. The defendant’s reliance on an annual inspection by the FEHD and the checklist does not in my view help to support his case at all. At best, it indicates that the food hatch might still existed but it does not mean that the defendant could not have blocked it with fish tanks as alleged by the plaintiff after the inspection by the authorities. In my view, the defendant was in a very good position to produce some contemporaneous records on this by way of a photograph taken at or around the date of the Accident. Yet, he has failed to do so. I would make an adverse inference against him on this.
5. Third, in relation to the Dirty Water splashed by his co-worker at the Water Table, I accept the plaintiff’s evidence that the amount of Dirty Water spilled out was quite large, at least sufficient to make his whole trousers wet. As such, the Dirty Water could easily be able to seep through the non-waterproof trousers onto the Wound.
6. I also accept the plaintiff’s description of how the worker would pour the buckets of water which were used to wash the gutted fish against the wall and would make it bounce back onto the corridor where the plaintiff and his colleagues had to walk past.
7. I reject the defendant’s evidence given on this matter when he stated that there would not be much water being spilled out by the worker at the Water Table when gutting and washing the fish. Not only this is in direct contradiction of the plaintiff’s description of how the kitchen operated while he was working in the Restaurant, it clearly goes against common sense and in my view inherently improbable.
8. Fourth, I do not find the evidence of Yu (DW2) particularly convincing. Although Mr Li for the defendant in his closing submissions emphasized the fact that he is no longer working for the defendant and therefore he has no reason to lie, I find his account on the worker at the Water Table would first store the Dirty Water in a portable basin and then would pour it into the drain is simply not believable. It does not accord with my understanding of how a busy kitchen in a small restaurant operates. In my judgment, it is inherently improbable that a kitchen worker busy handling the seafood at the counter would bother with that. The fact that there were open floor drains (with metal grills on top) lining next to the Water Table suggests that it would be more convenient for the worker to pour out the Dirty Water against the wall and let it run into the open floor drains. This is just human nature. However, Yu did admit under cross-examination that even if the Dirty Water was poured down by the sink from the container where they were collected, they could still be spilled out. It all depends on the volume of the water and the force used by the worker.
9. Equally, his evidence that both the chef and the assistant chef did not have to move around and would stay in front of the stoves during their whole 9-hour shift is simply unrealistic and goes against common sense.
10. In addition, his evidence that there were different sizes of water boots made available by the defendant at the Restaurant is also at odds with the evidence given by the defendant on this matter. He also denied that the defendant had told him not to come into work if he had suffered from any wounds. Thus, all in all, I do not find Yu’s evidence helpful to the defendant’s case at all.
11. Last but not least, one very important matter which I have taken into account when determining the credibility of the defendant is the fact that he had failed to take out any valid employees’ compensation (“EC”) insurance covering his employees (including the plaintiff) for the relevant period, including the date of the Accident. He was prosecuted by the Labour Department and was fined in the Magistrates’ Court for the offence. This shows that he was not only a careless and irresponsible employer, but also has every reason not to tell the truth in this case as any finding of liability against him in this case will mean that he has to pay the damages and the costs of the plaintiff out of his own pocket.
12. In this regard, I do not for one moment accept the defendant’s explanation that he had only inadvertently forgotten to renew his then exiting EC policy which had expired for 3 months only. I also reject his claim that he had only accidently found out that he had forgotten to renew the EC policy while searching something in his drawer one day about 2-3 months after it was expired. The fact that he had not immediately renewed the policy once he found out that it was expired and subsequently taken out new policy for his employees indicates to me that he never had any intention to do so. It is obvious that his employees’ welfare, including their health and safety at work, was never a priority in his mind. Therefore, I accept the plaintiff’s evidence that the defendant had told him that he had not purchased any EC insurance and therefore he could not pay him any compensation.
13. When asked by the court whether he realized the importance of taking out EC policy for his employees, the defendant only said that he knew it was required by law. Yet, he has produced no evidence to show that he had ever taken out any valid EC insurance policy to cover his employees, whether for the period before, during or after the Accident.
14. On top of that, the defendant also admitted under cross-examination that he had not made any mandatory provident funds (“MPF”) contribution in his capacity as the plaintiff’s employer on behalf of the plaintiff while he was under the defendant’s employment. He became rather vague when the court asked if he had made any MPF contributions on behalf of other employees. He said he could not remember whether he had done so or not.
15. I have no hesitation to reject this and find that the defendant had never done so. While this issue may not be directly relevant to the issue of liability in this case, it does in my view go to show the kind of employer that the defendant was. He was prepared to cut corner and sacrifice the interests of his employees as long as he could save some money.
16. In the aforesaid circumstances, I have no hesitation to find that the Accident happened in the way as described by the plaintiff, namely, the Dirty Water from the seafood counter was splashed out by the worker and seeped through his trousers onto the Wound when he was trying to deliver a cooked dish to the table placed by the kitchen door.
17. *Was the Accident reasonably foreseeable?*
18. Mr Li, the defendant’s counsel, submits that the plaintiff’s injury was not reasonably foreseeable in the circumstances of this case.
19. The plaintiff on the other hand seeks to rely on the “thin skull rule” in arguing that the defendant would be liable for the plaintiff’s injury even though he had no knowledge as to the plaintiff’s pre-existing open wound at the material time. The defendant submits that the “thin skull rule” is only applicable on the issue of quantum, ie once after the liability is established, but not the issue of liability itself.
20. In *Page v Smith* [1996] A.C. 155, 176H, the House of Lords held that:-

