#### **DCPI 864/2006**

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

#### **PERSONAL INJURIES ACTION NO. 864 OF 2006**

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| BETWEEN | YIU PAU YAU | **Plaintiff** |
|  | and |  |
|  | CO-RAY DESIGN & CONSTRUCTION LIMITED | Defendant |

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##### **Coram: Deputy District Judge R. Cheung in Court**

Date of Hearing: 27th April 2007

Date of Handing down Assessment of Damages: 3rd May 2007

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## **ASSESSMENT OF DAMAGES**

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1. The hearing is for the assessment of damages that arises out of an accident at work which took place on 3 June 2003. Interlocutory Judgment was already entered on 5 March 2007 by default. The Defendant's negligence is no longer a live issue. The Defendant has never appeared in Court and did not appear at the hearing. I am satisfied that the papers were duly served on the Defendant.

2. The Plaintiff himself testified before me. He is the only witness. I find him to be a credible witness in general.

3. The Plaintiff was born on 24 October 1952 in China. At the time of the accident, he was 50 years old and now he is 54 years old. He has received education up to primary 6 while in China. He is married and living with his wife.

4. The Plaintiff has more than 20 years of experience as a carpenter. At the time of the accident, he was working as a casual carpenter for the Defendant. He had been so engaged by the Defendant since some time in May 2003 and he was sent to work at the Ocean Park to affix doors and door frames and lay wooden flooring.

5. While under the Defendant's employ, the Plaintiff worked from 9 a.m. to 6 p.m. in a day and was paid daily wages of $700.00. He said he worked about 25 days in a month. He was therefore earning ($700.00 x 25 =) $17,500.00 in a month. I am satisfied that that was his normal income.

6. On 3 June 2003 at about 10 a.m., he was working at the staff quarters of the Ocean Park when his left index finger was cut by the spinning blade of an electric trimmer machine.

7. The Plaintiff was immediately sent to the Accident & Emergency Department of Ruttonjee & Tang Shiu Kin Hospital ("Ruttonjee"). Upon physical examination, he was found to have a laceration of the left index finger with tissue loss and tendon injury.

8. He was treated and transferred to the Orthopaedic Unit of Ruttonjee for further management.

9. Examination revealed that there was an open wound over his left index finger with irregular wound edge. He was not able to move the distal interphalangeal joint. There was also sensory loss over the ulnar aspect of the distal phalanx. The wound was explored and it was found that there was complete cut of the flexor digitorum profundus tendon, complete cut of both the radial and ulna digital nerve and complete cut of the ulna slip of the flexor digitorum superficialis. There was a 50% cut of the radial slip of the flexor digitorum superficialis. The damaged structures were repaired.

10. Post operation, a dynamic splint with rubber band attached to the left index finger was applied. The wound remained stable and he was discharged on 6 June 2003 with antibiotics and referral for physiotherapy and occupational therapy treatment.

11. The Plaintiff was granted sick leave from 3 June 2003 to 19 August 2003. I am satisfied that such sick leave is reasonable and justified.

12. The Plaintiff started to receive physiotherapy treatment on 10 June 2003. The last treatment was on 19 August 2003. The Physiotherapy Report dated 13 May 2005 lists 16 sessions of attendance (see page 42 of the trial bundle, hereafter "TB42", mutatis mutandis). The appointment card of the Plaintiff shows 17 sessions of attendance (see TB58). The difference arises by reason of an entry in the attendance card showing an appointment on 24 June 2003. I am satisfied that there were 16 sessions of physiotherapy treatment.

13. The Occupational Therapy Report in the Court file contains a list of the Plaintiff's treatment sessions, totalling 9. That page is omitted in the trial bundle. The Plaintiff also says that he has received 9 sessions of occupational therapy treatment. I am satisfied that there were 9 sessions.

14. The Plaintiff's testimony on the subject of follow up treatments shows that he does not have a clear recollection as to the number of such treatment sessions nor as to the amount of the charges that he has paid for such treatments.

15. I am prepared to find that the Plaintiff has probably also attended before doctors for a number of times for follow-up examination and treatment. I would give 3 as a reasonable figure. On giving further thoughts to this matter, I am also prepared to take judicial notice that the Plaintiff's physiotherapy and occupational therapy treatment sessions, as well as the doctors' appointments, would cost about $60.00 per session. That amounts to (16 + 9 + 3 =) 28 x $60 = $1,680.00.

16. During the physiotherapy treatment session on 20 June 2003, in performing a flexion exercise of the left index finger, a 'pop' sound was heard. There is no evidence that the Plaintiff suffered any pain on that occasion. However, because of that, the Plaintiff was re-admitted to the Orthopaedic Unit of Ruttonjee for diagnosis.

17. The Plaintiff's solicitors had instructed one Dr. Ho Ho Pak, Henry, specialist in orthopaedics and traumatology, to examine the Plaintiff and render a report. The report dated 26 November 2005 was compiled after an examination held on 21 November 2005. Dr. Ho then had before him the Plaintiff's past medical records. The report says that on 20 June 2003, there was a re-rupture of the flexor digitorum profundus tendon of the left index finger coupled with wound infection. I accept that to be true although the Occupational Therapy Report dated 9 May 2005 seems to suggest otherwise.

