## 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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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

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: Deputy District Judge Eddie Yip in Court

Date of Hearing: 19-21 November 2007

Date of Handing Down of Judgment: 3 December 2007

**JUDGMENT**

# Background

1. The Plaintiff was the 3rd Defendant’s employee. He was instructed to deliver some waste paper to the 1st Defendant’s premises.

The 1st Defendant was a dealer of waste paper. The 2nd Defendant’s was its employee, who was instructed to drive a forklift-truck. In the course of work, the 2nd Defendant lost control of the fork-lift truck, which hit the Plaintiff’s finger. The Plaintiff suffered injury and loss of earnings.

2. The Plaintiff was awarded $115,306.67 against the 3rd Defendant in DCEC 210/2006. The Plaintiff has just withdrawn the present action against the 3rd Defendant. The 1st and the 2nd Defendants has agreed not to seek any contribution and indemnity from the 3rd Defendant. The present judgment shall focus on the Plaintiff’s claim against the 1st and the 2nd Defendants.

3. I shall refer to the 1st and the 2nd Defendants as “the Defendants” unless the context dictates otherwise. There are 3 document bundles, A, B and C, for this trial. Take an example, “A34” means page 34 of Bundle A.

**The Plaintiff’s claim**

4. The Plaintiff originally claimed, but subsequently on 19 November 2007 abandoned, the item of loss of earning capacity $69,000.00.

The remaining claim is $856,685.00 (i.e., $925,685.00 – $69,000.00, at A35, A33 para. 15), which comprises:

1. Pain, suffering and loss of amenities (“PSLA”) $220,000.00 (A34 para. 16);
2. Pre-trial loss of earnings $223,700.00 (A31-32 para.9A);
3. Pre-trial loss of mandatory provident fund (“MPF”) $11,185.00 (A32 para. 9B);
4. Loss of future earnings $379,800.00 (A33 para. 12);
5. Loss of future MPF $18,990.00 (A33 para. 13);
6. Medical expenses $2,790.00 (A32 para. 9C);
7. Traveling expenses $220.00 (A32 para. 9D);
8. Interest (A34 para. 17-18);
9. Costs (A27).

**The Defence**

5. Both contributory negligence and quantum are in issue.

**The Plaintiff’s evidence**

6. By consent, the Plaintiff’s written statement [A135-137] forms part of his evidence-in-chief.

7. He was born on 31 October 1975. Since 1st February 2004, he was employed by the 3rd Defendant as a delivery worker. On 18 February 2004 at about 3 p.m., the 3rd Defendant instructed him to deliver some waste paper to the 1st Defendant. The 1st Defendant was a dealer of waste paper. The 2nd Defendant was its employee, who drove a forklift-truck.

8. He arrived the 1st Defendant’s premises with a colleague in a lorry. He tied a rope to a cage loaded with waste paper. He held the head of the rope at waist level for the 2nd Defendant to drive up to take it up and lift up the cage. The 2nd Defendant drove the forklift-truck forward at a high speed but failed to stop in time. The Plaintiff’s right index finger was caught between the fork and the beam of the cage. He suffered profuse bleeding. He was sent to the hospital. About ½ inch of his fingertip was removed. He was given sick leave and medical treatments until 12 October 2004. On 13 October 2004, he resumed work with a lower income. He was right-handed. He suffered residual weakness and pain of the finger. He could not participate in snooker and badminton. He lost some friends and a close girlfriend.

9. His earnings were as follows:

Date Event Earnings@ month Duration

18 Feb. 04 Injury $11,500 ---

18 Feb. 04 Sick leave $0 7 + months

- 12 Oct. 04

13 Oct. 04 night job $5,000 7 + months

- 31 May 05

1 Jun. 05 day job $13,500 8 months

- 31 Jan. 06 + night job

1 Feb. 06 day job $8,500 5 months

- 30 Jun. 06

1 Jul. 06 day job $9,200 12 months

- 30 Jun. 07

1 Jul. 07 day job $9,390 4 + months

- 21 Nov. 07

(Trial date)

10. At the time of the accident, he was 28 years old. At trial, he is 32 years old and single.

**The Defendants’ evidence**

11. The Defendants do not give evidence or call any witnesses.

**This Court’s findings**

12. I have considered both counsel’s full written submissions. I shall deal with such in due course.

**On the Plaintiff’s evidence**

13. I start with a point raised by the Plaintiff on the Defendants’ pleadings. The Plaintiff’s counsel submits (in para. 21 of Closing Submissions) that the Defendants have failed to specifically plead the issue of mitigation of loss on the part of the Plaintiff. The Defendants’ counsel then applies for an amendment of the defence pleadings.

14. The Plaintiff’s own case is that after sick leave, he had worked 2 jobs (earning more than before the accident) for some months but then worked only 1 job (earning less than before the accident). This state of events cries out for an explanation as he is claiming loss of earnings resulting from a decision to work only 1 job. The Plaintiff has to prove that the reason was injury-related. I do not think that the Defendants have to plead or prove the negative based on, say, a non-injury-related reason. The Plaintiffi’s accusation is groundless. There is no need to amend the defence pleadings.

15. Only a very general case of contributory negligence is put to the Plaintiff, who denies it. The Defendants are unable to challenge the Plaintiff’s evidence here. There is no evidence of contributory negligence. Liability wise, I find the Defendants fully liable to the Plaintiff. Quantum wise, however, the Plaintiff’s evidence, however, is challenged by the Defendants. I shall deal with such in due course.