“ … The rule that a tortfeasor is entitled to assume that his victim is of normal fortitude is designed to limit the class of bystanders to whom a duty is owed and is neither relevant nor necessary in the case of participants. Taking your victim as you find him however is relevant, not to the existence of a duty owed to him but rather to the question of damages payable in respect of breach of a duty otherwise established … ” [emphasis added]

1. Although the core issue in *Page v Smith* was liability for secondary psychiatric injuries, the defendant submits that the above cited legal principle, ie “thin skull rule”, is inapplicable for issue of liability in personal injuries cases.
2. In my judgment, it is entirely foreseeable that if the defendant allows Dirty Water to be spilled out from the seafood counter, if it manages to find its way on any open wound, it will lead to dire consequences, including severe wound infections as happened in this case.
3. My view above in fact is supported by the defendant’s own evidence. Under cross-examination, the defendant admitted that in the defence itself, it has been specifically pleaded that the defendant “had clear guidelines that all kitchen staff are required to wear protective water boots to cover all exposed areas of their legs and are advised to take sick leave if they are ill or suffering from injuries or open wounds…”[[5]](#footnote-5). The defendant admitted that open wounds are those wound that one can see. That would include any lacerations with redness or swollenness. His stance is that if the workers had any lacerations at all, he would ask them not to work or to inform him. The defendant said that he would ask his workers not to work if there were any wounds in their body at all. He stated that he had specifically told the plaintiff about the guidelines when the plaintiff first started working at the Restaurant. The reason given by the defendant of why such guidelines existed was because he thought it was his responsibility as an employer to do so. The reason why the workers could not work if they had laceration or wound according to the defendant was because he was afraid they might cause “infection or inflammation” to the wound. When asked why he thought of inflammation, the defendant admitted that the spilling water might cause inflammation to the wound. However, the defendant considered that the water boots and trousers provided by him would provide sufficient protection to the workers. This does not explain why he said that if the workers had any injury on their legs, he would ask them not to work.
4. In my view, the two answers simply are contradictory to each other. I find the defendant had not provided any guidelines to his workers (including the plaintiff) as alleged by him at all. As I found above, he was a careless and irresponsible employer who had failed to take out EC insurance for his employees and very likely failed to make any contributions for their MPF for them. I just cannot imagine that he would bother with giving out such guidelines to his kitchen workers of what they should or should not do when coming to work with an open wound.
5. Thus, based on the defendant’s own admission, I am of the view that the entire Accident, including the fact that serious injuries would be resulted if the Dirty Water is allowed to come into contact with open wounds, is reasonably foreseeable.
6. In the aforestated premises, I find the defendant liable for the Accident.

*(iii) Contributory Negligence*

1. The defendant has pleaded contributory negligence in his defence and claims that the plaintiff should not have worked while he was having the Wound and/or should have informed the defendant of the same. The defendant further claims that the plaintiff’s actions were therefore contrary to the defendant’s guidelines.
2. Mr Lung for the plaintiff submits that in deciding contributory negligence, the court would look at all the circumstances of the case before it, and consider not only “the *causative potency*of a particular factor but also its *blameworthiness*”: *per* Lord Denning in *Davis v Swan Motor Co (Swansea) Ltd (Swansea Corp & James) (third parties)* [1949] 2 KB 291, at 326. [emphasis added]
3. In short, the plaintiff submits that the defendant has failed to show any blameworthiness on the part of the plaintiff for the following reasons:-
   1. There is no solid evidence as to the existence of any guidelines by the defendant that employees should not work with an open wound and/or should inform the defendant of the same. Hence, the defendant’s claim is that the plaintiff had acted contrary to the said guidelines is not substantiated;
   2. The plaintiff was not warned of the dangers of the Dirty Water. Together with the fact that the Wound was almost healed by the time of the Accident, it was therefore reasonable for the plaintiff to work on the day of the Accident despite having the Wound; and
   3. The plaintiff took sufficient precautions to protect his Wound. It is the defendant’s own evidence that the plaintiff wore water boots and long trousers, and even tucked the trousers into the boots in order to avoid his legs coming into contact with any kitchen material.
4. Mr Li on behalf of the defendant submits that the plaintiff should be held 50% liable in contributory negligence on the basis that he should have informed the defendant about the Wound because he should know that the open wound might get infected by dirty water. Mr Li further submits that the plaintiff did not offer any reasonable explanation as to why he did not inform the defendant about the Wound. He submits that if the plaintiff had informed the defendant, appropriate arrangements could be made so as to prevent the Wound from contacting the Dirty Water.

1. I would reject the defendant’s claim for any contributory negligence against the plaintiff for the following reasons:-
   1. As found above, I reject the defendant’s claim that he had ever given any guidelines to his workers about the dangers of the bloody or dirty water coming out from the seafood counter and/or such water in coming into contact with any open wounds. I find he had made up of such stories in order to try to escape from liability. As such, the plaintiff was not acting against the instructions or guidelines of the defendant;
   2. The plaintiff had taken reasonable precautions by covering the Wound with a plaster and covered that with a pair of long trousers which had been tucked into the water boots; and
   3. I accept the plaintiff’s evidence that the Wound had almost been healed by the time of the Accident and he was not warned specifically by the defendant of the danger of the Wound coming into contact with the Dirty Water.
2. In the circumstances, I do not see why the plaintiff should be held partly responsible for the cause of the Accident. I therefore find no contributory negligence against him.

*QUANTUM*

1. The plaintiff was born on 21 December 1958 and was 56 years old at the time of the Accident. He turned 64 on the first day of trial.

