#### DCPI 2457/2011

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2457 OF 2011

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| BETWEEN | IP WING CHEONG | Plaintiff |
|  | and |  |
|  | KAM LAM trading as KONG FUNG DECORATION WORKS | Defendant |
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Coram: Deputy District Judge L C Cheng in court

Date of Hearing: 25-26 June 2015

Date of Handing Down Judgment: 30 July 2015

JUDGMENT

*Introduction*

1. The plaintiff’s claim is for damages for personal injury, loss and damages arising out of an accident which happened on 13 April 2010 at Room 2505, Block D, Cheung Wo Court, Kwun Tong, Kowloon (“the Site”).

*Application for adjournment*

1. On 24 March 2015, the learned master set this case down for trial on 25 June 2015 with 26 June 2015 reserved.
2. By a letter dated 5 June 2015 filed to this court with a copy to the solicitor for the plaintiff, Mr Kam, the defendant, applied for an adjournment of this trial by reason of illness. In the letter, he claimed that he was required to attend the psychiatric and clinical psychology department of the Pamela Youde Nethersole Eastern Hospital (“PYNE Hospital”) frequently. He further claimed that he was unable to attend the trial because of illness but had no money to ask the doctor to write a consultation note. In support of his application, he attached a number of appointment slips issued by the PYNE Hospital. None of those appointment slips, however, showed that he needed to see a doctor on the scheduled trial dates.
3. By a letter dated 16 June 2015, solicitor for the plaintiff wrote to Mr Kam, with copy to this court, objecting the application for adjournment.
4. On 17 June 2015, His Honour Judge Andrew Li directed that if Mr Kam intended to apply for adjournment, he was required to submit medical evidence before the trial date to prove that he was physically or mentally unable to attend trial, otherwise, the trial would proceed as scheduled.
5. Shortly before the trial, Mr Kam wrote again to this court asking for adjournment by the same reason. I directed him to refer to the direction previously given by His Honour Judge Andrew Li.
6. In any event, no medical evidence was submitted to this court prior to the trial date to prove that Mr Kam was physically or mentally unfit to attend trial on the scheduled trial dates.
7. On 25 June 2015, Mr Kam appeared in court. Before commencement of the trial, he claimed that he could not breathe and requested to call for an ambulance. I was not in a position to ascertain his physical and mental condition and therefore acceded to his request. At that juncture, I had no idea if he would be admitted to hospital or not and did not have a crystal ball to tell if he could attend trial on 26 June 2015. I therefore decided to adjourn the case to 26 June 2015 and gave various directions including that in case Mr Kam realized that he could not attend trial on 26 June 2015, he was required to inform this court and the solicitor for the plaintiff by 5:00pm over phone. Case adjourned. Then, he was taken by the ambulance men and presumably taken to a nearby hospital.
8. At about 4:00pm on the same day, Mr Kam phoned my clerk and said that he would not attend court on 26 June 2015. He did not expressly state that if he was admitted to hospital or not. He simply said that he needed to see a doctor on 26 June 2015. He said that he did not want to further drag on the case and decided not to attend the trial. He claimed that he understood the consequence.
9. On 26 June 2015, Mr Kam was absent. Mr Wong, counsel for the plaintiff, submitted that the case should proceed to trial. I agreed and said that I would give my reason together with the judgment. These are my reasons.
10. In *Law Yin Pok Bosco, a minor v Dr Chan Yee Shing*, HCMP 2256/2012 (unreported, 2 November 2012), it was held by Fok JA (as he then was) that :-

“9. In the ordinary course of events, milestone dates such as the dates fixed for the trial of an action must, on occasion, yield to the vicissitudes of life.  The illness of a party or a necessary and important witness may, depending on the circumstances of the case, justify vacating and re-fixing the trial dates.  This is simply a manifestation of the principle recognised in *Dick v Piller* [1943] 1 KB 497, the headnote of which reads:

“When a witness in, or a fortiori a party to, an action in a county court is alleged to be prevented by illness from attending the court for a hearing of the case and the judge is satisfied of the fact of his illness and of the materiality and importance of his evidence and that the granting of an adjournment will not cause an injustice to the other party which cannot be reduced by costs, it is the duty of the judge to grant an adjournment, it may be on terms, and failure on his part to do so constitutes a miscarriage of justice which necessarily involves an error of law on which an appeal may be founded.”

