#### DCPI 1415/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1415 OF 2006

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| BETWEEN | CHOW KAI KIT (周啟傑) | Plaintiff |
|  | and |  |
|  | INTERNATIONAL PAPER MANUFACTURING & DISTRIBUTION LIMITED(國際紙業(香港)有限公司) | 1st Defendant |
|  | 馬金福 | 2nd Defendant |
|  | 李漢泉 | 3rd Defendant |

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##### Coram: His Honour Judge Thomas Au in Chambers

##### (open to public)

Date of Hearing: 17 October 2007

Date of Delivering Reasons for Decision: 17 October 2007

Date of Handing Down Reasons for Decision: 17 October 2007

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### REASONS FOR

### DECISION

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Introduction

1. This is the Plaintiff’s application for interlocutory judgment and interim payment for a reasonable sum against the 1st and 2nd Defendants.
2. At the hearing before me, Mr Chan, counsel for the Plaintiff, however indicated that the Plaintiff would not pursue his application for summary interlocutory judgment, and asked to have that part of the application withdrawn. I understand that Mr Chan only received late instruction to appear today.
3. I am now therefore only concerned with the application for interim payment.

The Plaintiff’s claim against the 1st and 2nd Defendants

1. The Plaintiff was employed by the 3rd Defendant.
2. In the course of carrying out his work under the employment, the Plaintiff suffered an accident and injury to his right index finger on 18 February 2004, when he was moving a cage of waste papers in the 1st Defendant’s workshop (“the Workshop”) in Kwai Chung.
3. The injury to the Plaintiff came as a result of a forklift truck (“the Forklift Truck”) hitting him. At that time, the Forklift Truck was driven by the 2nd Defendant, moving towards the cage of waste paper intending to lift and move it from a lorry and unload it at the Workshop.
4. The Plaintiff pleads and says that the 2nd Defendant was negligent in the way he manoeuvred the Forklift Truck which caused the accident. The Plaintiff also claims against the 1st Defendant for vicarious liability for the 2nd Defendant’s negligence. He further claims against the 1st Defendant for its breach of occupier’s liability and statutory duty under sections 2 and 3 of the Factories & Industrial Undertakings (Loadshifting machinery) Regulations (Cap 59G) in failing to ensure that the Forklift Truck was operated by a person holding a valid certificate. It is the Plaintiff’s case that the 2nd Defendant did not hold such a valid licence at the material time. This seems not to have been disputed by the 1st and 2nd Defendants.
5. As a result of the Accident, the Plaintiff’s right index finger was crushed and the tip of it was amputated with loss of the pulp exposing the distal phalanx. A revision amputation of the finger was done when he was hospitalized on the day of the Accident.
6. By way of the present action, the Plaintiff claims the 1st, 2nd and 3rd Defendants total damages in the sum of HK$760,049.50.
7. It is pertinent to note that the trial of the action is set down to commence in about one month’s time on 19 November 2007. The Plaintiff took out the present application by way of Summons on 24 September 2007, but apparently did not serve the same on the 1st and 2nd Defendants until 2 October 2007.
8. It is also noteworthy that:
9. The 3rd Defendant has not paid the Plaintiff the employees’ compensation award in the sum of HK$115,306.67 pursuant to an order made on 26 April 2006.
10. The Plaintiff says in his supporting affirmation that he has been under substantial financial pressure since the Accident.

The 1st and 2nd Defendants’ Defences

1. Other than accepting that the Plaintiff suffered the Accident and the injury to the right index finger, the 1st and 2nd Defendants put the Plaintiff to strict proof of all the material allegations, including the allegations of negligence, in support of the claim. Further, they plead that the accident was caused by the Plaintiff’s contributory negligence as well.
2. At paragraphs 5 and 6 of his witness statement, the 2nd Defendant says that before he started to move the Forklift Truck towards the place where the Plaintiff was with the cage of used papers, he shouted out loudly to inform the people present that he was moving the Forklift Truck. He then moved the Forklift Truck forward and raised the forklift. He felt a bump and came down to see what happened. He found the Plaintiff there, who told the 2nd Defendant that his right hand was hit.
3. In light of the witness statement, it appears at least to be part of the 1st and 2nd Defendants’ case that the Plaintiff was contributory negligent in not moving away from the passageway of the Forklift after he was alarmed of its imminent coming by the 2nd Defendant’s shout.