*Injuries and treatments*

1. The plaintiff attended the Accident & Emergency Department (“A&E”) of Tuen Mun Hospital (“TMH”) at 11:13 am on 21 June 2015, ie the morning after the Accident. Physical examination showed that there was acute redness, tenderness and discolouration of his right leg. There was also a chronic ulcer over the distal part of the leg. The plaintiff was also noted to have hypotension and tachycardia. X-ray of his right leg revealed changes suspicious of osteomyelitis. Bedside ultrasound examination did not reveal any intra-abdominal free fluid. The condition was treated as septic shock and suspected necrotizing fasciitis.
2. Emergency right leg debridement was performed on 21, 22, 25 & 28 June 2015. Skin graft wound coverage surgery was performed on 2 & 9 July 2015.
3. On 28 July 2015, the plaintiff received psychological service during his stay in TMH. He was emotionally distressed with the physical pain related to repeated debridement procedures. He was also upset about the dependent and passive role as a patient. Psychological support was offered to the plaintiff for his adjustment reaction.
4. On 5 August 2015, the plaintiff was transferred to Pok Oi Hospital (“POH”) for wound management of right leg necrotizing fasciitis. Right leg skin graft was performed on 18 August 2015. The plaintiff was discharged on 27 August 2015 after one course of rehabilitation.
5. During the plaintiff’s stay in POH on 11 August 2015, the plaintiff was interviewed by the Psycho-Behavioral Unit of POH to review his psychological state. Counselling and emotional support was rendered to the plaintiff to facilitate the adjustment of medical condition. His adaptive cognitive and emotional regulation skills were reinforced to manage the pain and emotion.

*Cause of the plaintiff’s condition*

1. There is no dispute that the plaintiff had a pre-existing condition, ie the Wound caused by the opened door of a cabinet in the kitchen which he had bumped into a few days prior to the Accident.

1. The question here is whether the plaintiff’s septic shock and necrotizing fasciitis were caused by the Dirty Water which had been allowed to be spilled on his trousers which managed to seep through to the Wound.
2. The law on this has been explained succinctly by Master Marlene Ng (as she then was) in *Yu Wai Kan v Law Cho Tai*, unreported, HCPI 62/2010, (11 May 2011; Master Marlene Ng) at §71 as follows:-

“71. It appears to me that the following are the principles which govern the issue of causation and the quantification of loss suffered by the Plaintiff:

(a) The burden is on the plaintiff to establish on the balance of probabilities that the accident caused or materially contributed to the loss and damages he has sustained (see *CMY v Tam Siu Wing* [2008] 4 HKLRD 604, 613).

(b) The law’s approach to causation is pragmatic where there are several concurrent factors operating to cause injury (see *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, 236). A material contribution to the outcome is sufficient to impose liability for that outcome. A contribution which does not fall within the exception *de minimus non curat lex* must be material; and a cause is sufficient, it does not need to be the sole cause (see *CMY* at p.612).

(c) Causation is essentially a matter for the judge and not for the doctors. The judge will be assisted by the medical evidence but is not bound by it; he is not confined to those matters which the doctors may individually have picked out in their consulting rooms. It is important to bear in mind that law and medicine apply different standards. In law, there is a causal connection if it is shown on the balance of probabilities that the accident is a substantially contributing cause of the injury. On the other hand, the doctors practice the science of aetiology and look for “clinical cause” or “irrefragable chain of causation” which is to be proved beyond reasonable doubt or beyond any doubt (see *Lee Kin-kai, a patient by his father and next friend Li Wah* at pp.235-236, *Lee Sau Keung v Maxcredit Engineering Ltd & anor* [2004] 1 HKC 434, 450, and *Ansar Mohammad v Global Legend Transportation Limited* CACV 162/2010 (unreported, 24 March 2011) at para.22(2)).

(d) The wrongdoer must take his victim as he finds him so that the wrongdoer remains liable even though the severity or extent of the damage has been increased due to the victim’s pre-existing weakness or susceptibility to harm. This “thin skull” rule (see *Charlesworth & Percy on Negligence* 12th ed para.5-26 at p.350) extends to “eggshell personality” (see *Charlesworth & Percy on Negligence* 12th ed paras.5-31 – 5-33 at pp.351-352, *Lam Wing Ming v Dragages et Trauvaux Publics (HK) Ltd & anor* HCPI 1090/1995, Master A Chung (as he then was) (unreported, 21 July 1998) at paras.14-17, *CMY* at pp.610-613 and *Page v Smith* [1995] 2 All ER 736). Thus, if the primary victim has a *pre*-existing propensity to depression or psychiatric illness which is activated or re-activated by physical injury caused by the wrongdoer’s negligence, the wrongdoer cannot escape liability for the loss caused by the activated or re-activated depression even in rare or aggravated form by pleading lack of foreseeability once the relevant duty of care is established and personal injury of some kind is reasonably foreseeable.

(e) When considering the effect of a *pre*-existing condition on an award of damages, there are 3 possible scenarios. The first is where the plaintiff is almost certain to have gone through life unaffected by the condition, and the defendant will be liable for all damage caused. The second is where there is a strong possibility that some other event or natural progression of the condition will have brought about the plaintiff’s present state, so it will be necessary to assess the degree of the possibility in deciding what reduction is appropriate in the same way as it is necessary to assess the effect of other vicissitudes of life that may abbreviate the plaintiff’s working life or lifespan and thus abridge his loss. The third is where this will certainly have occurred at some stage in any event so that clearly an allowance has to be made but the extent of which depends on the evidence as to when the precipitating event will have occurred (see *Chan Kam Hoi v Dragages et Trauvaux Publics* [1998] 4 HKC 523, 527).

