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Mrs Jenny CHAN
(Rights and Benefits)
Labour Department
18/F, Harbour Building
38 Pier Road
Central
Hong Kong

By Fax (2544 3271) & By Post

17 May 2002

Dear Mrs Chan,

Employees Compensation Assistance (Amendment) Bill 2002

I refer to our recent conversation and my telephone conversation with Mr Lai Ka-tong, Assistant Labour Officer, of your office with regard to the above amendment Bill.

First of all, I would like to thank you for your indication that certain technical and procedural matters which I raised in my letter to you dated 28 March 2002 would be dealt with by way of Committee Stage Amendments and I look forward to the draft of such in due course.

In relation to the Bill, I have the following additional questions and I would be pleased if you could explain them for the benefit of members of the Bills Committee :-

(a) "Eligible persons" for relief payment

As a matter of law, any claim for loss of dependency as a result of an employment-related fatal injury must be brought under the Fatal Accidents Ordinance (Cap.22) ("FAO"). In other words, any person who can sue as a defendant of a deceased employee must fall within the definition of "defendant" under section 2 of FAO. In the Bill, the class of "eligible persons" in fatal injury cases includes a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law and sister-in-law. These persons are not regarded as "defendants" under FAO, hence they will not be awarded any damages by the court. As a

consequence, the fact that they are regarded as "eligible persons" in the Bill does not in itself make them eligible for any payment.

Please also clarify the meaning of "half-brother" and "half-sister". Similarly, do they come within the definition of "dependants" under FAO?

Will the Administration reconsider the list of "eligible persons" in light of this technical reason and other concerns of the members of the Bills Committee?

(b) Payment from the Employees Compensation Assistance Fund in the last 5 years

According to the information provided by the Administration, the payment from the ECA Fund from July 1991 to now amounts to \$142.8 million in damages and \$22 million in interests and the average amount of damages assisted per case is \$1.4 million. As you may be aware, the legal community generally feels that, for various reasons, the amount of court awards in respect of personal injuries claims (which include quite a substantial number of employees' compensation claims) have significantly increased in the last 5 years or so.

Could the Administration provide the Bills Committee with the amount of payment in damages and interests from the ECA Fund in the last 5 years and the average of each payment? It would also be helpful if the Administration can provide details of the payment from the ECA Fund in the 3 disaster injury cases (involving over \$10 million) which were mentioned in the past meetings.

(c) Application of relief payment in fatal injury cases

With a view to assisting members of the Bills Committee to better understand how the provisions in relation to relief payment are applied in real life cases, would the Administration explain the application of the proposals? Please use the facts of the following court cases to explain the application, assuming that the respective claims were ultimately paid from the ECA Fund, and give the amount that the respective claimants would receive under the Bill. (For your convenience, the digest and judgment of these cases are enclosed herewith.)

- (i) Tsui Shuk Fong v. Chan Chu Sun t/a Wai Tat Construction Engineering Co.
HCPI 979/98, [2000] HKCFI 1071
(Date of Accident: September 1995; Date of Judgment: September 2000)
- 40 year old male worker died in an industrial accident, leaving his wife, 2 children (16 and 12 year old at trial) and parents in Mainland China.

- The deceased was earning \$18,000 per month before death, the said figure would have increased to \$25,240 per month at date of trial.
- A total of \$3,133,407 (exclusive of Employees' Compensation) was awarded by the court as damages, which consisted of \$1,828,000 for dependency.

(ii) Lam Po Yuk v. Mercury Shipping Co. Ltd. (in liquidation)

(1997) 3 HKC 655

(Date of Accident: August 1989; Judgment date: November 1997)

- 54 year old male electrician sustained injuries to his abdomen in an industrial accident while on aboard the vessel in Reunion. He had undergone 2 operations in Reunion before he was repatriated to Hong Kong. His spleen, gall bladder and part of pancreas were removed. His condition continued to deteriorate and he died 6 weeks later.
- The cause of death on the post-mortem examination report was recorded as "gastro-intestinal bleeding from duodenal ulcer".
- Defendant employer who was in liquidation did not defend the case.
- The deceased left his elder sister, 2 sons (aged 23 and 22 at date of judgment and were in university) and a divorced wife. Before the accident, the deceased was obliged to pay maintenance to the sons pursuant to a maintenance order.
- The deceased was earning \$9,912 per month before the accident.
- A total of \$1,246,994.50 was awarded as damages.

I would be most grateful if you could let us have a reply as soon practicable, preferably on or before 21 May 2002.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

Encl

c.c. LA (w/o enclosures)
CAS(2)1



Court of First Instance of Hong Kong

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**TSUI SHUK FONG AND ANOTHER v. CHAN CHU SUN t/a WAI TAT CONSTRUCTION ENGINEERING CO. HCPI000979/1998 - [2000]
HKCFI 1071 (19 September 2000)**

HCPI000979/1998

HCPI 979/98

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
PERSONAL INJURIES ACTION NO. 979 OF 1998

BETWEEN

TSUI SHUK FONG AND TSANG CHUNG WAH, the administrators
of the estate of TSANG MEI WOON, deceased

Plaintiffs

AND

CHAN CHU SUN trading as WAI TAT CONSTRUCTION
ENGINEERING CO.

Defendant

Coram: Hon Seagroatt J in Court

Date of Hearing: 6 September 2000

Date of Judgment: 19 September 2000

JUDGMENT

This is a claim for damages arising out of the death of the first named Plaintiff's husband in the course of his employment on the 23 September 1995. He was engaged in the demolition of a concrete partition wall of a flat in a block in Broadwood Road, Hong Kong. The wall collapsed upon him and caused his death.

Originally the action was brought against the 1st Defendant as subcontractor who employed the deceased, and the 2nd Defendant as main contractor on the site. Following the judgement in the proceedings brought in the District Court by the Plaintiffs under the Employees' Compensation Ordinance, the action was discontinued against the 2nd Defendant. The 1st Defendant, although represented initially by solicitors and with the benefit of a Legal Aid Certificate, has taken no part in these proceedings since the hearing in the District Court which gave judgment for the plaintiffs against him alone.

The issues raised in the Defence served in this action have been fully dealt with in the opening submissions succinctly set out by Miss Anita Yip who appears for the Plaintiff. I will deal with them shortly.