The present Interim payment application

1. Only O. 29 r. 11 (1)(c) is relevant to the present interim payment application.
2. O 29 r. 11(1)(c) provides that if it is satisfied that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent, the Court may, if it thinks fit and just, order interim payment in an amount not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account of any relevant contributory negligence.
3. Further, O 29 r 11(2)(a) provides that interim payment shall only be made in an action for personal injuries if it appears that the defendant is, *inter alia*, insured in respect of the plaintiff’s claim.
4. In the present case, there is no dispute that the 1st and 2nd Defendants are insured for the Plaintiff’s present claim, and thus O. 29 r 11(2)(a) is satisfied.
5. For O 29 r 11(1)(c), Mr Chan submits that, subject to the argument of contributory negligence, this is a simple case of accident where the 1st and 2nd Defendants are clearly negligent. His submissions are as follows: At the time of the Accident, the Plaintiff was standing in front of the Forklift Truck, necessarily required to be there to help to hook up the rope onto the forklift to enable it to lift the cage of waste papers. The 2nd Defendant was aware of that, but still manoeuvred the Forklift Truck in a way to hit the Plaintiff. In these circumstances, the 2nd Defendant must be negligent in the manner he drove the Forklift, of which the 1st Defendant is no doubt vicariously liable. The extent of contributory negligence (if any) on the part of the Plaintiff, even if taking the 2nd Defendant’s evidence to it highest, can only be very small and limited.
6. Mr Chan further submits that the apparent delay in the present application should not prevent the Court from exercising its discretion to grant interim payment. This is so because, firstly the Defendants (being insured) have not suffered any prejudice in the delay, and secondly, under the rule, the Plaintiff is entitled to make the application “at any time” after the writ was served on the 1st and 2nd Defendants.
7. Mr Wong, counsel for the 1st and 2nd Defendants, says he contests the application on 2 principal bases. One on the appropriateness to grant interim payment and the other on quantum.
8. On the question of the appropriateness to grant interim payment, Mr Wong submits that as a matter of practicality, the application should not be granted because the trial is only a month away, and it is thus more practicable to leave the matter to trial. It is also more practicable to leave it to trial because there are the uncertainties and questions of contributory negligence and apportionment of liability between the 1st and 2nd Defendants on one hand and the 3rd Defendant on the other hand, that need to be determined at trial. These questions would affect significantly the quantum of damages.
9. However, when pressed, Mr Wong fairly submits that:
10. On the face of the evidence and the claim as pleaded, it is likely that the 1st and 2nd Defendants would be liable for some damages at trial.
11. In the best-case scenario for the 1st and 2nd Defendants, the apportionment between them and the 3rd Defendant should be 50% and the Plaintiff’s contributory negligence should also be 50%. Thus, the 1st and 2nd Defendants’ should still be liable for 25% of the damages if they lose at trial.
12. For the question of quantum, Mr Wong says the court in considering granting interim payment should also take into account of (a) the fact that a substantial part of the claim for loss of pre-trial earnings in the sum of HK$88,000.00 in the form of sick leave should have been covered by the employees’ compensation award, (b) the potential possibility that the claim of HK$150,000.00 for PSLA may well be cut down at trial, and (c) the remaining chance of the Plaintiff’s not succeeding in his claim at all at trial or on appeal (if any), or the revision down of quantum of damages on appeal.

Discussions

1. In light of Mr Wong’s submissions as set out in paragraph 23(1) above, I accept Mr Chan’s submissions that on the face of the issues and evidence before me, and on a balance of probabilities, the Plaintiff is likely to recover some substantial (in the sense of not being insignificant) damages from the 1st and 2nd Defendants.
2. In the premises and coupled with the circumstances of the present case, including the fact that the Plaintiff has yet to receive the employees’ compensation from the 3rd Defendant, I accept that this is an appropriate case to order interim payment.
3. Also in light of Mr Wong’s submission on quantum above, and coupled with the fact that the 1st and 2nd Defendants have not put forward any positive case (in terms of pleading or evidence) in reply to the Plaintiff’s Statement of Damages, after making the necessary adjustments, I am of the view that an interim payment in the sum of HK$100,000 is appropriate in all the circumstances of the present case.

Conclusion

1. For the above reasons, I order that the 1st and 2nd Defendants do make interim payment to the Plaintiff in the sum of HK$100,000 within 14 days from today. The parties are at liberty to apply.

*Costs*

1. Although the Plaintiff is successful in his application for interim payment, having considered all the circumstances of the applications before me and counsels’ submissions, I have come to the conclusion that it is just and fair to make no order as to costs for both the summary judgment and interim payment applications in the Summons. My reasons can be briefly stated as follows.
2. Given that the Plaintiff only withdrew his application for summary judgment at the hearing, time and costs have been wasted by the 1st and 2nd Defendants in dealing with this part of the application. The Plaintiff should be required to pay the 1st and 2nd Defendants’ costs incurred and wasted.
3. At the same time, in relation to the interim payment application, although he is successful, the Plaintiff only for the first time indicated in Mr Chan’s skeleton submission filed the day before the hearing that he was seeking the sum in the region of HK$220,000. Mr Wong submits that had his clients (effectively the insurers) been given more time to consider this suggested quantum, the parties may be able to come to some offer or agreement on the quantum. However, given that the indication came so late in the day, his clients simply did not have sufficient time to consider the position to make any offer. They are thus left with no alternative but to contest the application today. In these circumstances, Mr Wong submits that the Plaintiff should not be entitled to his full costs under this application.
4. I believe Mr Wong’s submissions have some force. In the present day of case management, the Court encourages parties to behave reasonably with the aim to save costs and time. I agree that for the present case, with the aim of saving time and costs, a more reasonable way of conducting the present application is for the Plaintiff to have written and informed the 1st and 2nd Defendants well beforehand the amount of interim payment he was seeking to see if any favourable agreement could be reached between the parties.
5. In the premises and for the above reasons, by netting out the would have been costs liability under the two applications, I believe it is only just and fair to make no order as to costs for the Summons.
6. I also would like to thank counsel for their efficient and short submissions.

# (Thomas Au)

District Court Judge

Mr Louie CHAN instructed by Messrs Peter C.O. Wong & Associates

for Plaintiff

Mr Martin W.H. WONG instructed by Messrs Chong & Partners

for 1st & 2nd Defendants