10. By way of example of the operation of the principle: see, as regards a material witness of fact, *Fairwing Investment Limited v China and Canton (Properties) Company Limited & Anor*, unrep., HCA 2137/2004, 16 June 2009; as regards an expert witness, *Joyce & Anor v King*, unrep., Times Law Reports, 13 July 1987; and, as regards a litigant, *Teinaz v Wandsworth London Borough Council* [2002] ICR 1471.

11. However, in order for an adjournment to be granted on this basis, the court is entitled to be satisfied that the inability of the litigant to be present is genuine and the onus is on the applicant for an adjournment to prove the need for such an adjournment: *Teinaz v Wandsworth London Borough Council* at §21.”

1. There was no medical evidence to substantiate that Mr Kam was unable to attend court or to conduct the trial due to any physical or mental illness. In fact, he did attend court on 25 June 2015 but the trial was adjourned due to his alleged “breathing problem”.
2. He did phone to my clerk by 4:00pm on the same day but did not apply for further adjournment. He gave no details of his alleged illness which caused him unable to breathe in court. He did not specify the result of the diagnosis after he was presumably taken to the hospital.
3. I have to consider the substance and timing of the application in a wider context of the litigation as a whole. Mr Kam applied for adjournment just 20 days prior to the scheduled trial date. He made the same application shortly before trial. His application was not refused right away despite all the appointment slips issued by PYNE Hospital failed to substantiate why Mr Kam could not attend court as scheduled. According to the direction given by His Honour Judge Andrew Li, Mr Kam could apply for adjournment upon medical proof.
4. When Mr Kam attended court on 25 June 2015, he gave no medical proof. He only claimed that he suffered from breathing problem.
5. Taking the whole picture into account, I find that Mr Kam decided to be absent from the trial after realizing that no adjournment would be granted without medical proof. There was simply no evidence upon which I could consider any further adjournment. He did not apply for further adjournment over the phone on 25 June 2015. Obviously, he elected to be absent and realized its consequence. It would not be fair to the plaintiff if the trial could not proceed as scheduled. I therefore decided that the trial started on 26 June 2015.

*The trial*

1. The pleadings and the plaintiff’s written opening were all in English but the witness statements were in Chinese. After seeking the view of Mr Wong, I allowed that the submission in English with evidence in Punti.
2. Mr Ip, the plaintiff, was the only witness giving evidence in court. Basically, he confirmed the content of his witness statement and gave further evidence on his earnings after the accident and also the present condition of his left hand fingers.

*The plaintiff’s evidence*

1. The evidence of Mr Ip was not subject to challenge. Still, during trial, he frankly admitted matters that were not in his favor, particularly he said that after the accident, Mr Kam continued to employ him until about mid January 2011. His injuries and treatments were supported by documentary proof. I accept his evidence.

*The accident*

1. I find that Mr Ip was employed by Mr Kam as a casual worker at the Site. On 13 April 2010, Mr Ip was instructed to remove old water pipe and install new ones. As the old water pipe was installed beneath a wooden ceiling, Mr Ip had to cut an opening at the wooden ceiling. He was provided a portable electric circular saw (“the Saw”) by Mr Kam Siu, the younger brother of Mr Kam, who served as the supervisor at the Site. The Saw was not equipped with any proper guard to cover its top.
2. When Mr Ip carried out his work, the Saw hit a nail of the wooden ceiling. Then, the Saw rebounded towards the left hand of Mr Ip causing injuries to his left hand fingers and palm.

*Injuries and treatments*

1. He went to hospital. Emergency operation was performed on 13 April 2010. Suture of index, middle and ring finger was performed. The little finger flexor tendon was repaired. The digital nerves and arteries were beyond repair. He was discharged on 16 April 2010. Then, he received 9 sessions of occupational therapy training from 21 June 2010 to 20 August 2010. On 1 September 2010, he was re-admitted for tenolysis and full thickness skin graft for his left little finger flexion contracture. The skin graft was taken from his groin. He was discharged on 2 September 2010. On 21 September 2010, he was admitted again for debridement due to an infection of his skin graft. He was discharged on 22 September 2010.
2. He was given a total of 105 days sick leave.