(f) Where a *pre*-existing condition is likely to lead to disability and loss in the absence of the injury for which the plaintiff is entitled to recover, the usual method of assessing the recoverable loss is to take account of the risks by an appropriate assessment of general damages. Past loss of earnings may also be reduced if the risks during the years concerned are sufficiently high. For future loss of earnings, a reduced multiplier is usually the most accurate way of giving effect to the findings on the medical evidence, especially when a plaintiff’s working life is likely to be limited by a pre-existing condition (see *Chan Kam Hoi* at p.529 and *Cheung Fat Tim v Wong Siu Ming trading as Kee Construction Company & anor* HCA 5079/1991, Findlay J (unreported, 17 January 1995)).

(g) The principles in (e)-(f) above have been developed by the courts to give the plaintiff reasonable compensation in order to achieve *restitutio in integrum*, which is the key objective in awarding loss caused by negligence.”

*The Joint Medical Experts’ evidence*

1. The parties rely on the contents of the Joint Medical Report (“the JMR”) and Supplementary Joint Medical Report (“the Supp JMR”) prepared by Dr Wong See Hoi (“Dr Wong”) for the plaintiff and Dr Lee Po Chin (“Dr Lee”) for the defendant dated 9 February 2018 and 27 March 2021 respectively.
2. The following is a summary of their opinions which have been extracted from the JMR and Supp JMR:-
   1. On the plaintiff’s physical injuries, it is common ground between both orthopaedic experts that the diagnosis for the plaintiff was necrotizing fasciitis;
   2. In relation to causation, Dr Wong opined that the Accident likely caused the plaintiff’s injuries. Dr Lee did not expressly disagree, but suggested possibilities of infection before the Accident and suggested the time lapse between the Accident and symptoms might be too short;
   3. Both experts agreed that the treatment received by the plaintiff was appropriate;
   4. Both experts agreed the plaintiff needed no further psychological treatment or counselling;
   5. As to the plaintiff’s present complaints of weakness, Dr Wong suggested that his ankle condition was consistent with destruction of soft tissue, muscle loss and nerve injury from the Accident, while the knee weakness was a “*secondary effect as a result of shifting weight from the injured right leg*”. Dr Lee disagreed to the above, stating the weakness should not be directly or indirectly related to the injury, but speculated it may be due to mild degeneration;
   6. Both experts agreed the Accident had caused skin hypersensitivity, but Dr Lee opined it should not affect the plaintiff’s ability to wear waterproof boots;
   7. Both experts agreed the plaintiff has reached the stage of maximal medical improvement (“MMI”); and
   8. Dr Wong concluded that the plaintiff’s whole person impairment and loss of earning capacity was around 6 to 8%, while Dr Lee opined it should be around 5%.
3. As regards the plaintiff’s pre-existing conditionsof chronic ulcer and varicose vein, the experts differed in their opinions as to the extent to which these conditions contributed to necrotising fasciitis. Dr Wong opined the varicose vein was not related to the plaintiff's injuries, while Dr Lee estimated the pre-existing ulcer “contributed” 50% to the injuries “*because without the pre-existing ulcer, the spillage of the dirty water may not produce a necrotising infection*”.
4. In the JMR, both experts mentioned that the plaintiff had a right leg abrasion for two weeks before the Accident happened and the plaintiff was diagnosed to suffer from necrotizing fasciitis when he attended hospital on 21 June 2015. The defendant particularly relies on the following opinion stated by Dr Lee:-
5. The plaintiff’s chronic ulcer could be pre-existing due to the varicose vein. If the plaintiff did not have pre-existing ulcer and only had abrasion, such abrasion normally should have healed in two weeks. If the abrasion had not healed in two weeks, there could be infection before the alleged exposure to the dirty water;
6. In some cases, it is believed that the source of infection may be from bacteria that normally colonize the body;
7. The time lapse between the suspected exposure and development of symptoms appeared to be too short in the plaintiff’s case although there is no information in medical literature confirming the minimal time lapse;
8. The plaintiff’s knees’ pain should not be related to the Accident. X-ray of both knees of the plaintiff showed mild degeneration and it is likely to be the cause of his knee symptoms;
9. The plaintiff should be able to return to work as full time chef with mild impairment in work efficiency and impaired endurance. There is no need of changing occupation; and
10. Sick leave of one year should be adequate.
11. In the JMR, Dr Wong opined that the Accident was likely the main contributing event causing the development of necrotizing fasciitis without qualification. He based his opinion on the following factors :-
12. The plaintiff had an unhealed abrasion wound;
13. The wound was contaminated by dirty seafood water; and
14. The incubation period for the development of septic shock.
15. Mr Li for the defendant notes that Dr Wong did not provide further explanations or justifications for his opinion set out in §27 of the JMR. In particular, Dr Wong did not address on the issues raised by Dr Lee, such as the presence of chronic ulcer and varicose vein, the long period of the unhealing of the abrasion wound and the short time lapse between suspected exposure and development of symptoms.
16. In §47 of the JMR, Dr Wong opines that the plaintiff’s knee problems are not directly caused by the Accident and can be regarded as secondary effect as a result of shifting weight from the injured right leg. In §§52 to 53 of the JMR, Dr Wong opines that the plaintiff is expected to have difficulty to stand more than 30 minutes without break for work. He may require intermittent break during work. Dr Wong further opines that the plaintiff may change to other sedentary works once he feels difficulty to continue with his original work.
17. The defendant notes that Dr Wong did not address on the X-ray images showing degenerations at the plaintiff’s knees as raised by Dr Lee.
18. The defendant submits that Dr Lee’s evidence should be preferred because Dr Wong has not provided sufficient justifications for his opinions. Mr Li submits that the plaintiff’s necrotizing fasciitis should be entirely pre-existing and not caused by the Accident. As to the working incapacity, the plaintiff’s difficulty to stand for prolonged time should be related to his degenerations at his knees but not the Accident.
19. In the Supp JMR, both experts commented on the apportionment issue according to the categories defined in *Chan Kam Hoi v Dragages Et Travaux Publics* [1998] 2 HKLRD 958.
20. Dr Lee pointed out that X-ray studies of the plaintiff’s right leg revealed changes suspicious of osteomyelitis and this suggests pre-existing infection as X-ray changes suspicious of osteomyelitis will not be present with an infection established a few hours before the X-ray examination. Dr Lee further opined that the plaintiff had a chronic open wound which might have been chronically infected before the alleged spillage of dirty water.
21. Dr Lee found it difficult to comment on the apportionment in this case. He explained that a number of organisms can produce such infection and some of these organisms involved are normally present in the environment and some of them could have colonized the body. If there has been no spillage of dirty water, the necrotizing fasciitis is a spontaneous complication of his chronic ulceration due to continuous exposure to the environment. With a pre-existing non-healing ulcer, the plaintiff ran the risk of the wound getting infected because of exposure to the environment. However, he may not eventually develop a necrotizing infection. If his wound was spilled with dirty water, the contamination would have contributed to the onset of the necrotizing fasciitis. Dr Lee commented that this case is somewhere between categories (a) and (b) and he eventually gave the opinion that the pre-existing condition contributed to 50% of the occurrence of the condition.
22. On the other hand, Dr Wong gave the opinion that the varicose vein was not one of the common predisposing factors leading to the condition and opined that this case falls into category (a) and the condition was not related to the varicose vein.
23. The defendant submits that Dr Lee’s evidence again should be preferred. According to Dr Lee, the organisms that could cause the infection were present in the environment, which means not only in dirty water, and some even could have colonized the body. It is noted that Dr Wong has not provided an alternative account on this issue. It follows that there is no basis to rule that the plaintiff would certainly have gone through life unaffected by the condition but for the Alleged Accident. It is also noted that Dr Wong’s only justification supporting his opinion on this issue is that the varicose vein is not related to the condition of necrotizing fasciitis. However, this does not resolve the issue of whether the plaintiff’s wound would get infected in his daily life nevertheless but for the Alleged Accident. As such, the defendant submits that Dr Lee’s opinion on apportionment is much more well-founded and relevant and should be preferred.
24. It is further noted that in the plaintiff’s supplemental witness statement, the plaintiff mentioned that the “bloody water” soaked his trousers and “came into contact” with his wound in this manner thereby causing the infection. However, in both JMR, both experts proceeded on the account that the plaintiff’s wound was “spilled” with “dirty water”. It therefore appears that the experts’ opinions about the causation of the infection were on the assumption that the “dirty water” came into direct contact with the wound, instead of indirectly seeping through the trousers.
25. Therefore, the defendant submits that in any event the plaintiff lacks evidence on whether the relevant bacteria could cause infection of the wound if, as alleged by the plaintiff, the “dirty water” soaked the trousers and came into contact with the wound in such an indirect manner.
26. Mr Lung for the plaintiff submits that Dr Lee’s above opinion should be rejected since such pre-existing conditions are largely irrelevant considerations pursuant to the well-established principle of the “*eggshell skull*” rule, ie the victim’s particular vulnerability to harm is generally irrelevant once the tortfeasor has breached his duty: See *Owens v Liverpool corp* [1939] 1 KB 394 [PLA/5] at 400-401:-