The Plaintiffs' capacity to sue was not admitted in paragraph 1 of the Defence. The Letters of Administration granted to the Plaintiffs in respect of the deceaseds' estate answers this.

The fatal accident was denied in paragraph 11 of the Defence. There is ample uncontested evidence that the deceased met his death on the 23rd September 1995 when the concrete wall collapsed upon him at the site. In the Employees' Compensation proceedings commenced against the 1st Defendant in 1996 the learned District Judge reviewed the Coroner's findings as to the circumstances of the deceased's injuries and "could find no other explanation" but that "the deceased must have suffered the fatal injuries when he was tearing down the wall in the said premises." This finding is res judicata. The Defence puts forward no contrary averment to account for the deceased's death. In any event the Coroner's findings have not been challenged.

The third issue is at the heart of the Defence. Was the deceased an independent contractor or was he an employee of the 1st Defendant? This issue featured as the main issue in the Employees Compensation proceedings. Evidence given there included the sworn testimony of the 1st Defendant who was cross-examined by Miss Yip, who also appeared in these proceedings on behalf of these Plaintiffs (as Applicants). On page 233 (to 234) the learned District Judge set out his findings in this regard - "I have no hesitation to say that the deceased worked for the 1st Respondent (the 1st Defendant) the deceased was the employee of the 1st Respondent." These findings are "res judicata" or issue estoppel. See Wood v. Luscombe 1966 I.Q.B. p. 169; Henderson v. Henderson 1843. 3 Hare p.100; Wain v. F Sherwood & Sons Transport Ltd (The Times - 16 July 1998); Wong Wang Sum v. Lee Kam Engineering Co (A Firm) & Anor 1996 3 H.K.C. p. 627; and; Chung Mou Sau v. Ho Keung and Others HCPI No. 11420 of 1995 (24 July 1998)

The final issue - was there breach of duty of care or negligence on the part of the Defendant employer? - is essentially a matter for me but this was canvassed fully in the Employees' Compensation proceedings when the Defendant, as stated earlier gave evidence and was cross-examined. The non-delegable duty of care owed by the Defendant to the deceased as employer, needs no reassertion. The factual detail of the work being carried out by the deceased included admissions by the Defendant that instructed the deceased to contact the foreman on site to identify the demolition work, that he sent two other workers to the site to clear the débris and that he had given general instructions to the deceased as to which walls were to be dismantled and how to go about it - i.e. work from top to bottom. The Defendant's evidence in one forum was contradictory to that given by him in another. At one stage he attended the premises to see how the deceased was getting on with the work.

The Assistant Building Surveyor who attended the premises, concluded that the collapse of the wall was due to "incorrect demolition procedures." The findings of the Factory Inspector were consistent with this. An abutting partition wall had already been demolished leaving one partition wall unsupported. There was some evidence of chipping away at the lower part of the wall possibly to facilitate eventual demolition. It seems that once the supporting abutting wall had been demolished, the remaining wall was likely to collapse if demolition proceeded from the bottom or even from the top. The whole system or plan - if there was one - was fraught with danger. The employer's obligations to devise and institute a safe system of work was not fulfilled. Similarly, there was no supervision or instruction. The employer was unarguably negligent. There being no pleaded allegation of contributory negligence on the part of the deceased, the employer was wholly liable for this tragic accident and there will be judgment for the Plaintiffs accordingly.

QUANTUM

Dependency

Pre-trial

The deceased was only 40 at the time of his death. His average monthly income was \$18,000. He gave his wife \$11,000 monthly for running the home and the family. He sent a further \$1,200 monthly to his parents on the mainland. A further \$1,000 monthly was spent on family outings. He kept about \$3,000 monthly for his own expenses and saved a further \$1,800. His widow has given evidence as to these figures. Within the monthly sum for running the home and family is an element for his own benefit. This applies equally to the modest figure for family outings. The earnings of \$18,000 are therefore initially reduced by \$4,800 (his expenses plus the savings) leaving a figure of \$13,200. That should be reduced by a percentage to

reflect the element of cost or expense in respect of the deceased. \$12,000 monthly would be a reasonable dependency figure.

Since his death, his earnings would have increased, according to the Census and Statistics Department, to about \$21,620 by the date of trial. Over the five year pre-trial period this averages out at \$21,620 of which 60% ($12,000/18,000\%$) would be \$12,972. The pre-trial loss of dependency is therefore $12,972 \times 12 \times 5 = \$778,320$.

Post-Trial Dependency

I agree with Miss Yip that 14 would be the correct multiplier given the deceased's age. That leaves a balance of 9.

The dependency figure is to be calculated from the current wage level of \$25,240 monthly, 60% of which is 15,144. However, I think this man would be likely to apply more for the general maintenance of the family and less to his own spending. His children are now incurring more expenses, a natural consequence of the teenage period. The more likely dependency figure is nearer \$17,000.

The two children are likely to be dependent for a number of years and I consider a multiplier of 6 is reasonable. This produces \$1,224,000 ($17,000 \times 12 \times 6$).

The parents of the deceased would soon cease to be dependants given their relative ages. It would be reasonable to let them remain within the dependency figure for two of the six years of the remaining multiplier. The question then arises as to how to deal with their proportion of the dependency figure thereafter. Would it be reasonable to regard it as forming part of the family's dependency or would it have formed part of the savings accumulated? I think the available sum would have been applied for the benefit of the family and particularly the children. Accordingly there should be no reduction in the dependency for this six year period.

The remaining part of the multiplier, three years, should be for the widow but allowing something for the fact that the children, though no longer strictly dependent, would nonetheless benefit, as most children do, from their parents' generosity. The figure will be \$17,000 less a proportion to represent the fact the parents and children are no longer direct dependents (and the parents not at all). Would that fixed sum have been used by the deceased, and/or saved? Or is it likely to have been applied in both directions? Any calculation as to what that figure should be is speculative. As far as the savings element is concerned it matters not whether it is extracted and put into the loss of accumulation of wealth or ignored and left as part of the dependency. I propose to leave it as dependency. From the dependency figure, it would be reasonable to deduct a further \$3,000 monthly as the deceased's likely increased expenses. This leaves $\$14,000 \times 12 \times 3$ as the final dependency figure = \$604,000.

