#### DCPI 2343/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

#### PERSONAL INJURIES ACTION NO. 2343 OF 2006

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| BETWEEN | LAI CHEUNG KONG | Plaintiff |
|  | and |  |
|  | LO KING SUM | 1st Defendant |
|  | EVER TRUSTFUL INTERIOR CONSTRUCTION COMPANY LIMITED | 2nd Defendant |

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##### Coram: Deputy District Judge Richard Khaw in Court

Date of Hearing: 17 July 2008

Date of Handing down of Judgment: 8 August 2008

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## ASSESSMENT OF DAMAGES

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# **Background**

1. This is the assessment of the Plaintiff’s claim against the 1st and 2nd Defendants for damages arising from an accident which happened on 2 January 2004. Interlocutory judgment has been entered against the Defendants due to their failure to give notice of intention to defend.

2. In the hearing on 17 July 2008, the Defendants were absent although notice of hearing dated 26 June 2008 was sent to all parties. Further, affirmations of service were made on 11 June 2008 for and on behalf of the Plaintiff, which show that further notice of the hearing was sent to the Defendants. The hearing therefore continued in the absence of the Defendants.

3. The Plaintiff was the only witness called to give evidence in the hearing. The Plaintiff also relied on the documents disclosed and contained in the hearing bundle. According to the Order made in the hearing of the Checklist Review on 24 April 2007, the joint medical report dated 27 September 2005 of Dr Fu Wai Kee (“Dr Fu”) (engaged by the Plaintiff) and Dr Danny C W Tsoi (“Dr Tsoi”) (engaged by the Defendant), could be relied upon by the parties without having to call the experts to give evidence.

The Plaintiff’s case

4. The Plaintiff’s case is that at the time of the accident, he was working as a general worker on a casual basis at a site at No. 34 Island Road, Hong Kong (“the site”). The accident happened when he was operating a winch (which was equipped with a cable drum to allow the cable to be pulled in and let out) and his left hand was dragged towards the cable drum. As a result, the Plaintiff sustained injuries.

5. After the accident, the Plaintiff was first sent to Ruttonjee Hospital and subsequently transferred to the orthopaedic unit of Pamela Youde Nethersole Eastern Hospital for further management. A deep laceration of his left second web space was found and X-ray showed dislocation of the left second carpo-metacarpal bone. The digital nerve was exposed and remained intact. The intrinsic muscles were cut longitudinally. The Plaintiff underwent an emergency operation in which the wound was sutured and the dislocated joint fixed.

6. After his discharge on 5 January 2004, the Plaintiff continued to have follow-up treatment together with both physiotherapy and occupational therapy. Sick leave was granted from 2 January 2004 to 28October 2004.

7. On 19 August 2005, the Plaintiff was examined by both Dr Fu and Dr Tsoi. During the examination, the Plaintiff complained of pain, numbness and weakness of his left hand, which would be aggravated by lifting of objects and change of weather. Both medical experts expressed the following views and observations regarding the Plaintiff’s condition:-

1. The positive findings upon physical examination included tenderness of scar, decreased sensation of left index and middle finger distal to the scar, decreased range of movement and power of left index and middle finer and decreased hand grip power.
2. The Plaintiff’s clinical picture was compatible with intrinsic muscle injury, neropraxia of digital nerves and dislocation of second metacarpo-phalangeal joint of the left hand.
3. His condition reached maximal medical improvement and no further treatment would be necessary.
4. The sick leave granted was appropriate.
5. The Plaintiff could return to work as a general labourer at construction sites. However, his efficiency would be reduced and he should avoid lifting heavy objects and would have some inconvenience in climbing scaffold.
6. Both his whole person impairment and loss of earning capacity were assessed to be 8%.

8. I accept the Plaintiff’s case as set out in paragraphs 4 - 7 above, which has been supported by the Plaintiff’s evidence and the relevant medical reports. In any event, the Plaintiff’s case has never been challenged by the Defendants.

9. I will now deal with the items of loss and damage claimed in the Plaintiff’s Revised Statement of Damages and also set out in the Opening Submissions.