“*…one who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one*”.

1. I agree with Mr Lung on this issue and find that the defendant must take the victim as he finds him. I find his pre-existing condition has nothing to do with the injuries sustained by him in the Accident. I therefore find the defendant 100% liable for the injuries and subsequent pain, suffering and loss of amenities (“PSLA”) experienced by the plaintiff.

*Causation*

1. The defendant argued in his opening submission that the plaintiff’s necrotizing fasciitis should be entirely pre-existing and not caused by the Accident: (See §29 of the defendant’s opening submissions). In this regard, the defendant relies on Dr Lee’s opinion that:-
   1. the plaintiff’s chronic ulcer could be pre-existing due to the varicose vein. If the plaintiff did not have pre-existing ulcer and only had abrasion, such abrasion normally should have healed in two weeks. If the abrasion had not healed in two weeks, there could be infection before exposure to the Dirty Water;



* 1. in some cases, it is believed that the source of infection may be from bacteria that colonize the body; and
  2. the time lapse between the suspected exposure and development of symptoms appeared to be too short in the plaintiff’s case although there is no information in medical literature confirming the minimal time lapse.

1. Dr Lee’s opinion is contradicted by that of Dr Wong in that:
   1. necrotizing fasciitis is a severe disease of sudden onset that spreads rapidly; and
   2. the symptoms of necrotizing fasciitis usually occur within the first 24 hours of infection.
2. Hence, Dr Wong concluded that the Accident was likely the main contributing event causing the development of necrotizing fasciitis after considering, *inter alia*, the incubation period for the development of septic shock.
3. I accept Dr Wong’s evidence should be preferred since it was well supported with medical basis while Dr Lee’s opinion is purely speculative as there is no evidence that the plaintiff had any infection before exposure to the Dirty Water.
4. I therefore find that the necrotizing fasciitis was caused by the Dirty Water spilled on the Wound on the day of the Accident of which the defendant must be held 100% liable for.