Loss of Accumulation of Wealth

Pre-Trial

The Plaintiffs' case is that the deceased saved about \$1,800 per month at the time of his death. There is clear evidence of savings by him in bank accounts. In one at the date of his death there was a little over \$95,000. In the other at the same date there was \$150,000. Monthly savings of \$1,800 would produce \$21,600 in a year. Over the five years pre-trial I accept that there would have been some increase in his savings in line with the increase in wages. The average over that period has been calculated at \$2,100 per month. The total is therefore $\$2,100 \times 12 \times 5 = \$126,000$.

Post-trial

At trial the projected figure is \$2,400 per month. When considering the post-trial dependency I considered whether or not the fact that the deceased's parents and the children would cease to be dependents should result in more money being saved monthly. In the event I concluded that it was more likely that the wife's dependency would increase and surplus earnings would be devoted to the children rather than to hard savings. It is highly speculative but makes no difference in the long run. Therefore, the post-trial savings should be regarded as continuing at the level of \$2,400 monthly. The figure under this head will therefore be $\$2,400 \times 12 \times 9 = \$259,200$.

Bereavement Award

This is fixed by statute at \$70,000.

Funeral Expenses

These total \$71,887 and are allowed in full.

Summary:

Dependency	Pre-Trial	778,320
	Post-Trial	1,224,000
		<u>604,000</u>
		1,828,000
Loss of accumulation of wealth -		
	Pre-Trial	126,000
	Post-Trial	259,200
Bereavement Award		70,000
Funeral Expenses		<u>71,887</u>
		3,133,407
Less Employees' Compensation paid		<u>1,099,065</u>
		<u>\$2,034,342</u>

There will be judgment for the Plaintiffs for \$2,034,342 damages credit having been given for the said Employees' Compensation payment together with interest on the relevant items at the appropriate rates for the respective periods, to be calculated by the Plaintiffs' Solicitors taking into account the earlier receipt of the E.C. money, and costs to be taxed.

Apportionment

The deceased's parents

The five year period pre-trial produces \$81,000 ($1,350 \times 12 \times 5$). Post-trial the figure is \$36,000 ($1,500 \times 12 \times 2$). The total is \$117,000 plus interest.

The deceased's children

It is appropriate to apportion a lump sum to each of them for the Court to hold and invest on their behalf until both attain 18 years. It is not appropriate to carry out an artificial exercise in calculating the element of their past and future dependency and then isolating that figure. Their mother has been supporting them to date and will continue to do so out of the funds. The lump sum for each of them is to constitute a cushion for them as they enter adult life, having been deprived of material support from their father.

The son is 16 years of age and the daughter 12 years. It would be invidious to distinguish between them. In deciding on the appropriate figure for them I have to have regard to the total figure of damages not the net figure after deduction of the Employees' Compensation. In my view the figure should be \$150,000 each.

The total of \$300,000 must be paid into Court for investment by the Registrar on the usual terms.

(Conrad Seagroatt)
Judge of the High Court

Representation:

Miss Anita Yip, instructed by Messrs Liu, Chan & Lam, Solicitors for the Plaintiffs

The Defendant did not appear and was not represented

Damages (Personal Injuries or Death)

Held, allowing the appeal, that, given that D only came to know that she was pregnant one month after she was in custody and the baby would be born in prison environment if she had to serve out her term of 12 months and that this would be D's first childbirth experience, this was an appropriate case for this court to exercise clemency to allow the appeal against sentence. D had served two and a half months of her sentence. This was sufficient to deter D from returning unlawfully to Hong Kong.

HKSAR v WU FEI WAN, Mag App No 985 of 1997, 11 November 1997, Leong J.

DAMAGES (PERSONAL INJURIES OR DEATH)**Fatal accident**

X was an electrician employed on board the MV "Acacia". On 17 August 1989, while the vessel was in Reunion, X met with an industrial accident suffering various internal injuries. He was hospitalized in Reunion for approximately four weeks before being repatriated to Hong Kong where his hospitalization continued. His condition deteriorated and he died on 26 September 1989. The cause of death on the post-mortem examination report was recorded as "gastro-intestinal bleeding from duodenal ulcer." X was 54 at the date of the accident earning a total monthly income of \$9,912. His dependants included an elder sister and two sons.

Held, awarding damages, that:

- (1) Because X's employer had been wound up it was impossible to know how much X would have earned but for the accident. However, it was reasonable to suppose that X's earnings would have increased by about 10% per annum (*Yau Wing Fui v Winning Fire Engineering Ltd*, PI No 110 of 1996 (see [1997] HKLRD H48) and *Kwan Wing Sang v Chi Chiu Engineering Co Ltd*, PI No 1045 of 1995 (see [1997] HKLRD H49) followed). On that basis, X's current expected monthly earnings would have been \$21,247.
- (2) The elder sister's award for dependency was based on the sum of \$800 x 2 per annum and on the assumption that X's contribution to her would have increased at the rate of 10% per annum. Thus, she would now receive about \$3,430 from X. Her award for pre-assessment loss of dependency from 26 September 1989 to 9 October 1997, a period of 8 1/2 years at a median of \$2,515 per annum amounted to \$20,225.
- (3) On average, the deceased gave \$750 per month to each of his two sons for a total of \$1,500. In addition, he also provided financial support for each son in pursuing their tertiary education, which since the accident would have increased to an average combined contribution to both sons of \$5,500. Thus, the median contribution to each son would have been $(\$1,500 + \$5,500) \div 2 = \$3,500$. The pre-assessment loss of dependency for each of the two sons, from 26 September 1989 to 9 October 1997, a period of 8 years and 1/2 month, at a median of \$3,500 per son would be $\$3,500 \times (8 \times 12 + 1/2) = \$337,750$.
- (4) As to the post-assessment loss of dependency, a multiplier of one was applied. Therefore for the elder sister a sum of \$3520 ($\$3,520 \times 1$) was awarded and for the two sons an award of \$66,000 ($\$5,500 \times 12 \times 1$) was made.
- (5) Under s.6(5) of the Fatal Accidents Ordinance (Cap.22), an award of \$3,000 was made for funeral expenses (the defendant already having contributed \$15,000 under this head) and under s.4(2)(b) \$40,000 was awarded as damages for bereavement.
- (6) Under s.20(1) of LARCO and s.4(5) of the Intestates Estate Ordinance (Cap.73) the two sons were entitled to step into the shoes of the deceased and claim as his estate. The deceased suffered a loss of earnings of \$9,912 per month for a period of 1 1/3 months. Thus the sons were awarded \$13,183 ($\$9,912 \times 1 \frac{1}{3}$).