*Earnings*

1. Since October 2009, he worked as a casual worker for Mr Kam. His daily wages was $500 and he worked for appropriately 26 days per month. His monthly income was $13,000.

*Liability*

1. Mr Wong submitted that the issue of the relationship between Mr Ip and Mr Kam had been decided in the employees’ compensation case commenced by Mr Ip against Mr Kam in DCEC 1023/2011 (“the EC Case”). I agree. Insofar as the claims in the present case raised issues which had been raised and formed parts of the decision in the EC Case, it is an abuse of process to raise those issues again. It had been decided in the EC Case that Mr Kam was the employer of Mr Ip at the material time.
2. In any event, even without the decision in the EC Case, I accept the evidence of Mr Ip. Accordingly, I find that he was employed by Mr Kam at the time of the accident at a monthly salary of $13,000.
3. Mr Wong submitted that in the circumstance, Mr Kam was liable at least for :-
4. Negligent as an employer in providing a system of work or equipment to Mr Ip;
5. In breach of statutory duties under Regulations 10(4) and 20(1) of the Factories and Industrial Undertakings (Woodworking Machinery) Regulations of the Factories and Industrial Undertakings Ordinance, Cap 59G (“the Regulation”); and
6. In breach of the implied term of the contract of employment.
7. According to the Regulation, the top of a circular saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw furthest from the fence.

1. I accept that the top of the Saw was not covered with any proper guard. That was in breach of the Regulation and Mr Kam was therefore in breach of the statutory duty. Furthermore, it was apparent that the Saw was dangerous because it was unguarded and no safety feature was installed. Mr Kam was clearly in breach of the implied terms of contract of service. In providing the Saw to Mr Ip, Mr Kam owed a duty to Mr Ip and was in breach of that duty of care by allowing the Saw to be used in circumstances where it was obviously unsafe. I therefore accept Mr Wong’s submission and find that Mr Kam was liable in this case.
2. Contributory negligent was pleaded. Mr Wong submitted that the circumstance in this case failed to justify that Mr Ip was contributory negligent. He emphasized that Mr Ip was provided the Saw which was without protection. Mr Ip was given only one saw on that day. So, Mr Ip had no option but to use the Saw. Mr Wong also pointed out that in some circumstance, a worker might, due to convenience, take away the protective guard and that amounted to contributory negligent. In the present case, however, the Saw was simply provided without any protective guard and Mr Ip could not be held liable for any contributory negligence.
3. Taking all evidence into account, I accept the submission of Mr Wong. I think it was unrealistic to suggest that Mr Ip should have insisted on the protective guard, if any at the Site, being put back before using the Saw. In *Wong Chi Shing v Argos Engineering & Heavy Industries Co Ltd & ors,* [1993] 1 HKC 598, the plaintiff was operating a shearing machine, which was unguarded, to cut iron plates in the course of employment and an accident happened. Kaplan J, in deciding that there was no contributory negligence, said at p615E:-

“The relevant persons were well aware that this machine was unguarded, and thus it was dangerous, and if it suggested that the plaintiff should have insisted on the guard being put back before using the machine, this again, is unrealistic. Even if the plaintiff had reported this matter, I do not think anything would have flowed from that.”

1. I find that Mr Ip was not contributory negligent for the accident.

*Quantum of damages*

1. Mr Ip was born on 10 February 1953 and was 57 years old at the time of the accident. He is now 62 years old. His monthly income before the accident was $13,000. Now, he was able to secure a job with a higher monthly salary. He said that up to the trial date, apart from the thumb, all fingers in his left hand still suffered from different level of numbness. Also, he could not stretch his little finger to its full extent. He could not bend his ring finger in full. Because of the medical condition of his left fingers, he cannot now play darts which he loved to play prior to the accident.

