DCPI 1850 OF 2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 1850 OF 2007**

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BWTWEEN

SIT SAI KIT Plaintiff

and

NG TAK WAH trading as WAH KEE

PLUMBING ENGINEERING COMPANY 1st Defendant

YUEN CHEONG PLUMBING & DRAINAGE

ENGINERING COMPANY LIMITED 2nd Defendant

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Coram : H. H. Judge YUNG, District Judge

Dates of Hearing : 25th July, 2008 & 28th July, 2008

# Date of Handing

Down of Judgment :22 Octoboer 2008

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## J U D G M E N T

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### Liability and Contributory Negligence

1. The Plaintiff is a young man. In 2004 he was injured while doing plumbing work in a construction site. His left little finger was crushed by a falling object from a pile of materials from which he wanted to retrieve an accessory part for use in the installation work he was doing .The 1st Defendant was his employer and together with the 2nd Defendant were the concurrent occupier of the site. It is not in dispute that both Defendants would be liable if the stack of materials were piled up in the way described by the Plaintiff.
2. The Plaintiff himself was the only witness of the accident. He described the pile of materials and the manner in which the pile was dangerous. The Defendants called Mr. Ng purportedly to discredit the evidence of the Plaintiff about the state of the pile of materials. He gave two statements. In his first statement, it does not appear that he had taken a look at the pile of the materials right after the accident, or taken an interest to see if the pile of materials was in fact not properly stacked. All he could say he was that he remembered this and that. It was not clear what time frame he was referring to. He admitted in that statement the project was near its end and not many accessory parts should be left. I am not satisfied that he had any clear personal knowledge of the state of the pile of materials that the Plaintiff referred to.
3. In his supplementary statement filed specifically for the purpose of rebutting the Plaintiff’s description of how the pile of materials was packed, he did not do any better than in his first statement, in so far as personal knowledge is concerned. He prayed in aid of a labour department inspection the day before the accident. He said all was well for the inspection day. Incidentally, he said that the 1st defendant made a point to ask workers to stack up things properly. For all we know things could be again in a mess as described by the Plaintiff after the labour inspectors had gone.
4. As to the issue of in what state of the pile of materials, there is no reliable evidence to rebut the Plaintiff’s version. It boils down to whether the Plaintiff’s evidence is reliable. In this respect his credibility should be looked at in other respects the Defendants took issue with.
5. The Plaintiff alleged that the hard object that fell on his finger causing the injury was a socket. He was cross-examined at length on it. The defence utilised the different descriptions documented. These so called discrepancies were satisfactorily explained by the Plaintiff. I find these discrepancies are understandable and were results of the Plaintiff trying to simplify the description of an object with a technical name “socket” to person not in the plumbing trade. I do not find the Plaintiff shaken in cross-examination in this respect.
6. The other point the defence wants to make is the manner in which the Plaintiff retrieved the object. Much reliance was placed on the words ‘拖出來’ when he described his action to the defence witness. I had the impression what he meant was to describe the overall action of retrieving the object in the tangle of other objects. He did not mean the movement he was taking right before the socket fell upon his finger. The defence witness was in court hearing the Plaintiff’s evidence of how he retrieved the object and got injured. He confirmed that to his understanding that the Plaintiff’s descriptions in court of his action is not inconsistent with what the words ‘拖出來’
7. When the Plaintiff described his injury and suffering, he was quite straightforward without exhibiting any tendency to exaggeration. I find the Plaintiff a reliable witness and I accept his evidence. Having said that I did not lose sight of the fact he was unable to tell exactly how the object fell. This clearly shows some kind of oversight or negligence of his part. It is my view that there is contributory negligence on his part. 5% is the appropriate assessment of his negligence in failing to take care of himself in these circumstances.

#### Damages

##### Pain, Suffering and Loss of Amenities

1. The Plaintiff suffered crush injury resulting in a fracture on its left little finger. The consequent medical treatments and the recovery spanned a period over two years including four operations, 15 sessions of various kinds of physiotherapy treatment. At the end the Plaintiff suffered permanent impairment of his little finger resulting in some loss of the power of hand grip.
2. The appropriate awards for pain, suffering and loss of amenities assessed by counsel for the Plaintiff and counsel for the Defendants are respectively, $200,000 and $100,000. Counsel for the Plaintiff cited several cases for comparison in support of his submission. Counsel for the Defendants was content in arguing his case generally stressing on the nature of the injury, resultant impairment. I presumed he was also relying on cases cited on the Plaintiff’s behalf. Looking at the cases cited to me, I am inclined to accept the submission by the counsel for the Plaintiff. I am of the view that his assessment is reasonable and in line with the cases cited to me.

