#### DCPI2328/2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2328 OF 2007

------------------------

|  |  |  |
| --- | --- | --- |
| BETWEEN | CHAN HUNG HANG | Plaintiff |
|  | and |  |
|  | FAT KEE MARINE REPAIRING & ENGINEERING CO. LIMITED  WONG OI LING trading as TAT SING COMPANY | 1st Defendant  2nd Defendant |

------------------------

##### Coram: H H Judge Marlene Ng in Court

Date of Hearing: 2nd September 2008

Date of Handing Down Judgment: 3rd September 2008

------------------------

###### ASSESSMENT OF DAMAGES

------------------------

I. Introduction

1. At all material times, the Plaintiff was a welder employed by the 2nd Defendant and instructed to perform duty on Ship No.6 (“Ship”) of the Customs and Excise Department (“Department”) at Maintenance Plant No.CB3, Government Dockyard, Stonecutters Island, Hong Kong (“Site”).
2. The 1st Defendant was the principal contractor in respect of maintenance work for ships for the Department at the Site, and it sub-contracted the maintenance work to the 2nd Defendant.
3. The 1st and/or 2nd Defendants were occupier of the Site and the Plaintiff was their lawful visitor thereat within the meaning of the Occupiers Liability Ordinance Cap.314.
4. At/about 8:30am on 15th November 2004, the Plaintiff in the course of his employment with the 2nd Defendant was instructed to weld pieces of new metal at the lower level of the Ship. Other employees of the 2nd Defendant carrying out maintenance work on the Ship would look for and cut away damaged sections of the Ship, and the Plaintiff would then weld new metal pieces to replace the removed damaged sections.
5. Before carrying out such work, the Plaintiff went into a generator room to collect tools. There was an uncovered hole of irregular oval shape about 10 inches in diameter in the generator room. In fact a damaged section had been cut away by other employees of the 2nd Defendant at that spot, and the uncovered hole was pending further maintenance work. Some plastic pipe was placed on top of the uncovered hole, and the Plaintiff did not notice it when he entered the generator room. At that time he was holding a pack of metal rods that weighed about 10 lbs. When he stepped onto the plastic pipe, his right leg tripped over the uncovered hole, and he lost balance and fell to the floor (“Accident”). As a result of the Accident, the Plaintiff’s right middle finger (“RMF”) was hit and injured by the metal rods.
6. The Plaintiff claimed for loss and damages against the 1st and 2nd Defendants for breach of contract of employment on the part of the 2nd Defendant and/or for negligence and/or breach of common duty of care and/or breach of statutory duty on the part of the 1st and/or 2nd Defendants, their servants or agents for whom they were vicariously liable.
7. The 1st and/or 2nd Defendants did not serve any Defence, so interlocutory judgment was entered against them for damages to be assessed on 28th April 2008 and 21st May 2008 respectively.
8. On 29th May 2008, Master K Lo set down the hearing of the assessment of damages to be returnable before me on 2nd September 2008. At the hearing on 2nd September 2008, both the 1st and 2nd Defendants were absent. According to the affirmation of service filed on 28th August 2008, the Order of Master K Lo dated 29th May 2008 was served by post to the 1st and 2nd Defendants in June 2008. There was no reason not to proceed with the assessment hearing, and the hearing continued.