*PSLA*

1. For PSLA, Mr Wong submitted a range of $250,000 to $350,000 and cited a number of cases in support. In *Tsui Kim Ming v Charter Form Co Ltd,* HCPI 681/2001 (unreported, 29 October 2002), the plaintiff suffered from 4 cm laceration over the dosal side of the left index finger, a deep cut of extensor tendor and fractures of proximal and middle phalanges of left index finger. PSLA was awarded at $350,000.
2. In *Chung Tat Ho v Au Hoi Lam Sub-contractor Ltd,* HCPI 472/2003 (unreported, 6 September 2004), the plaintiff suffered from amputation above the proximal phalanx of the left index finger. Laceration over the middle finger was fully recovered at the time of assessment. PSLA was assessed at $350,000.
3. In *Yiu Pau Yau v Co-ray Design & Construction Ltd,* DCPI 864/2006 (unreported, 3 May 2007), the plaintiff suffered from complete cut of flexor digitorum profundus tendon of left index finger, radial and ulna digital nerve and ulna slip of the flexor digitorum superficialis tenderness and partial sensory loss on left index finger. PSLA was assessed at $200,000.
4. Each case must be decided on its own fact. Considering the authorities cited and having regard to the condition of Mr Ip, I find that Mr Ip’s case was not as serious as *Tsui Kim Ming* and *Chung Tat Ho*, but more serious than *Yiu Pau Yau.* A fair and reasonable amount of PSLA should be $250,000.

*Pre-trial loss of earning*

1. In the witness box, Mr Ip said that he continued to work for Mr Kam during the sick leave period. He further added that in fact he worked for him until about mid January 2011 and was paid in full. He also, without hiding, said that due to personal reason, he did not work from 18 August 2012 to 18 October 2012. Since 19 October 2012, he was able to secure a stable job at $16,000 per month.
2. Mr Wong, in his final submission, fairly conceded that the loss of earnings should only be calculated from mid January 2011 until mid August 2012.
3. I accept Mr Ip had tried to look for various works before securing a stable job from 19 October 2012 onwards. From mid January 2011 until 18 August 2012, ie, for 19 months, his total earnings were $196,310. I accept that but for the accident, he could have earned $13,000 per month as a general worker. The pre-trial loss of earnings is therefore :-

($13,000 x 19 months) - $196,310 = $50,690

*Post trial loss of earning*

1. In this case, there was no loss of future earnings because Mr Ip was able to secure a job with a monthly salary more than he earned before the accident.

*Loss of earning capacity*

1. For loss of earning capacity, Mr Wong referred me to the well known decision by Browne LJ in *Moeliker v Reyolle & Co* [1977] 1 WLR 132 (CA) 132 at 140B:-

“This head of damage generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job.”

1. I accept the present condition of the left hand fingers of Mr Ip will cause him disadvantage in looking for another job if he lose his present employment. Mr Wong suggested a sum of $50,000. I agree that is a fair and reasonable sum.

*Other special damages*

1. According to the pleadings, Mr Kam agreed the medical expenses of $2,000 and traveling expenses of $500. I allow these sums.
2. In the witness box, Mr Ip said that his mother prepared some tonic food like pseudo-ginseng (田七) for him. In the absence of justification and receipt for the expenses of tonic food, I will not allow any award for it.

*Summary*

1. In summary, Mr Ip is entitled to the following compensation against Mr Kam:-

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(A) PSLA $250,000

(B) Pre-trial loss of earnings 50,690

(C) Loss of earning capacity 50,000

(D) Future loss of earnings nil

(E) Special damages $2,500

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Total : $353,190

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1. Credit should be given to the sum of the employees’ compensation awarded. So, $71,600 should be deducted. Judgment should be entered for Mr Ip against Mr Kam for :-

$353,190 - $ 71,600 = $281,590

*Interest*

1. There will be interest on general damages at 2% per annum from date of writ to the date of this judgment and on special damages at half judgment rate from date of accident to the date of this judgment and thereafter at judgment rate until satisfaction.

*Costs*

1. Costs follows event. There will be an order *nisi* against the defendant to pay costs of this action (include any cost reserved) to the plaintiff to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs be taxed with the Legal Aid Regulation. The order *nisi* for costs shall become absolute after 14 days hereof unless a party has applied to the court for varying the order.

*Other*

1. This judgment is in English and the defendant can contact my clerk for arrangement of interpretation, if needed. Last but not the least, I thank Mr Wong for his assistance in this case.

L C Cheng

Deputy District Judge

Mr Peter K C Wong, instructed by K Y Woo & Co for the plaintiff

The defendant was not represented and did not appear