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Damages (Personal Injuries or Death)

- (7) The deceased was conscious from the time of the accident until his death nearly six weeks later, having undergone two medical procedures in Reunion, feeling depressed in a foreign hospital, no doubt missing his family, probably not able to communicate with those around him except with the help of an interpreter, and requiring medical repatriation over a period of two days. On these facts, an award of \$150,000 was made for pain suffering and loss of amenities (*Chan Pui Ki v Leung On & Another* [1996] 2 HKLR 401, *Hall v Staffordshire Moorlands District Council*, English, unrep, 1 December 1993, *Re Moore*, English, unrep, CIBC, A-G v *Chun Yai Nam* [1995] 1 HKC 218 (see [1994] HKLY 489), *Lam Fong & Another v On Lee and Co & Others* (1992) HKLJ 100, *Chan Kin Fu v Lee Kam Hung* (1985) HKLJ 110 and *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657 considered).
- (8) A global award of \$100,000 for loss of accumulation of wealth was made on the basis that X was an individual whose habits and lifestyle indicated a probability that he would accumulate wealth by his retirement and retain that wealth by the date of his death from natural causes (*Ho Pang Lin & Another v Ho Shui On & Another* [1994] 2 HKLR 313 ([1995] HKLY 524) applied).

LAM PO YUK & ANOTHER v MERCURY SHIPPING CO LTD (in liquidation), PI No 750 of 1996, 3 November 1997, Master Cannon.

Pelvis

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P was injured in a traffic accident on 10 March 1990 when the motorcycle he was driving collided with D's goods vehicle. D was convicted of careless driving. P was 24 years old at the date of the accident. He suffered a severe injury to his pelvis. The left ilium and acetabulum were fractured and the left hip was dislocated. He underwent a number of operations but despite aggressive treatment by open reduction and internal fixation, the hip joint was permanently damaged. Advanced degenerative changes had already occurred and the condition of the left hip was expected to deteriorate progressively and rapidly in the next few years. He would have to undergo at least two further operations within the next few years.

Prior to the accident, P was an extremely active person. He was a kung fu instructor and a scout master and was actively engaged in canoeing and windsurfing activities. At the time of the accident, P was employed full-time as an office assistant and driver earning \$5,065 per month. This would have increased at trial to \$10,648 per month. He also worked as a casual worker and driver on weekends and public holidays earning about \$1,650 per month. He resigned from his full-time job on 16 February 1994 because he could not cope with the delivery work which was part of his job as office assistant. He worked in other jobs thereafter, suffering partial loss of earnings between 1 March to 31 December 1997. P earned \$6,500 as a public light bus driver.

Held, that:

- (1) General damages for pain, suffering and loss of amenities, placing P's injuries within the bottom to middle range of the substantial injury category, awarded at \$600,000 (*Chan Pui Ki v Leung On & Another* [1996] 2 HKLR 401 and *Yip Pui Kwan v Tsui Kwok Hung*, HCA No A6169 of 1983 (see [1985] HKLY 403) considered).
- (2) Pre-trial loss of earnings while P was on reduced sick leave pay agreed at \$4,135.40; for loss of earnings as a part-time driver, taking into account inflation, awarded at \$186,000 (\$2,000 x 93 months); for the periods between 1 March to 30 June and 1 July to 31 December 1997 awarded respectively at \$6,592 and \$24,888.
- (3) Future loss of earnings, adopting a multiplier of 15, awarded at \$746,640 (\$10,648 - \$6,500 x 12 x 15); future loss of earnings as a part-time driver awarded at \$360,000 (\$2,000 x 12

TOTAL P.09
P.09

analysis, the total sentence imposed by the judge was not excessive, having regard to the gravity of the offences which the applicant committed.

Conclusion

For these reasons, this application for leave to appeal against sentence must be refused.

Reported by Lindy Course

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A LAM PO YUK & ANOR v MERCURY SHIPPING CO LTD (IN LIQ)

COURT OF FIRST INSTANCE – PERSONAL INJURIES NO 750 OF 1996
MASTER CANNON
9 OCTOBER, 3 NOVEMBER 1997

B Tort – Damages – Fatal accident – Internal injuries leading to subsequent death – Loss of dependency – Annual increase in deceased's earning – 10% adopted in line with inflation despite employer in liquidation – Pain and suffering up to death awarded – Loss of accumulation of wealth – Relevant factors – Law Amendment and Reform (Consolidation) Ordinance (Cap 23) – Fatal Accidents Ordinance (Cap 22)

侵權 – 賠償 – 致命意外 – 內傷引致其後死亡 – 失去經濟上的依靠 – 死者的入息每年調升 – 雖然僱主已清盤，引用10%與通脹並齊 – 死亡前痛苦判值 – 損失累積的財富 – 有關因素 – 《法律修訂及改革（綜合）條例》（第23章） – 《致命意外條例》（第22章）

E The deceased was an electrician employed by the defendant to work on board the motor vessel 'Acacia'. On 17 August 1989, an industrial accident occurred whilst the deceased was on board the vessel in Reunion whereby he sustained injuries to the abdomen. The deceased had undergone two operations in Reunion before he was repatriated to Hong Kong. His spleen, gall bladder and part of the pancreas were removed. His condition continued to deteriorate and he died six weeks later. A writ was issued for claims under the Fatal Accidents Ordinance (Cap 22) and the Law Amendment and Reform (Consolidation) Ordinance (Cap 23). The defendant, in liquidation, filed an acknowledgement of service of writ, stating that it did not intend to contest the proceedings. Interlocutory judgment was entered with damages to be assessed. Under the Fatal Accidents Ordinance, the deceased's elder sister and two sons claimed loss of dependency. The deceased had divorced his wife and she was not a dependent of the deceased at the time of the accident. Under the Law Amendment and Reform (Consolidation) Ordinance, claims were made on behalf of the estate for the deceased's loss of earnings, pain, suffering and loss of amenity, and loss of accumulation of wealth. At the date of the accident, the deceased was 54 years old and was earning \$9,912 per month.