18. Antibiotics and wound dressing were prescribed for the Plaintiff. No operation was performed and he was discharged on 25 June 2003 with continuation of oral antibiotics and daily wound dressing.

19. The Occupational Therapy Report recommends the Plaintiff to resume work as a decorator. Dr. Ho's report says that the Plaintiff should be able to return to his original job as a carpenter. At the hearing, the Plaintiff said that he resumed working as a carpenter towards the end of 2003. The Plaintiff has not claimed for any pre-trial loss of income beyond the days of his sick leave.

20. The Plaintiff did not say that he has suffered any significant drop of income after he resumed work. He said that of the 20 or so people who had from time to time offered him employment prior to the accident, one or two of them ceased to do so after the accident. He said that he had to explain to some of his previous employers of his condition to convince them that he is still capable of taking up carpentry work.

21. I accept that the Plaintiff has attained maximal medical improvement at the time of his examination by Dr. Ho. At the time of the examination on 21 November 2005, the Plaintiff still complained of stiffness of the left index finger. He was not able to fully extend his left index finger. There was numbness over the left index finger especially over the middle phalanx and distal phalanx. There was also pain over the left index finger during the winter time and when exposed to cold temperature. I accept that the above conditions have persisted up to the hearing and would continue to be present.

22. During the examination, Dr. Ho found that there was mild tenderness over the left index finger on palpation. There was a large discrepancy between the active versus the passive range of motion of the distal inter-phalangeal joint. The function of the flexor digitorum profundus was not intact. There was also partial sensory loss of both radial and ulna digital nerves from the proximal inter-phalangeal joint to the pulp of the left index finger. There was a scar across the proximal and middle phalanx and cornification of the skin of the middle phalanx on the volar side. I am satisfied that these conditions have persisted and would continue to be there.

23. Dr. Ho assessed the Plaintiff to have suffered a 6% permanent impairment of the whole person based on American medical authorities. He opined, for the purpose of employees' compensation assessment only, that there is a 7% loss of earning capacity.

24. The Plaintiff is right hand dominant. He confirmed in Court that the residual condition of his left index finger has rendered him less efficient in performing his work as a carpenter. He gave the example of hammering nails. Before the accident, he would use his left index finger and thumb to hold the nail. After the accident, he has to use his other fingers. He said that the residual condition has slowed down his work.

25. However, apart from some impairment to his work, the Plaintiff did not say that the residual condition of his left index finger has any significant impact on his daily living. The Plaintiff enjoyed good health before the accident.

26. I would now turn to the individual heads of damages claimed by the Plaintiff.

PSLA

27. On damages for pain, suffering and loss of amenities, solicitor for the Plaintiff has quite helpfully referred me to the following cases for comparison: (1) Chan Ming Yat v. Youh Eng Lai Michael trading as Prime Industrial Company (Hong Kong), DCPI 201/2003, 5 June 2004 in which a sum of $180,000.00 was awarded under this head. The injuries relate to open fracture of the left index finger, dislocation of the finger joint, rupture of the ligament of the finger joint and contused ulnar digital nerve and artery. Medical findings show 8-9% impairment of the whole person; and (2) Tsui Kim Ming v. Charter Form Company Ltd., HCPI 681/2001, 29 October 2002 in which $350,000 was awarded under this head. The injuries relate to a 4 cm laceration over the dorsal side of the left index finger, exposing the proximal interphalangeal joint. There was a cut of the extensor tendon and fractures of the proximal and middle phalanges of the left index finger. Medical findings show a 6% impairment of the whole person.

28. My own rather limited legal research has also yielded some results: (1) Wong Shek Mui v. Mammoth Holdings Limited, HCPI 1291/2003, 16 February 2007 in which $500,000.00 was awarded, but the injuries are more serious and relate to crushing injury and acute traumatic closed fractures at multiple sites of the right hand; (2) Mak Kam Bo v. Ever Gain Engineering Limited & Another, HCPI 37/2004 in which $450,000.00 was awarded, but then the injuries are a 6 cm laceration to the back of the right hand with a fracture of the second metacarpal head. Further, there is the incidence of psychiatric disability; (3) Singh Jagdeep v. VSC Engineering Products Co. Ltd., DCPI 391/2005, 17 June 2005 in which a mere sum of $30,000.00 was awarded, but then the injury is just a 1/2 cm abrasion over the left dorsal part of the hand; (4) Lee Tsz Kin Ken v. Climax Paper Converters Ltd., HCPI 504/2003, 24 June 2004 in which a mere sum of $50,000 was awarded, but then the injury is just a sprained right thumb; (5) Ng Tat Ping v. Cho Shui Leung, HCPI 646/2000, 13 June 2001 in which a sum of $150,000.00 was awarded. The injuries are a 1 cm laceration on the left middle finger with 2 tendons cut partially and a 1.5 cm laceration on the left ring finger with 2 tendons thereat completely severed. The Plaintiff was hospitalized for 4 days and received physiotherapy and occupational therapy thereafter. About a month after the accident, one of the repaired tendons of his left ring finger ruptured again and he was re-admitted into the hospital for another tendon repair operation which occasioned a 3 days stay in the hospital. The Plaintiff was assessed to have suffered a 2% impairment of the whole person by doctors. The Plaintiff used to enjoy playing basketball. After the accident, he no longer was able to play the game; (6) Tang Shau Tsan v. Wealthy Construction Company Ltd., HCPI 1092/1998 in which a sum of $300,000.00 was awarded to the carpenter Plaintiff. The principal injury is the amputation of his left index finger. There was a minor back injury; (7) Yeung Yuk Kee v. Kong Tsing Bor, HCPI 2957/1975, 20 July 1976 in which a mere sum of $15,000.00 was awarded. The injury relates to the fracture of each proximal phalanx of the right hand and a 1 cm wound on the index finger. This case is ages old.