*II. Plaintiff’s earnings*

1. The Plaintiff was the sole witness and he adopted his witness statement as part of his evidence. After careful consideration, I accept his evidence on the balance of probabilities.
2. At the time of the Accident, he was 44 years old. He received education up to Form 1 level, and was/is a registered construction worker. In 2007 he passed the trade test for construction craftsman (general welder), and his relevant certificate was valid until 11th November 2010. Prior to the Accident, he was employed as a casual general welder for about 20 odd years.
3. The 2nd Defendant employed the Plaintiff as a casual welder since 8th November 2004 (ie a few days before the Accident). The Plaintiff was responsible to carry out welding work on the Ship at the Site. His usual working hours were from 8:00am to 9:00pm.
4. The Plaintiff claimed that prior to the Accident, he earned HK$750.00 *per* day, and on average worked 22-26 days *per* month (according to his witness statement) or 22-24 days *per* month (according to his *viva voce* evidence). He claimed that his *pre*-Accident average monthly earnings were about HK$18,000.00.
5. According to the Form 2 dated 14th January 2005, the 2nd Defendant stated that (a) the Plaintiff’s average number of days worked *per* month were 15 days, (b) his rest day was fixed on Sunday with no pay, (c) his basic salary was HK$432.00 *per* day, and (d) his average monthly earnings were HK$6,480.00.
6. The Plaintiff did not accept the assertions in Form 2. He said that since he was a casual worker who worked for different employers, there would be days between jobs in which he would have no work and no pay. So he would not have fixed rest days and if there were work available, he would work on Sundays and even during the Chinese New Year holidays. He believed that the 2nd Defendant was unaware of his employment status since he only worked for the 2nd Defendant for only a few days before the Accident but he also worked for other contractors such as Cheung Kong and Hip Hing. He said that the 2nd Defendant’s statement that he worked on average 15 days was an inaccurate estimate.
7. The Plaintiff explained that a full day’s work would be up to at least 7:00pm. However, the basic rate of HK$432.00 *per* day as stated in Form 2 was the wage rate for work up to 5:00pm. He also received overtime pay and hence his daily rate was HK$750.00. The Plaintiff further explained there would be savings for the employer for adopting a basic rate since severance pay for causal workers employed for more than a month would be calculated on the basic rate and not on the full daily rate that included overtime pay.
8. I note the Plaintiff was unable to provide any documentation to support his assertions in relation to his *pre*-Accident earnings. But I accept his explanation that it was because the 2nd Defendant paid him in cash, and his other employers paid him in cash or by cash cheque.
9. On balance I accept the Plaintiff’s evidence in relation to his *pre*-Accident earnings and his explanation in relation to Form 2. I accept his evidence that prior to the Accident, half of his welding work was on government projects and the rest of his welding work was in the private sector. I bear in mind that at the time of the Accident, he was already an experienced welder, and I further accept that average monthly earnings of HK$6,480.00 (as set out in Form 2) were earnings expected to be earned by apprentices or junior welders with 1-2 years’ experience. Indeed, the *Hong Kong Annual Digest of Statistics* 2005 ed at p.39 showed that the average daily wages of general welder engaged in government building and construction projects in 2003 and 2004 were HK820.60 and HK$803.90 respectively. I accept the Plaintiff’s claim of an average daily rate of HK$750.00, which I find reasonable and believable.
10. Given the Plaintiff’s experience in the field, I am also prepared to accept that on average he worked about 24 days *per* month.

III. Injuries and treatment

1. The Plaintiff is a smoker and right hand dominant. He was of good health and had no record of any other accident before the Accident.
2. Immediately after the Accident, the Plaintiff’s RMF was very painful, but he thought the pain would soon go away, so he did not immediately notify the foreman. About an hour after the Accident, his RMF was still very painful, so he told the foreman he had a work injury, and the foreman arranged for another colleague to accompany him to Princess Margaret Hospital (“PMH”).
3. The Plaintiff arrived at PMH’s Accident and Emergency Department (“AED”) at 10:46am. He was found to have suffered crush injury to his RMF. Physical examination revealed bruise and tenderness over the tip of the RMF and subungal haematoma over nail. The active range of motion was decreased although flexion and extension mechanism was intact. X-ray showed fracture of the tuft of distal phalanx of the RMF. The subungal haematoma was drained. The Plaintiff was referred to and seen at the orthopaedic clinic on the same day for further management. He was admitted to the orthopaedic ward on 16th November 2004. A finger/thimble splint was fitted and applied by the occupational therapist, and he was discharged on the following day.
4. The Plaintiff was referred to the Specialist Clinic of PMH’s Occupational Therapy Department (“OTD”) for follow up of the splint upon discharge from hospital. Initial assessment was done on 29th November 2004. The Plaintiff complained of mild swelling of his RMF, and mild ulna deviation of the distal interphalangal joint (“DIJ”) was also noted. The splint was checked regularly. It was recommended to be off on 22nd December 2004.
5. Pain persisted in subsequent follow up by the Department of Orthopaedics and Traumatology (“DOT”). The fracture line was still visible on 12th January 2005. Splintage was stopped and the Plaintiff was referred to the Specialist Outpatient Clinic of PMH’s Physiotherapy Department (“PD”) for mobolisation exercise and denisitisation of pain. Physiotherapy treatment was started on 14th January 2005. The Plaintiff attended 4 treatment sessions and the treatment included ultrasound and wax therapy, and desensitisation/mobolisation exercises. The progress was satisfactory after the course of rehabilitation. The Plaintiff was discharged on 23rd February 2005.
6. Home mobolisation programme was taught by OTD for active mobolisation of the DIJ after splint off. Mobolisation and strengthening programme was then started at OTD on 19th January 2005. Regular assessment and adjustment of the programme were done according to progress. Between 29th November 2004 and 22nd February 2005, the Plaintiff received 10 sessions of treatment by PMH’s OTD. Assessment on 22nd February 2005 found the range of movement was full, and the power grip of the right and left hands were 41 kgf and 42 kgf respectively whereas the pad-to-pad pinch grip of the right and left middle fingers were 2 kgf and 5 kgf respectively. There was only mild pain over the RMF on exertion. The condition was reported to PMH’s DOT with suggestion to discharge the case.
7. As evidenced by sick leave certificates, sick leave was granted to the Plaintiff from 15th to 24th November 2004 by PMH’s AED and from 16th November 2004 to 9th March 2005 by PMH’s DOT.
8. The Plaintiff attended PMH’s AED again on 10th March 2005 because of persistent pain, and further sick leave was given from 10th to 12th March 2005. No further regular follow up was required from PMH’s orthopaedic unit.
9. By a Certificate of Assessment (Form 7) dated 26th April 2005 in relation to “right middle finger injury resulting in pain, weakness and stiffness”, the Medical Assessment Board assessed the Plaintiff’s loss of earning capacity permanently caused by injury as 4%.