F The deceased was an electrician employed by the defendant to work on board the motor vessel 'Acacia'. On 17 August 1989, an industrial accident occurred whilst the deceased was on board the vessel in Reunion whereby he sustained injuries to the abdomen. The deceased had undergone two operations in Reunion before he was repatriated to Hong Kong. His spleen, gall bladder and part of the pancreas were removed. His condition continued to deteriorate and he died six weeks later. A writ was issued for claims under the Fatal Accidents Ordinance (Cap 22) and the Law Amendment and Reform (Consolidation) Ordinance (Cap 23). The defendant, in liquidation, filed an acknowledgement of service of writ, stating that it did not intend to contest the proceedings. Interlocutory judgment was entered with damages to be assessed. Under the Fatal Accidents Ordinance, the deceased's elder sister and two sons claimed loss of dependency. The deceased had divorced his wife and she was not a dependent of the deceased at the time of the accident. Under the Law Amendment and Reform (Consolidation) Ordinance, claims were made on behalf of the estate for the deceased's loss of earnings, pain, suffering and loss of amenity, and loss of accumulation of wealth. At the date of the accident, the deceased was 54 years old and was earning \$9,912 per month.

G The deceased was an electrician employed by the defendant to work on board the motor vessel 'Acacia'. On 17 August 1989, an industrial accident occurred whilst the deceased was on board the vessel in Reunion whereby he sustained injuries to the abdomen. The deceased had undergone two operations in Reunion before he was repatriated to Hong Kong. His spleen, gall bladder and part of the pancreas were removed. His condition continued to deteriorate and he died six weeks later. A writ was issued for claims under the Fatal Accidents Ordinance (Cap 22) and the Law Amendment and Reform (Consolidation) Ordinance (Cap 23). The defendant, in liquidation, filed an acknowledgement of service of writ, stating that it did not intend to contest the proceedings. Interlocutory judgment was entered with damages to be assessed. Under the Fatal Accidents Ordinance, the deceased's elder sister and two sons claimed loss of dependency. The deceased had divorced his wife and she was not a dependent of the deceased at the time of the accident. Under the Law Amendment and Reform (Consolidation) Ordinance, claims were made on behalf of the estate for the deceased's loss of earnings, pain, suffering and loss of amenity, and loss of accumulation of wealth. At the date of the accident, the deceased was 54 years old and was earning \$9,912 per month.

H Held, assessing damages in the amount of \$1,071,428:

I (1) Since the defendant had been wound up, it was impossible to know how much the deceased would have earned but for the accident. It was reasonable however to adopt a 10% annual increase in the deceased's earning for the period since death, which was approximately in line with the rate of inflation. *Kwan Wing Sang v Chi Chiu Engineering Co Ltd* (PI 1045/95, unreported), digested in [1997] HKLRD H49 and *Yau Wong Fui v Winning Fire Engineering Ltd* (PI 110/96, unreported), digested in [1997] HKLRD H48 considered (at 658G-I).

J (2) An award of \$150,000 was made for pain and suffering taking into account that the deceased was conscious from the time of the accident until his death which was six weeks later; that he underwent two medical procedures in Reunion,

a foreign country in which he was unable to communicate except with the help of an interpreter; and that it took two days for him to be repatriated to Hong Kong. *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2 HKLR 650. *Chan Kin Fu v Lee Kam Hung & Anor* (1985) HKLJ 110. *Lam Nam Fui & Ors v Wong See Mo* [1990] 2 HKC 319. *Lam Fong & Anor v On Lee & Co & Ors* (1992) HKLJ 100. *Leung On & Anor v Chan Pui Ki* [1996] 2 HKC 565, *Re Moore* (York, CICB, 17 September 1993, unreported) Kemp & Kemp, para F6-072 and *Hall v Staffordshire Moorlands District Council* (Stoke County Court, 1 December 1993, unreported) Kemp & Kemp, para F6-071 considered (at 662A-663B).

(3) A global award of \$100,000 was made for loss of accumulation of wealth. Although the deceased was a person without any identifiable savings pattern, however, his habits, lifestyle, and good prospects of employment indicated a probability that he would have accumulated wealth by his retirement and also a probability that he would have retained an accumulation of wealth by the date of his death from natural causes. *Ho Pang Lin & Anor v Ho Shui On & Anor* [1994] 3 HKC 294 applied (at 664C-E).

Cases referred to

- Attorney General v Chun Yat Nam* [1995] 1 HKC 218
- Chan Kin Fu v Lee Kam Hung & Anor* (1985) HKLJ 110
- Chan Yuk Ying & Anor v Chan Cheung Wan* [1990] 1 HKC 474
- Hall v Staffordshire Moorlands District Council* (Stoke County Court, 1 December 1993, unreported) Kemp & Kemp, para F6-071
- Ho Pang Lin & Anor v Ho Shui On & Anor* [1994] 3 HKC 294
- Kwan Wing Sang v Chi Chiu Engineering Co Ltd* (PI 1045/95, unreported), digested in [1997] HKLRD H49
- Lam Fong & Anor v On Lee & Co & Ors* (1992) HKLJ 100
- Lam Nam Fui & Ors v Wong See Mo* [1990] 2 HKC 319
- Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2 HKLR 650
- Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657
- Leung On & Anor v Chan Pui Ki* [1996] 2 HKC 565, [1996] 2 HKLR 401
- Moore, Re* (York, CICB, 17 September 1993, unreported) Kemp & Kemp, para F6-072
- Yau Wong Fui v Winning Fire Engineering Ltd* (PI 110/96, unreported), digested in [1997] HKLRD H48

Legislation referred to

- Employees' Compensation Ordinance (Cap 282)
- Evidence Ordinance (Cap 8) s 47
- Fatal Accidents Ordinance (Cap 22) ss 4(2)(b), 6(5)
- Intestates' Estate Ordinance (Cap 73) s 4(5)
- Law Amendment and Reform (Consolidation) Ordinance (Cap 23) s 20(1)
- Legal Aid Regulations (Cap 91 sub leg)
- Rules of the High Court (Cap 4 sub leg) O 38

Other source referred to

- Kemp & Kemp (1995 Ed) paras F6-071, F6-072

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A Assessment of damages

This was a hearing for the assessment of damages in an action by the administratrices of the deceased, Lam Kam Chau, in respect of claims under the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) and the Fatal Accidents Ordinance (Cap 22). The facts appear sufficiently in the following judgment.