##### Pre-Trial Loss of Earnings

1. At the time of accident, the Plaintiff was earning as a plumber a daily wage of $450, or monthly $11,700. After the sick leave, the Plaintiff carried on working for the 1st Defendants for 18 days, earning in total $8,100, before the 1st defendant terminated his employment.
2. Counsel for the Defendant quite fairly and wisely did not dispute that the daily wages the Plaintiff could have earned as a plumbing worker was exactly what he was earning, namely $450. I also find it a reasonable to assess the pre-trial loss of earnings at $450 a day as submitted by the counsel for the Plaintiff.
3. The sick leave period is supported by medical evidence and there is no dispute. I accept that it is reasonable for the Plaintiff to be compensated for the loss of earnings in this period.
4. The Plaintiff was unable to find work in his old trade in plumbing work and at the end he settled in a delivery driver/worker job. The defence did not seriously dispute that the Plaintiff had reasonable done what he could in looking for job during the pre-trial period to mitigate his loss. This is also my finding.
5. What the defence disputed is the number of days the Defendant would have worked in a month. Counsel for the Plaintiff submitted it should be 26 days. This is the usual estimate unless there are grounds to suggest somehow the Plaintiff could not have worked 26 days. The defence suggested 20 days a month should be adopted. Their counsel pointed to Form 2 and the List Of Earnings. In Form 2 the employer also estimated the average monthly earnings at $11,700 adopting the usual average of 26 days a month. The Form 2 does not help the defence in this point. The list of earnings only covers the month of September, the same month when the Plaintiff injured himself. It was not explored why the Plaintiff only worked for about 20 days in that month. The real issue in this respect is how many days in a month the Defendant would have worked as a plumbing worker if he had not been injured. To rely on the work record of one month is not safe.
6. Because of the work record of the Plaintiff, I can see two factors which are relevant in assessing the number of days of work he would have done in a month, the job opportunity in the field of plumbing work, and the diligence of the Plaintiff. Any suggestion that there was lack of employment opportunity is not supported by the assessment in the employer’s Form 2 or in the List of Earnings. It was noted many other workers worked more than 26 days during the same month. There is nothing to suggest that the Plaintiff would not have worked more than 26 days. On the contrary he had found work paid on monthly basis, very likely requiring him to work more than 5 days a week.
7. I find that pre-trial earning the Plaintiff could have made but for the injury should be assessed at $450 a day, 26 days a month. In the premises, the pre-trial loss of earnings is what counsel for the Plaintiff submitted, namely, $372,910

##### Future Loss of Earnings

1. The Plaintiff is 25 years old and I accept that a multiplier of 15 is appropriate. The future loss of earnings that I award is therefore $432,000

##### Loss of Mandatory Provident Fund

1. The defence did not dispute that the Plaintiff is entitled to be compensated for the reduction in contributions by his employers brought about by the loss of earnings. It is reasonable to adopt the current employers’ requirement of 5% contribution. The loss under this head, past and future, is 40,245.50

##### Loss of Earning Capacity

1. The defence argued that the Plaintiff should be compensated for his loss of capacity but not for future loss of earnings. The defence suggested a sum of $100,000 is appropriate.
2. The purpose of this claim is to fully compensate the Plaintiff for his injury and loss. I find that it is unrealistic to expect the Plaintiff to return to his old trade. I accept the evidence of the experts in this respect. Looking at the education and training of the Plaintiff, it is more than likely that he could not follow a career in which he would not be disadvantaged by the impairment of his little finger. The defence did not suggest any such job or career.
3. For these reasons I am of view that the Plaintiff should be awarded a sum under this head. $100,000 is appropriate.

##### Future Medical Expenses and Special Damages

1. These items were not seriously contested. I find all of them reasonable. I award $16,500 for future medical expenses and $10,235 for special damages.

##### Award and Interest and Costs

1. For pain, suffering and loss of amenities I award a total sum of $190,000 ($200,000($100,000+$100,000)x0.95) and with interest at 2% from date of writ to date of judgment.
2. For Future Loss of Earnings, Loss of Mandatory Provident Fund, and Future Medical Expenses, I award a total sum of $448,633($432,000+$40,245.50+$16,500) x 0.95
3. For Loss of Earning Capacity I award a sum of $95,000 ($100,000 x 0.95)
4. For Pre-Trial Loss of Earnings, and Special Damages I award a total sum of$369,939.50 (($372,910+$16,500) x 0.95) and with interest at half judgment rate from date of accident to date of judgment.
5. Judgment be entered for the Plaintiff against both Defendants in the sum of $1,103572.35, and with interest on $190,000 thereof at 2% from the date of writ to date of judgment and with interest on a further sum $369,939.50 thereof at half judgment rate from date of accident and to date of judgment.
6. It is further ordered that the Plaintiff do give credit for the ECC award of $278,406. There be an order nisi for costs in favour of the Plaintiff against both Defendants with Certificate for Counsel.

(H. H. Judge YUNG)

District Judge

Mr. Andy Hung, instructed by M/S Au Yeung, Cheng, Ho & Tin Assigned by D.L.A. for the Plaintiff.

Mr. Victor Gidwani, instructed by M/S Chong & Partners for D1 & D2.