*Pain, suffering and loss of amenities (“PSLA”)*

1. In the Revised Statement of Damages (“RSOD”), the plaintiff seeks an award for PSLA in the sum of HK$650,000.
2. Mr Lung refers me to the following cases involving burn injuries, which also require debridement and skin grafting and leave the victim with disfiguration and hypersensitivity:-



1. In *Leung Yuk Kwan v Maple Professional Beauty Centre Limited,* unreported, HCPI 274/2002; 4 December 2002, the plaintiff suffered scalding of the right leg, pain, blistering, ulceration and eventually scarring. The incident left her with emotional/psychological damage as she had once wanted to become a model. PSLA of HK$300,000 was awarded;
2. In *孫有興v廖少冰* unreported, DCPI 1292/2005; 25 June 2007, the plaintiff was bitten by a dog on the left leg, and underwent debridement and skin grafting. His total person impairment was 3%. PSLA of HK$200,000 was awarded;
3. In *Tam Wing Yan v Smart Elegant Enterprises Limited,* unreported, DCPI 1104/2010; 21 February 2011, the plaintiff was scalded on both thighs by hot tea, causing burns of 7% of skin surface and ugly scars to the legs. PSLA of HK$200,000 was awarded; and
4. In *Tsang Choi Ping v Li Yin Lun,* unreported, HCPI 23/2012; 10 May 2013, the plaintiff was burnt by boiling sauce on the legs, which was exacerbated as it was trapped inside her boots. She was burned in around 9% of the total body surface area, and the incident caused scars, discomfort and inability to walk/stand for prolonged periods. PSLA of HK$400,000 was awarded.
5. Mr Li for the defendant on the other hand, besides cases (ii) above, refers me to the 2 following additional cases:-
   1. In *Chan Chan Ping v Colliers Jardine Management Ltd* (unreported, DCP1145/2000, August 2003), the plaintiff suffered from crush injury to his left foot. Upon examination, it was found that he had open fracture of the proximal and distal phalanx as well as dislocation of the inter-phalangeal joint of the left big toe. Emergency operation of wound debridement and K-wire fixation was performed. A wound infection necessitated further wound debridement on two days. Split-skin graft was also performed. The Court awarded HK$180,000 for PSLA; and
   2. In *Tam Wing Yan v Smart Elegant Enterprise Limited trading as 小肥牛火鍋活魚專門店*(unreported, DCPII 104/2010, 21st February 2011), the plaintiff suffered from second degree burn over 7% of skin surface on both thighs. Unsightly scars were left and caused embarrassment to the plaintiff. The coult awarded HK$200,000 as PSLA.
6. In my judgment, the plaintiff’s injuries are more akin to cases (i) and (iv) referred to by the plaintiff rather than the other cases cited by both counsel.
7. As mentioned in the plaintiff’s opening submission, there is no similar case involving necrotizing fasciitis. Reference is therefore made by Mr Lung to cases involving burn injuries, which also require debridement and skin grafting and leave the victim with disfiguration and hypersensitivity.
8. The plaintiff therefore submits that the plaintiff’s injuries are comparable to the injuries sustained by the victims in *Tsang Choi Ping v Li Yin Lun, supra* where the court awarded PSLA in the amount of HK$400,000. Further, both *Tsang Choi Ping* and the present case involved around 9% of the total body surface area, and the incident caused scars, discomforts and inability to walk/stand for prolonged periods. Taking into account of inflation, it is submitted that PSLA in the amount of HK$650,000 for the plaintiff is appropriate in the present case.
9. Having taken into account of the plaintiff’s injuries, his multiple skin grafts operations and the disabilities resulting from the Accident, I am of the opinion that a sum of HK$500,000 will act as a reasonable award for PSLA in this case.

# *Pre-trial loss of earnings and MPF*

1. The plaintiff claims that he was employed by the defendant under an oral contract with a monthly salary of HK$20,000.

1. On the other hand, it is the defendant’s case that the plaintiff had only been employed on the day before the Accident, ie on 19 June 2015 and that he was paid for 3 days, including the day after the Accident, ie on 21 June 2015, at a daily wage of HK$500.
2. Given my assessment of the defendant’s credibility on the issue of liability above, I also do not accept his evidence on the plaintiff’s employment for the following reasons.
3. First, I do not think the defendant would employ one of the head chefs in the eve of a major Chinese festival where he knew the Restaurant would likely become very busy.
4. Second, the way the plaintiff was provided with his water boots and trousers, etc, suggests that he could not have just turned up and started working immediately after the interview as suggested by the defendant;
5. Third, the plaintiff was able to provide a detailed account of how the Restaurant was run which suggests to me that it is most unlikely that he had only worked there for 2 days before the Accident happened.
6. The plaintiff was granted intermittent sick leave from 21 June 2015 to 6 February 2017. Dr Wong considered sick leave granted by his doctors up until 6 February 2017 was appropriate.
7. Dr Wong further opined the plaintiff would have difficulties in standing for more than 30 minutes without breaks, but could resume as a part-time cook or in a different occupation.
8. I prefer Dr Wong’s opinion on this issue and find that he has suffered loss of earnings during his sick leave period. I further accept that, in order to earn a living, the plaintiff did actively seek employment in the open labour market after the sick leave period has expired. However, due to the skin hypersensitivity and the residual stiffness of his right leg, the plaintiff could not resume working as a full-time cook or secure alternative employment until he found temporary jobs as a part-time chef in or around December 2016.
9. I accept Mr Lung’s submission that the plaintiff’s daily salary as alleged by the defendant (ie HK$500) is significantly lower than that in the open market according to Table 8 of the Quarterly Report of Wage and Payroll Statistics issued by the Census and Statistics Department[[6]](#footnote-6) (ie $17,085/month for 26 working days ($657.12/day)). This is most improbable especially when the defendant alleged that the plaintiff was employed on an urgent basis on the day before Dragon Boat Festival.