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*Dennis Chuah (Director of Legal Aid) for the plaintiffs.
Defendant, absent.
Official Receiver, absent.*

C Master Cannon: ASSESSMENT OF DAMAGES

This is an action brought by the administratrices of the estate of the deceased under the Law Amendment and Reform (Consolidation) Ordinance (Cap 23), and for the benefit of his dependants under the Fatal Accidents Ordinance (Cap 22). The first named plaintiff is the elder sister of the deceased and the second named plaintiff is the ex-wife of the deceased.

The deceased was an electrician employed by the defendant to work on board the MV 'Acacia'. On 17 August 1989, while the vessel was in Reunion, the deceased met with an industrial accident. He was admitted to the Gabriel Martin Hospital in St Paul, Reunion, for treatment. The injury report made on the day of the accident records the injuries as 'Awaiting doctor's full report but suspect broken rib/s. One or two teeth may be loose and chin was seen to be bruised and swollen. Minor cuts and scratches on the skin especially around the hands.' According to the medical reports,

the deceased had sustained direct traumatism of the left hypocondrium, ie, the left lateral regions in the upper zone of the abdomen, below the level of the floating ribs.

On 18 August 1989, upon echography, the deceased was found to have splenic contusion with suspicions about the pancreas, and a splenectomy was performed. After the operation, the deceased's condition did not improve and his digestive system deteriorated further. A pleural effusion appeared on the left side. On 26 August 1989, the deceased had a second operation to remove part of the pancreas and the gall bladder. Later, the deceased was found to suffer occlusive symptom.

The deceased was depressed whilst hospitalised, and he was repatriated to Hong Kong on 15 September 1989, for further medical treatment. He arrived in Hong Kong on 17 September and was admitted to the Canossa Hospital for treatment. His condition continued to deteriorate and on 22 September 1989, he was transferred to Queen Mary Hospital for further treatment. In spite of the medical treatment, he died on 26 September 1989. The cause of death on the post-mortem examination report was recorded as 'gastro-intestinal bleeding from duodenal ulcer.'

The writ issued on 31 July 1992, with an amended writ being filed on 21 July 1993. On 25 April 1994, the defendant company (in liquidation) filed an acknowledgment of service of writ, stating that it did not intend to contest the proceedings. Interlocutory judgment was entered on 13 May 1994. A notice under s.47 of the Evidence Ordinance (Cap 8) and O 38 of the Rules of the Supreme Court was filed on 31 May 1996, with a supplemental notice being filed on 22 June 1997, and a third notice being filed on 16 September 1997. Pursuant to the order of Mr Registrar Belts, dated 25 July 1997, the plaintiffs filed four witness statements, with the notice of appointment of assessment of damages issuing on 28 August 1997. A revised statement of damages was filed on 19 September 1997.

At the assessment, the four witness statements were admitted into evidence, with the two sons giving oral evidence. The defendant company, in liquidation, was absent.

At the date of the accident, the deceased was aged 54.

FATAL ACCIDENTS ORDINANCE (FAO)

Loss of dependency

The claim for loss of dependency under the Fatal Accident Ordinance (Cap 22), is made on behalf of the following dependants:

The elder sister of the deceased, Lam Po Yuk, aged 75 now

The elder son of the deceased, Lam Kent Son, aged 23 now

The younger son of the deceased, Lam Kin Teng, aged 22 now

As a divorcee, the second named plaintiff was not a dependent of the deceased at the time of the accident.

At the time of the accident, the deceased was earning a basic monthly sum of \$6,800, together with a monthly leave pay of \$2,285 and monthly free meals valued at US\$106 (HK\$827), being a total income of \$9,912 pm. Form 2 and the defendant's details of earnings are to be found at pp 2 and 41 and 42 of the document bundle. The deceased was required to work seven days a week on board the vessel but received leave pay in lieu of holidays.

Because the defendant company has been wound up, it would now be impossible to know how much the deceased would have earned but for the accident. Counsel submitted that it would be reasonable to suppose that the deceased's earnings would have increased by about 10% pa, approximately in line with the rate of inflation. Counsel referred to *Kwan Wing Sang v Chi Chiu Engineering Co Ltd* (PI 1045/95, unreported), and *Yau Wong Fui v Winning Fire Engineering Ltd* (PI 110/96, unreported), digested in paras H48 and H49 of [1997] HKLRD, in support of this submission. In *Kwan Wing Sang*, a 12% increase per year was adopted and in *Yau Wong Fui*, a 10% increase per year was adopted.

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A I accept counsel's submission, and adopt a 10% pa increase for the period since death. On that basis his current expected monthly earnings would have been:

$$\begin{aligned} \$9,912 \times 110\% \times 110\% \times 110\% \times 110\% \times 110\% \times 110\% \\ = \$21,247. \end{aligned}$$

B Counsel submitted that she would be pursuing the loss of dependency claims based on the actual contributions made by the deceased to his three dependants.

C As to the loss of dependency of the elder sister, in her statement Lam Po Yuk says that the deceased would give her a sum of \$600 to \$800 twice a year. On her birthday he would give her \$300 and at Lunar New Year \$600. Lam Po Yuk's claim is set out at p 4 of the revised statement of damages, at p 8 of the pleadings bundle. The claim is based on the sum of \$800 x 2 pa, and on the assumption that the deceased's contribution to her

D would have increased at the rate of 10% pa, so that Lam Po Yuk would now receive about \$3,430 pa from the deceased. Lam Po Yuk's claim for loss of dependency from 26 September 1989 to 9 October 1997, a period of 8½ years at a median of \$2,515 pa would amount to:

$$2,515 \times (8 + 1/24)$$

$$= \$20,225$$

I accept the basis of the claim on behalf of Lam Po Yuk, and make an award of \$20,225 for the pre-assessment loss of dependency.