IV. Pain, suffering and loss of amenities

1. The Plaintiff is right hand dominant. After the end of his sick leave period, he was able to look for and return to his *pre*-Accident work as welder at construction sites and/or shipyards. But his RMF was still painful upon change of weather, exertion and when pressed lightly. In order to avoid causing pain to his RMF, the Plaintiff would favour such finger in his work, which meant he could not work as fast as before. I also note that the Plaintiff had undergone various sessions of physiotherapy and occupational therapy treatment, and although the fracture of the distal phalanx of the RMF had healed, there was still mild deviation of the DIJ.
2. Ms Wong, solicitor for the Plaintiff, submitted that the award for damages for pain, suffering and loss of amenities should be HK$140,000.00 after taking into account inflation. I have carefully considered the following authorities cited by Ms Wong :
3. *Ho Shu Yau v Lo Siu Ling formerly trading as Chi Wo Civil Engineering Company & anor* HCPI1336/2000, Master M Yuen (unreported, 31st January 2002);
4. *Lee Tsz Kin Ken v Climax Paper Converters Limited* HCPI504/2003, Tang J (as he then was) (unreported, 24th June 2004);
5. *Singh Jagdeep v VSC Engineering Products Company Limited* DCPI391/2005, H H Judge Wong (unreported, 17th June 2005).
6. I find that the injuries suffered by the plaintiff in *Ho Shu Yau* (ie amputation of ⅓ portion of the distal phalanx of the left ring finger was amputated with 10% loss of flexion of his DIJ) were more serious than those suffered by the Plaintiff in the present case. Master M Yuen awarded the plaintiff HK$120,000.00 under this head of claim.
7. In *Lee Tsz Kin Ken* the plaintiff sprained his thumb. There was tenderness over the right thumb base but range of movement and sensation were normal. He was given successive sick leave and an exploratory operation was performed. Only mild scarring around the radial digital nerve of the right thumb was discovered. He had 40 sessions of rehabilitation and 850 days of sick leave, and complained of severe pain and weakness. However, Tang J (as he then was) preferred the evidence from the defendant’s medical expert and the videotape evidence, and concluded that the plaintiff had no difficulty in manipulating his right thumb and that he exaggerated its condition. The plaintiff was awarded HK$50,000.00 under this head.
8. In *Singh Jagdeep*, the plaintiff had a ½ cm abrasion of the left hand and received 16 days of sick leave, so pain and suffering was minimal. He was awarded HK$30,000.00 under this head.
9. I also refer to the more recent authority of *Wong Yun San v Cheung Yue Yiu trading as Radio Engineering Co* DCPI1909/2007 (unreported, 21st July 2008). In that case, the plaintiff suffered crush injury to left middle and index fingers with pulp loss in his index finger and deep laceration in middle finger exposing extensor tendon over proximal interphalangal joint. X-ray showed communited intra-articular fracture of the condyle of the proximal phalanx of the left middle finger. Surgery for open reduction, internal fixation and extensor repair was carried out. There was another operation to resurface the left index finger with a local flap advanced to cover the defect in the left index finger by way of skin graft taken from the wrist. Despite treatment, the index finger had residual stiffness, numbness in the pulp and nail deformity. There was mild tenderness along the scar, and sensation along the scar as well as over the skin flap was reduced. In respect of the middle finger, there was an operation scar as well as a nodule with tenderness on palpation and swelling over the condyle. Power grip of the left hand was weakened. The learned judge awarded HK$150,000.00 for pain, suffering and loss of amenities.
10. In my view, the injuries suffered by the Plaintiff in the present case are less serious than those of the plaintiffs in *Ho Shu Yau* and *Wong Yun San* and more serious than those of the plaintiffs in *Lee Tsz Kin Ken* and *Singh Jagdeep*. I am satisfied that an appropriate award under this head of damages should be HK$100,000.00.