1. Based on my assessment on the witnesses’ credibility above, I accept the plaintiff’s evidence that he was employed by the defendant starting from 1 April 2015 with a monthly salary of HK$20,000.
2. According to Table 8 of the Quarterly Report of Wage and Payroll Statistics issued by the Census and Statistics Department of HKSAR, the average monthly wages of a cook and the percentage increase of wages are as follow:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Month | Average Monthly salary | Percentage Increase | Plaintiff’s nominal salary but for the Accident | |
| June 2015 | HK$17,0856 | -- | HK$20,000 |  |
| June 2016 | HK$18,121[[7]](#footnote-7) | 6.06% | HK$21,212 |  |
| June 2017 | HK$18,867[[8]](#footnote-8) | 4.12% | HK$22,086 | |
| June 2018 | HK$19,835[[9]](#footnote-9) | 5.13% | HK$23,219 | |
| June 2019 | HK$20,271[[10]](#footnote-10) | 2.20% | HK$23,730 | |
| June 2020 | HK$20,392[[11]](#footnote-11) | 0.60% | HK$23,872 | |
| June 2021 | HK$20,344[[12]](#footnote-12) | -0.24% | HK$23,815 | |
| June 2022 | HK$20,963[[13]](#footnote-13) | 3.04% | HK$24,539 | |
| Average: | | 2.99% | HK$23,210 | |

1. I would adopt the above average as his monthly earnings during the pre-trial period.

*Pre-trial loss of earnings and MPF*

1. Mr Lung therefore submits that, but for the Accident, the plaintiff would have continued to work as a full-time cook with his salary increased by 2.99% annually. For the sake of calculation, Mr Lung invites the court to adopt HK$23,210 as the nominal average salary of the plaintiff but for the Accident.



1. I accept the plaintiff’s above submissions as they are in my view perfectly reasonable and logical.
2. The plaintiff frankly admitted that he has resumed working in around December 2016 although he was granted intermittent sick leave from 21 June 2015 to 6 February 2017, for which Dr Wong also considered as appropriate.
3. Hence, I accept that the appropriate sick leave period should be from 21 December 2015 (ie the day of Accident) to 30 November 2016.

1. In terms of the plaintiff’s ability to return to his pre-accident work, Dr Wong opined he would have difficulties standing for more than 30 minutes without breaks, but he could resume as a part-time cook or in a different occupation. I accept Dr Wong’s opinion on this.
2. The evidence shows that the plaintiff did actively seek employment in the labour market after the sick leave period, which shows that the plaintiff is a hard-working and honest person.
3. At trial, the plaintiff frankly admitted that he would be able to work as a cook after taking analgesics. However, he also testified that he is not able to work as a long-term (“長工”) full-time cook since:-
   1. a long-term worker usually requires to work for 11 hours per day, while a casual worker usually requires to work for 9 hours per day. He has difficulties standing for a long time; and
   2. the duties of a long-term worker usually involve cooking different sauces, which are put in large and heavy containers. He has difficulties lifting heavy weights.
4. In my judgment, these are reasonable and plausible explanations of why he could not undertake the job of a full-time cook. Therefore, I accept that it is reasonable for the plaintiff not being able to return to work as a full-time cook since the Accident. Further, taking into account the fact that the Plaintiff has only worked as a cook in his entire working life, I can quite understand why it is so difficult for him to secure any other alternative employment with his current disabilities.
5. I accept the plaintiff’s evidence that, after the Accident, he was only able to work on casual basis and it is difficult, if not impossible, for him to secure employment from different employers continuously. As a result, the plaintiff could only work for about 10 to 15 days at a daily salary of about HK$750 to HK$800, ie about HK$9,687.50 on average (HK$775 x 12.5 days).
6. Hence, based in the above discussions, I would allow the following as pre-trial loss of earnings in this case:-
7. Total loss of earnings and MPF from 20 June 2015 to 30 November 2016:

HK$20,000 x 530/30 x 1.05 HK$371,000

1. Partial loss of earnings and MPF from 1 December 2016 to 21 December 2022 (ie 1st day of trial)

HK$(23,210 – 9,687.50) x 2212/30 x 1.05 HK$1,046,911.95

HK$1,417,911.95

# *Post-trial loss of earnings and MPF*

1. As said, the plaintiff was 58 at the time of the Accident and was 64 on the first day of trial.
2. Even after the Accident and with the residual symptoms and disabilities, the plaintiff is still working from time to time as a substitute cook at his age. I therefore accept that, but for the Accident, the plaintiff would continue to work until the age of 70 which is not uncommon for a cook who works in a small Chinese restaurant. A discount rate of 1% and a multiplier of 5.65 has been claimed by the plaintiff and I consider that as reasonable and should be adopted.
3. Hence, I find the post-trial loss of earnings and MPF the plaintiff is entitled to recover in this case in light of his injuries are as follows:-