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

10. For the purpose of assessing the PSLA award, Mr Nick Lee, Legal Aid Counsel acting for the Plaintiff, has referred me to *Yiu Pau Yau v Co-ray Design & Construction Limited*, unrep., DCPI 864/2006, 3 May 2007 (in which PSLA in the sum of HK$200,000 was awarded) and also *Tse Lai Yin v Incorporated Owners of Albert House (No. 5)*, unrep., HCPI 828/1997, 17 September 2001 (in which HK$430,000 was awarded as PSLA).

11. Mr Lee fairly accepted that the degree of injuries sustained by the plaintiff in *Tse Lai Yin* (above) (which, apart from injuries to right hand, included cognitive and psychiatric disabilities and also multiple contusion of chest wall, etc) was far more serious than that in the present case. The injuries in *Yiu Pau Yau* are obviously more comparable to those of the Plaintiff. I have also considered *Ng Ching v Link Machinery Works Limited*, unrep., HCPI 112/2004 in which the court awarded the plaintiff HK$200,000 as PSLA in view of similar injuries.

12. I take the view that the sum of HK$200,000 claimed by the Plaintiff for PSLA is appropriate.

# **Loss of earnings**

13. The Plaintiff was born on 14 July 1960. He received education up to the level of primary 6 in Hong Kong.

14. According to the Plaintiff’s evidence, during the period of about one year prior to the accident, he was working as a general worker in various construction sites with an average daily income of about HK$550 to HK$650. In particular, for the period between August/September and December 2003, he was working as a general worker for a construction company known as “Wah Cheong” in Tsuen Wan and Mongkok. While giving evidence in the hearing, the Plaintiff confirmed that over the period of one year before the accident, on average, the number of his working days each month was about 20-22.

15. The Plaintiff has failed to provide any documentary evidence in support of his pre-accident earnings. However, I accept the Plaintiff’s oral evidence in this respect, which has never been challenged.

16. The accident happened on the first day of the Plaintiff’s work for the Defendants at the site. This gave rise to a dispute in the related application for employees’ compensation in DCEC 1236/2004 (“the EC Application”), which was eventually determined by the Court of Appeal in CACV 202/2007.

17. In the EC Application, it was not in dispute that the Plaintiff’s daily income was HK$600. In determining the Plaintiff’s monthly earnings at the time of the accident, the court considered the following provisions in the Employees’ Compensation Ordinance (Cap. 282) (“ECO”):-

Section 11(1)

“ Subject to this section, for the purposes of this Ordinance the monthly earnings of an employee at the time of the accident shall be the earnings –

1. for the month immediately preceding the date of the accident; or
2. computed in such manner as is best calculated to give the rates per month at which the employee was being remunerated during the previous 12 months if he has been so long employed by the same employer, but, if not, then for any lesser period during which he has been employed by the same employer,

whichever calculation is more favourable to the employee.”

Section 11(2)

“ Where by reason of the shortness of the time during which an employee has been in the employment of his employer or of the causal nature of the employment, or of the terms of employment, it is impracticable to compute the rate of remuneration of such employee at the date of the accident, regard may be had to the average monthly amount which, during the 12 months previous to the accident, was being earned by a person of similar earning capacity in the same grade employed at the same work by the same employer, or if there is no person so employed, by a person of similar earning capacity in the same grade employed in the same class of employment and in the same district.”

Section 11(5)

“ Where the earnings of an employee calculated under any of the provisions of this section amount to less than the amount specified in the second column of the Sixth Schedule shown opposite section 11(5) specified in the first column of that Schedule per month, the earnings of such employee shall, for the purposes of this Ordinance, be deemed to be the amount specified in the second column of the Sixth Schedule shown opposite section 11(5) specified in the first column of that Schedule per month.”

18. In the EC Application, the court held as follows:-

1. Section 11(1)(a) of ECO did not apply as the accident happened on the first day of the Plaintiff’s work for the Defendants. Neither was section 11(1)(b) applicable as the provision is confined to computation of earnings on the basis of remuneration provided by “the same employer” during the 12 months before the accident.
2. The Plaintiff failed to provide any evidence as required under section 11(2) regarding income “earned by a person of similar earning capacity in the same grade employed at the same work by the same employer” or “by a person of similar earning capacity in the same grade employed in the same class of employment and in the same district.”
3. In the light of subparagraphs (1) and (2) above and pursuant to section 11(5), HK$3,460 was taken as the Plaintiff’s monthly earnings at the time of the accident.