V. Pre-trial loss of earnings

1. Based on the above analysis, I find that the Plaintiff’s *pre*-Accident monthly earnings were HK$750.00 x 24 days = HK$18,000.00.
2. The Plaintiff was granted sick leave from 15th November 2004 to 12th March 2005 (ie about 4 months). During such time, he received on-going physiotherapy and occupational therapy treatment. I am satisfied he suffered full loss of earnings for the sick leave period.
3. I also accept the Plaintiff’s evidence that after expiry of the sick leave period, he was unable to secure work immediately. I find it reasonable that he took 1-2 months to ease back into his *pre*-Accident work. In the circumstances, I agree with Ms Wong’s submission that the Plaintiff should be entitled to loss of earnings for a further 1½ months after expiry of the sick leave period.
4. In the circumstances, the Plaintiff’s *pre*-trial loss of earnings were HK$99,000.00 being HK$18,000.00 x (4 + 1½) months.

VI. Pre-trial MPF loss

1. Pre-trial loss of MPF should be HK$99,000.00 x 5% = HK$4,950.00.

VII. Loss of earning capacity

1. The Plaintiff did not claim for *post*-trial loss of earnings since he returned to his *pre*-Accident work with similar income. However, given his disabilities as described above, he would have reduced efficiency in his work. He was not well-educated and in light of the need to favour his RMF in his work, he claimed he would suffer a handicap in the labour market as compared with other able-bodied persons. Ms Wong submitted that a sum of not less than HK$50,000.00 should be awarded under this head of claim.
2. Whilst I accept that as a result of injury to the Plaintiff’s RMF he would suffer a handicap in the labour market, I have found that he could return to his *pre*-Accident work with slightly reduced capacity. I must also bear in mind that the Plaintiff was engaged in casual work *pre*- and *post*-Accident, so practically speaking he would “lose” his present job (whether it be a few days or a longer period depending on the project) when he finished work for the present employer. The Plaintiff’s loss of earning capacity must be considered in such context.
3. In my view, a reasonable and fair award under this head of claim is a global sum of HK$40,000.00.

VIII. Special damages

1. The Plaintiff claimed a total sum of HK$1,600.00 for medical expenses (ie HK$100.00 for hospitalisation, HK$200.00 for AED, HK$380.00 for DOT, HK$280.00 for PD and HK$640.00 for OTD). These expenses were confirmed in writing by PMH.
2. The Plaintiff claimed a total sum of HK$500.00 for travelling expenses. Since he attended PMH’s AED, DOT, PD and OTD on numerous occasions, I am satisfied that the amount of HK$500.00 as claimed is reasonable.
3. The Plaintiff also claimed for expenses for tonic food and nourishing soup in the sum of HK$5,000.00. But there is no evidence before me (documentary or otherwise) as to what tonic food was purchased or consumed. Only a reasonable sum would be awarded where there was no evidence as to the advisability or suitability of tonic food. Following *Yu Ki v Chin Kit* *Lam* [1981] HKLR 419 and judging from the mild nature of the Plaintiff’s injuries, I would allow a global sum of HK$2,000.00 for the Plaintiff’s claim for tonic food expenses.

*IX. Employees’ compensation*

1. The Plaintiff had received and would give credit for employees’ compensation in the sum of HK$87,586.40.

X. Conclusion

1. I summarise the award for the Plaintiff’s loss and damages as follows :

|  |  |
| --- | --- |
|  | HK$ |
| Pain, suffering and loss of amenities | 100,000.00 |
| Pre-trial loss of earnings | 99,000.00 |
| Pre-trial MPF loss | 4,950.00 |
| Loss of earning capacity | 40,000.00 |
| Special damages | 4,100.00 |
| Less employees’ compensation | (87,586.40) |
| Total : | 160,463.60 |

1. Interest is payable on the award for pain, suffering and loss of amenities at 2% pa from the date of the writ of summons to the date of judgment herein, and on pre-trial loss of earnings, pre-trial MPF loss and special damages but less employees’ compensation from the date of the Accident to the date of judgment herein at half judgment rate and thereafter at judgment rate until payment.
2. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that 1st and 2nd Defendants shall pay the Plaintiff costs of the assessment of damages (with all costs reserved, if any) to be taxed if not agreed.

# (Marlene Ng)

District Court Judge

Representation:

Ms P Y Wong of Messrs K Y Woo & Co for the Plaintiff.

The 1st Defendant in person and absent.

The 2nd Defendant in person and absent.