(HK$23,210 - $9,687.50) x 12 x 5.65 x 1.05 MPF = HK$962,666.78

# *Loss of earning capacity*

1. The test for awarding damages under this head is trite: whether the plaintiff stands at a disadvantage compared to other able-bodied workers in the labour market as a result of the injuries sustained in the accident, if he is to find a job: *Lee Wai Kin v San Xing (China) Trading Ltd and Anor* [2019] HKCFI 361.
2. In *Gurung Bhakta Bahadur v Green Valley Landfill Ltd* (unreported, HCPI 333/2009, 28.01.2011), the court did not award damages for loss of earnings from the time the plaintiff could have resumed his pre-accident job. However, damages for loss of earning capacity were awarded because of the added risk of further injuries brought about by his residual disabilities. At §48, Bharwaney J said:-

“*…*However, I must assess damages in this case based on the actual injury suffered by the plaintiff and its current impact on the plaintiff’s earning capacity, and I find that, apart from the period covered by his sick leave certificates*, he is able to return to his pre-accident employment but with this added vulnerability,* which might impact on his future earning capacity. In my judgment, this is a classic case for an award of damages for loss of earning capacity. The plaintiff is under a continuing duty to mitigate his loss and he has to be more conscious of his back problem. He must perform exercises to strengthen his back and to reduce the risk of reinjury. *Having said that, however, it is reasonably foreseeable that he is at risk of spraining or injuring his back some time in the future at which point in time the cumulative effect of the present and the future injury may to impact adversely on his future earning capacity…”* [emphasis added]

1. As mentioned in the JMR, the plaintiff’s whole person impairment and loss of earning capacity are considered to be at 6 to 8% (as assessed by Dr Wong) or 5% (as assessed by Dr Lee). Both doctors also agree that intermittent breaks during work and/or even day breaks may be necessary for the plaintiff even if he is to resume working.

1. The plaintiff claims a reasonable sum of HK$87,187.50 for loss of earning capacity, being roughly 9 months of his current average earnings (ie HK$9,687.50 x 9).
2. I disagree. I think his current job as a part-time / casual cook working for different employers suits him well in light of his disabilities. I do not see he will suffer any disadvantage in the labour market in finding alternative employment in that line of work, particularly on a part-time/casual basis. I therefore do not think the evidence in this case justify for a separate award for loss of earning capacity. I therefore would not allow any award under this head.

# *Special Damages and Post-trial expenses*

1. The plaintiff claims for pre-trial expenses in the sum of HK$20,000 being (1) medical expenses; (2) travelling expense; and (3) tonic food expenses.
2. The plaintiff requires follow-ups and medical treatments for his residual symptoms. The plaintiff therefore claims for post-trial expenses in the sum of HK$50,000.
3. Given the fact that the plaintiff has only produced receipts for HK$7,249 in support of his claim, I am prepared to award a sum of HK$10,000 as pre-trial expenses in this case only. This is to reflect the fact that some items like travelling expenses will not usually need to be proved by receipts provided that they can be shown to be reasonable and necessary.
4. As for further expenses, given the lack of any medical evidence in support, I would not allow any award for this claim.

*Employees’ compensation received*

1. The plaintiff has received a sum of HK$300,000 being the employees’ compensation payments he had already received from the defendant for which it would be deducted from any damages he may receive under the present common law claim.

*Summary of calculations*

1. In summary, I would award the following amount of damages in this case:-

|  |  |
| --- | --- |
|  | (HK$) |
| (a) PSLA | 500,000.00 |
| (b) Pre-trial loss of earnings and MPF | 1,417,911.95 |
| (c) Post-trial loss of earnings and MPF | 962,666.78 |
| (d) Loss of earning capacity | nil |
| (e) Special damages | 10,000.00 |
| (f) Post-trial expenses | nil |
| *Less*  Employees' compensation received | (300,000.00) |
| Total: | 2,590,578.73  (plus interest) |

*Interest*

1. The following interest will be awarded in this case:-
2. at 2% on general damages from date of writ to date of judgement and thereafter at judgment rate; and
3. at half of the judgment rate on special damages from the date of the Accident to date of judgment and thereafter at judgment rate.

*Costs*

1. Costs will follow the event. I make an order nisi that the defendant do pay the costs of the plaintiff in this action, to be taxed if not agreed, with certificate for counsel. In the absence of any application by the parties to vary the same within 14 days, the order nisi will become absolute.
2. It remains for me to thank counsel on both sides for their helpful submissions in this case.

( Andrew SY Li )

District Judge

Mr James Lung, instructed by Messrs Or & Partners, for the plaintiff

Mr Marco Li, instructed by Messrs Jal. N. Karbhari & Co, for the defendant

1. Trial Bundle (“TB”)/B 80-112 [↑](#footnote-ref-1)
2. TB/B 113-122 [↑](#footnote-ref-2)
3. TB/E1 235 [↑](#footnote-ref-3)
4. TB/E1 233 [↑](#footnote-ref-4)
5. TB/A 17 §8(3) [↑](#footnote-ref-5)
6. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092015QQ02B0100.pdf, page 36 [↑](#footnote-ref-6)
7. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092016QQ02B0100.pdf, page 37 [↑](#footnote-ref-7)
8. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092017QQ02B0100.pdf, page 37 [↑](#footnote-ref-8)
9. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092018QQ02B0100.pdf, page 39 [↑](#footnote-ref-9)
10. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092019QQ02B0100.pdf, page 39 [↑](#footnote-ref-10)
11. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092020QQ02B0100.pdf, page 39 [↑](#footnote-ref-11)
12. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092021QQ02B0100.pdf, page 39 [↑](#footnote-ref-12)
13. https://www.censtatd.gov.hk/en/data/stat\_report/product(B1050009/att/B10500092022QQ02B0100.pdf, page 41 [↑](#footnote-ref-13)