E As to the loss of dependency of the two sons, Lam Kent Son in his affidavit states that his father paid maintenance to his mother in the sum of \$800 pm for him and his brother. He says his father always gave him \$200 odd on occasions like his birthday, and other festivals like Christmas and New Year. He would also give him a sum of \$300 odd on each return trip to Hong Kong. Two months prior to the accident, the deceased started to give him pocket money in the sum of \$200 per month via autopay to his

F Hong Kong Bank Savings account. However, he had just received a lump sum of \$800 and then lost his savings book. He had opened a new bank account and intended to tell his father the new number when he returned to Hong Kong, but unfortunately the accident occurred and he was unable to receive further maintenance from his father. He is now aged 23, and is studying for a Bachelor of Engineering (Building Services Engineering) degree at the Hong Kong Polytechnic University. He will graduate in 1998.

G His current annual tuition fee is \$37,500. His current annual expenses, inclusive of tuition fees, is \$80,000.

H In his affidavit, Lam Kin Teng, tells of the maintenance of \$800 pm paid to his mother as maintenance for the two sons. His father always gave him pocket money on his birthday, and other festivals or on each return

trip to Hong Kong. He cannot recall the amount he would give each time. Two months prior to the accident, his father started to give him \$200 pm pocket money via autopay to his brother's Hong Kong Bank Savings account. He had received a total sum of \$400, with the payments interrupted when his brother lost the savings book and cancelled the bank account. He is now 22, and is studying for a Higher Diploma in Building Surveying at the City University of Hong Kong, and will graduate in 1998. The current annual tuition fee is \$28,000, and his current annual expenses, inclusive of the tuition fee, is \$56,265.

Counsel submitted that the deceased was obliged to pay a monthly sum of \$800 to the two sons pursuant to the maintenance order. When the deceased returned to Hong Kong and on special occasions such as the sons' birthdays, Christmas and Chinese Lunar New Year, he would give an average of about \$300 to each of the two sons. On average, therefore, each of the sons would receive \$1,200 pa. Moreover, two to three months before the accident, the deceased told the elder son to open a bank account so that he could deposit a fixed sum of about \$500 for the two sons. The deceased had actually only deposited a global sum of \$800 to cover two months' payment, ie, \$200 pm for each of the two sons, when the accident occurred. Just before the accident, the elder son lost the savings book and asked the deceased not to deposit further money in the account until he obtained a new savings book. On average therefore he gave \$750 pm to each of the two sons at the time of his death, calculated as follows:

$$\begin{aligned} \$800 + (\$600 \times 4 \div 12) + \$500 \\ = \$1,500 \text{ pm for both sons} \end{aligned}$$

Counsel submitted that the sons are now studying at university, and their current annual tuition fees are \$37,494 and \$28,113 respectively, as can be seen by the receipts at pp 79 and 80 of the documents bundle. But for the accident, counsel submitted that the deceased would have increased his contribution to subsidise the study of the two sons. The two sons gave evidence as to the encouragement, both in words and in terms of financial support, their father gave them in pursuing tertiary education, and the satisfaction he felt in their progress in their studies. On that basis, counsel submits that the average contribution to both sons would have increased to \$5,500. The median contribution to each of the two sons would have been:

$$\begin{aligned} (\$5,500 + \$1,500) \div 2 \\ = \$3,500 \end{aligned}$$

The pre-assessment loss of dependency for each of the two sons, from 26 September 1989 to, say, 9 October 1989, a period of 8 years and $\frac{1}{2}$ month, at a median of \$3,500 per son, would be:

$$\begin{aligned} \$3,500 \times (8 \times 12 + \frac{1}{2}) \\ = \$337,750 \end{aligned}$$

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A As to the pre-assessment loss of dependency of the two sons, I accept the submissions add calculations placed before me by counsel, and I award the sum of \$337,750 to each son for his pre-assessment loss of dependency.

As to the post-assessment loss of dependency, counsel submitted that, taking into account the age of the deceased, the age of the first named plaintiff, and the fact that the two sons are expected to be independent in about September 1998, a multiplier of one should be used in calculating the future loss of dependency, as follows:

First named plaintiff's loss:

$$\begin{aligned} \$3,520 \times 1 \\ = \$3,520 \end{aligned}$$

Two sons' loss:

$$\begin{aligned} = \$5,500 \times 12 \times 1 \\ = \$66,000 \end{aligned}$$

D I accept a multiplier of one for the post-assessment loss of dependency of the first named plaintiff and of the two sons, and I award the sum of \$3,520 and \$66,000 to the first named plaintiff and the two sons respectively under this head.

E There remains, under the Fatal Accidents Ordinance, the claim for funeral expenses and damages for bereavement.

The funeral expenses amounted to about \$18,000. Of this sum, \$15,000 was contributed by the defendant with the deficit paid by the first named plaintiff. Under s 6(5) of FAO, I make an award of \$3,000 for the funeral expenses.

F I make an award of \$40,000 for damages for bereavement under s 4(2)(b).

LAW AMENDMENT AND REFORM (CONSOLIDATION) ORDINANCE (LARCO) CLAIMS

G Counsel made reference to the provisions of s 20(1) of LARCO and s 4(5) of the Intestates' Estate Ordinance (Cap 73). Pursuant to those provisions, the two sons of the deceased are entitled to step into the shoes of the deceased and claim as his estate.

Deceased's loss of earnings

H Counsel submitted that between the date of the accident and the date of his death, the deceased had suffered a loss of earnings at \$9,912 pm for a period of $1\frac{1}{2}$ months, as follows:

$$\begin{aligned} \$9,912 \times 1\frac{1}{2} \text{ months} \\ = \$13,183 \end{aligned}$$

I accept the submission on this head of damages, and award the sum of \$13,183.

PSLA

Counsel submitted that damages may be claimed by the estate of the deceased for the pain and suffering borne by the deceased up to the time of his death. As to the assessment of PSLA, counsel referred me to the following authorities:

Chan Kin Fu v Lee Kam Hung (1985) HKLJ 110, where a sum of \$50,000 was awarded to the victim for the loss of his spleen. In this case, which was decided in November 1984, the plaintiff was injured in a traffic accident in May 1983. She suffered a ruptured spleen, undergoing an emergency laparotomy and splenectomy, and being hospitalised for one week. \$50,000 was awarded for PSLA, which included amounts for suffering surgery and for six months diminished amenity after the accident.

At that time, on the authority of *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657, decided in 1980, the category of serious injuries commanded awards in the range of \$60,000 to \$80,000. *Lee Ting Lam* was followed in assessing damages (taking into account inflation) until 1988, when the Court of Appeal in *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2 HKLR 650 increased the range of serious injury awards to \$135,000 to \$180,000.