29. While noting the above for reference, I am aware that each case is to be decided on its own individual merits. I note that the figure in Chan Ming Yat supra is more in line with the figure in Ng Tat Ping supra than Tsui Kim Ming supra.

30. Solicitor for the Plaintiff suggested that a sum of $280,000.00 should be awarded under this head.

31. The treatment which the Plaintiff received and the process to recovery is not a matter of just a few days but they are far from being a long and tortuous experience. The Plaintiff did not say that he was embarrassed by the residual condition of his left index finger. He is over 50, male and married. The accident left the Plaintiff with permanent disabilities which will stay with him for life but the number of years that lies ahead for the Plaintiff would probably be shorter than that for a young man in his twenties. There is no evidence that after the injury he is no longer able to enjoy the things that he used to enjoy before the accident.

32. I also take into account that the Plaintiff in giving his evidence on this matter was rather modest in his assertions, and appears to have understated, rather than exaggerated, his suffering.

33. I do not consider the Plaintiff's injury can be classified as "serious injury" according to the classification scheme devised in Lee Ting Lam v. Leung Kam Ming, CACV 11/1980, 30 May 1980.

34. I would award the Plaintiff $200,000.00 under this head. After giving credit for the employees' compensation awarded in the sum of $76,280.00, the balance of the amount of damages for pain, suffering and loss of amenities will become $123,720.

Loss of earning capacity

35. I am satisfied that the Plaintiff will suffer a certain handicap in the labour market by reason of the residual condition of his left index finger. The Plaintiff is now 54 years old. It should be reasonable for me to consider his retirement age to be about 60. He has about 6 years of working life ahead of him. I consider $30,000.00 which averages out to be about $5,000.00 for a year, to be a fair amount in all the circumstances. I would make this award.

Pre-trial loss of earnings

36. The Plaintiff was granted 78 days of sick leave. I am satisfied that the claimed amount of $45,500.00 is justified and reasonable: $17,500.00/30 days x 78 days = $45,500.00. I would make this award.

Medical expenses

37. The pleaded amount of $2,830.00 was never vigorously pursued. Only the hospitalization expenses of $800.00 are supported by receipts. The cost of other medical attendances/treatments sessions come to about $1,680.00 - see paragraph 15 above. I would award ($800.00 + $1,680.00 =) $2,480.00.

Travelling expenses

38. Although there is no receipt in support, I am satisfied that the amount asked for in the sum of $1,000.00 is justified and reasonable. I would make this award.

Tonic food

39. Although there is no receipt in support, I am satisfied that the amount asked or in the sum of $5,000.00 is justified and reasonable. I would make this award.

Credit for employees' compensation

40. The Plaintiff should and is prepared to give credit for the amount of employees' compensation awarded in the sum of $76,280.00. To that extent, the General Damages will be reduced: ($200,000.00 less $76,280.00 =) $123,720.00.

Summary

41. The following is a summary of the awards made and the calculations:

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|  | General Damages |  |
|  | Balance of PSLA | $123,720.00 |
|  |  |  |
|  | Special Damages |  |
|  | Loss of earning capacity | $30,000.00 |
|  | Pre-trial loss of earnings | $45,500.00 |
|  | Medical expenses | $2,480.00 |
|  | Travelling expenses | $1,000.00 |
|  | Tonic food | $5,000.00 |
|  | Total: | $207,700.00 |

Orders

42. I would make the following Orders:

(1) The Defendant do pay the Plaintiff the above sum of $207,700.00 being $123,720.00 as to general damages and $83,980.00 as to special damages.

(2) There be interest at 2% per annum on the above general damages from the date of the Writ and interest at half judgment rate on the above special damages from the date of the accident, both to the date of the handing down of this Judgment, and thereafter at the judgment rate until satisfaction.

(3) There be an Order Nisi that the Defendant do pay the Plaintiff's costs of this action to be taxed if not agreed. Unless there is an application to vary the Order Nisi, it will become absolute in 14 days.

# (R. Cheung)

Deputy District Judge

Representation:

Mr. Lo Chi Hung, of Messrs. Christopher Li & Co., for the Plaintiff

The Defendant: unrepresented, absent