19. The above decision in the EC Application has been overruled by the Court of Appeal in CACV 202/2007 in which it was held that for the purpose of computing the monthly earnings of an employee under ECO, the court was entitled to take into account his average monthly earnings over the period of 12 months before the accident (albeit with different employers). According to the judgment of Mr. Justice Cheung, JA, for the purpose of section 11(2), income “earned by a person of similar earning capacity in the same grade employed in the same class of employment and in the same district” for 12 months prior to the accident should include the applicant’s own income during that period.

20. Although the Court of Appeal’s decision primarily focuses on the construction and operation of the relevant provisions of ECO (which are not directly relevant to the present claim), the Court of Appeal has come to a conclusion, as a finding of fact, that the Plaintiff’s average monthly income at the time of the accident was HK$12,000.

21. As the issue of the Plaintiff’s monthly income has been litigated between the same parties and finally determined by the Court of Appeal, there is no reason why I should not take HK$12,000 as the Plaintiff’s average monthly earnings at the time of the accident in this action (see *Wong Wang Sum v Lee Kam Engineering Co (A Firm) and Another*, unrep., HCPI 644/1995; and *Tsang Chin Keung v Employees Compensation Assistance Fund Board* (2003) 1 HKC 499).

22. In any event, for the purpose of the present claim, I am satisfied, on the basis of his evidence, that the Plaintiff was earning an average sum of HK$12,000 per month at the time of the accident.

23. Although the Plaintiff alleges that he has not been able to resume any gainful employment since the accident, the Plaintiff’s claim for loss of earnings is formulated on the basis that he should have been able to continue his pre-accident work after sick leave with some reduction in work efficiency and that a notional sum of HK$2,400 per month has been used to reflect such reduced efficiency. I agree that this is a sensible approach which is consistent with the relevant medical evidence.

24. In the premises, my assessment of the Plaintiff’s loss of earnings (on the basis that he should have been able to return to work in early November 2004) is as follows:-

1. Pre-assessment loss:-

HK$12,000 x 10 months (from 2 January 2004 to early November 2004) + (HK$2,400 x 45 months) (from early November 2004 to the date of this assessment)

= HK$228,000

1. Post-assessment loss:-

HK$2,400 x 12 x 8 (multiplier) = HK$230,400

25. It follows from the above assessment of the Plaintiff’s loss of earnings that his total loss of MPF should be HK$22,920 (i.e. HK$11,400 as pre-assessment loss and HK$11,520 as post-assessment loss).

Special damages

26. I allow the Plaintiff’s claim for special damages in the total sum of HK$8,150 (consisting of medical expenses in the sum of HK$2,350, travelling expenses in the sum of HK$800 and expenses for tonic food in the sum of HK$5,000).

**Deductions**

27. The Plaintiff is prepared to give credit for the employees’ compensation award in the total sum of HK$167,790.

**Summary of quantum**

28. The items of the Plaintiff’s claim as assessed above can be summarised as follows:-

* + 1. PSLA HK$200,000
    2. Pre-assessment loss of earnings HK$228,000
    3. Pre-assessment loss of MPF HK$ 11,400
    4. Post-assessment loss of earnings HK$230,400
    5. Post-assessment loss of MPF HK$ 11,520
    6. Special damages HK$ 8,150

SUBTOTAL: HK$689,470

Less

EC Award HK$167,790

TOTAL: HK$521,680

**Interest**

29. I award interest as follows:-

1. Interest on all pre-assessment special damages is to run from the date of accident to the date of this assessment at half the judgment rate per annum.
2. Interest on the award for general damages, namely, PSLA, is to run from the date of service of the writ until the date of this assessment at 2% per annum.
3. Interest after the date of this assessment is to run at the judgment rate until payment.

**Costs**

30. I make an order *nisi* that costs of the assessment of damages be paid by the 1st and 2nd Defendants to the Plaintiff, to be taxed if not agreed and that the Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.

# (Richard Khaw)

Deputy District Judge

Mr. Nick Lee, Legal Aid Counsel, Legal Aid Department, for the Plaintiff

1st Defendant: absent

2nd Defendant: absent