In *Lam Fong & Anor v On Lee & Co & Ors* (1992) HKLJ 100, a sum of \$40,000 for damages for PSLA was awarded where the deceased had survived for two weeks after the accident. In this case, decided in November 1991, the deceased had suffered very serious burns caused by electrocution in July 1981, and it was common ground that the deceased's injuries fell within the category of 'serious' injuries as described in the *Lee Ting Lam* case. Reference was made to the November 1990 decision of *Wong See Mo* (*supra*), where it was said that the lowest end of the category should be \$150,000.

In December 1994, the Court of Appeal in *A-G v Chun Yat Nam* [1995] 1 HKC 218 accepted that, taking into account an increase due to inflation only, the level of the PSLA award for serious injury would range from \$250,000 to \$335,000. In *Leung On & Anor v Chan Pui Ki* [1996] 2 HKC 565, [1996] 2 HKLR 401, the category of serious injury award was increased to \$400,000 to \$540,000. In that case, the Court of Appeal emphasised again that they were guidelines not strait jackets, and that they were intended to be flexibly applied.

Counsel also referred me to *Hall v Staffordshire Moorlands District Council*, a Stoke County Court case, unreported, but referred to in *Kemp & Kemp*, at para F6-071, and *Re Moore*, a CICB, York, unreported, but found at para F6-072 of *Kemp & Kemp*.

In the *Hall* case, general damages of £12,000 was awarded to a 15-year old who fell from a climbing frame on to a raised concrete kerb and who suffered internal injuries to his spleen, resulting in its removal.

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A There was also some renal damage, there were resulting adhesions causing repeated attacks of pain, with a long term risk of further intestinal obstruction which might possibly require further surgery.

In *Re Moore*, the 34-year old female, was punched in the abdomen by her husband, her husband initially refusing to call an ambulance, and from

B expressions of the ambulance and hospital staff, the wife thought she was going to die. She underwent a splenectomy, she was embarrassed by the laparotomy scar, and she suffered psychological symptoms. She was awarded £10,000 in general damages.

In the case before me, the deceased was conscious from the time of the accident until his death nearly six weeks later, having undergone two medical procedures in Reunion, feeling depressed in a foreign hospital, no doubt missing his family, probably not able to communicate with those around him except with the help of an interpreter, and requiring medical repatriation over a period of two days. Having considered the facts, I am

D satisfied that an award for pain and suffering should be made. Counsel submitted that damages for the category of 'serious injury' now starts at about \$440,000, and that a figure of \$150,000 in this case was in all the circumstances reasonable. Having considered the line of authorities in Hong Kong, and the two English authorities, I am satisfied that an award in the amount of \$150,000 as claimed is reasonable and proper in this case.

Loss of accumulation of wealth

Counsel submitted that at the time of his death, the value of the deceased's estate was \$267,880, as can be seen from the provisional schedule filed with the Estate Duty Office, found at p 4 of the bundle. After the graduation of the two sons, and but for the accident, it would be expected that the deceased would be able to save more of his earnings. Counsel submitted that a global sum of between \$50,000 and \$100,000 should be awarded for loss of accumulation of wealth for the benefit of the estate in this case.

G Counsel submitted that there is evidence that the deceased had a habit of savings but there was insufficient evidence to show how much he saved each month. She submitted that the court should consider making a lump sum award following the approach of Deputy Judge Jones in *Ho Pang Lin & Anor v Ho Shui On & Anor* [1994] 3 HKC 294.

H As to the classifications found in *Ho Pang Lin*, the deceased would fall into the third of the three categories set out by Deputy Judge Jones at p 299G of that report, that is, a deceased 'without any identifiable savings pattern, but whose habits and lifestyle indicate a probability that he would accumulate wealth.' Deputy Judge Jones went on to say that 'As always, the court must avoid speculation. However, if thrift, frugality, responsibility

I and perhaps good employment prospects clearly emerge from the evidence then an award should be made even if the contemporary income is fully utilised, for example, on maintaining a young family.'

Deputy Judge Jones went on to consider the difficulty in quantifying the damages for the loss of that wealth, referring to the approach of Nazareth J (as he then was) in the case of *Chan Yuk Ying & Anor v Chan Cheung Wan* [1990] 1 HKC 474, where he applied a notional 10% of net income in assessing the measure of damages. In the final analysis, Deputy Judge Jones made a global award in the sum of \$100,000 for loss of accumulation of wealth in the case before him, saying that 'This will necessarily have an arbitrary element, but no more so than the 10% factor adopted in other cases. The figure should be on the conservative side and related so far as possible to the factors of the deceased's lifestyle already discussed.'

I accept counsel's submission that in this case I should make a global award. The deceased was an electrician working on board ship, in steady and well paid employment which would have been expected to continue well into his sixties. He was a caring and responsible father to his two sons, assisting them financially to achieve their goal of a tertiary education. As in *Ho Pang Lin*'s case, it is more probable than not that the deceased would have accumulated wealth by his retirement, and that it is also probable that the deceased would have retained an accumulation of wealth by the date of his death from natural causes. As to the quantum of the award, taking into account the deceased's lifestyle, I am satisfied that an award of \$100,000 is appropriate in this case.

In summary, I make an award of damages as follows:

Under FAO

Loss of dependency (pre-assessment)	\$ 695,725	F
Loss of dependency (post-assessment)	69,520	
Funeral expenses	3,000	
Bereavement	40,000	

LARCO

Loss of earnings	13,183	G
PSLA	150,000	
Loss of accumulation of wealth	100,000	
Total	\$ 1,071,428	H

An award in the sum of \$85,000 was made to the first named plaintiff on 2 July 1992, under the provisions of the Employees' Compensation Ordinance (Cap 282), and credit will be given for that payment.

I award interest on the special damages at half judgment rate from the date of the accident until the date of judgment. The award of general damages will carry interest at 2% pa from the date of service of the writ

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A until the date of judgment. Both awards will thereafter carry interest at judgment rate until payment.

The costs of this assessment are to be paid by the defendant to the plaintiff, with certificate for counsel, to be taxed if not agreed. The plaintiff's own costs to be taxed in accordance with Legal Aid Regulations.

Reported by PY Lo