**PSLA**

16. The Plaintiff originally claimed $150,000.00 in his Statement of Damages, dated 23 October 2006 [A28.5], but subsequently revised it to $220,000.00 in his Revised Statement of Damages, dated 7 November 2007 [A34]. The Plaintiff’s solicitors have somehow not included the Statement of Damages in the Trial Bundle for this Court. Owing to the injury, he stopped his favourite sport of badminton and snooker. He lost some friends and a close girlfriend. The Defendants argue that it should not exceed $100,000.00 as the Plaintiff’s injury was far below the “serious injury” category as set out in *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657.

17. The Plaintiff cites the following cases:

1. In *Yiu Pau Pau v Co-ray Design & Construction Limited* DCPI 864/2006, the plaintiff worked as a carpenter. His left index finger was cut by the blade of an electric trimmer machine. He was left with residual weakness and stiffness of his left index finger. He was awarded $200,00.00;
2. In *Wong Wing Sun v Chan Man Kin* HCPI 902/2002, the plaintiff was a professional driver. He sustained injuries in a traffic accident. He suffered head injury with amnesia, laceration at right elbow, right knee and nose, abrasion on both legs and right ankle fracture. He suffered residual weakness and stiffness of his right ankle. He was awarded $220,000.00;
3. In *Leung Lai Yin v Yeung Kei Chi* HCPI 317/1999, the plaintiff worked as a carpenter. He lost balance. His left hand was cut by an electric circular saw blade mounted on a saw bench. His left index and ring fingers were partly amputated. His left middle finger was amputated. He was right-handed. He was awarded $400,000.00;
4. In *Chow Cheung Ching v Right Base Construction and Engineering Co. Ltd.* [2002] 2 HKLRD 738, the plaintiff was an odd-job worker at the construction site. He lost balance. His left index and middle fingers were fractured and his left second toe was cut. He suffered residual numbness and stiffness of the index finger, deformity, pain and stiffness of the middle finger, and pain over the base of the toe, which had to be amputated. He was awarded $540,000.00.

18. The Defendants’ counsel cites the following cases:

1. In *Lee Tsz Kan v Climax Paper Convertors Limited* HCPI 504/2003, the plaintiff was an electrical technician. He sprained his right thumb when operating a vacuum cleaner. There was no residual problem. He was awarded $50,000.00;
2. In *Khan Sujad v Ho Ho Kwong* DCPI 339/2004, the plaintiff was an odd-job worker at the construction site. His left thumb was cut by an electric saw. He suffered residual weakness and stiffness of his left thumb. He was awarded $100,000.00;
3. In *Ho Shu Yau v Lo Siu Ling* HCPI 1336/2000, the plaintiff was a worker at the construction site. His left right fingertip, 0.7 cm, was cut off by a metal pipe that he was helping to fix. He was right-handed. He suffered residual pain and stiffness of his finger joint. He was awarded $120,000.00;
4. In *Ng Tat Ping v Cho Shui Leung* HCPI 646/2000, the plaintiff was an electrician apprentice. His left middle and ring fingers were cut by the metal sheets that he was carrying. He suffered residual weakness and stiffness of those fingers. He was awarded $150,000.00;
5. In *Chung Tat Ho v Au Hoi Lam Sub-contractor Ltd & Anor.* HCPI 472/2003, the plaintiff was a formworker at a construction site. His left fingers were cut by a hand held rotary saw when he was cutting sheets of plywood. The middle finger was lacerated but fully recovered. However, the left index finger’s distal and intermediate phalanxes had to be amputated. He was right-handed. He was awarded $350,000.00;
6. *Leung Lai Yin v Yeung Kei Chi & Anor.* (also cited by the Plaintiff).

19. I regard an award of $150,000.00 appropriate.

**Pre-trial loss of earnings (and MPF) from 19 February to 12 October 2004**

20. The Defendants do not dispute that the sick leave taken was reasonable and necessary. His pre-accident income from working for the 3rd Defendant was $11,500.00 per month. During this period, he was given $12,000.00 by Waihong Environmental Services Ltd. (“Waihong”), his previous employer. He agrees that to have this deducted from his loss of earnings. I shall allow the sum of $77,058.75, which comprises:

1. $4,107.14 (i.e., $11,500.00 x 10/28, from 19 to 28 February 2004);
2. $80,500.00 (i.e., $11,500.00 x 7, in the 7 months from 1 March to 30 September 2004);
3. $4,451.61 (i.e., $11,500.00 x 12/31, from 1 to 12 October 2004);
4. *Less: Credit for Waihong’s $12,000.00*.

21. The corresponding loss in MPF would be $3,852.94 (i.e., $77,058.75 x 5%). I shall allow this sum.

**Pre-trial loss of earnings (and MPF) from 13 October 2004 to 31 May 2005**

22. There is no evidence to challenge his evidence that he could only get 1 job of 5,000.00 per month (i.e., a night job cleaning for Waihong) from 13 October 2004 to 31 May 2005. I accept his evidence here. I shall allow the sum of $48,225.81, which comprises:

1. $2,725.81 [i.e., ($11,500.000 – $5,000.00) x 13/31, from 13 to 31 October 2004];
2. $45,500.00 [i.e., ($11,500.00 – $5,000.00) x 7, in the 7 months from 1 November 2004 to 31 May 2005];

23. The corresponding loss in MPF would be $2,411.29 (i.e., $48,225.81 x 5%). I shall allow this sum.

**Pre-trial loss of earnings (and MPF) from 1 June 2005 to 31 January 2006**

24. According to the Revised Statement of Damages [A30 para. 5 and A31], the Plaintiff had taken a day job on top of the night job. The day job gave a salary of $8,500.00 per month. He has been doing the same job up to the present date of trial. When cross-examined, he reveals that a year-end double pay had not been included. His day job salary was therefore $9,208.33 (i.e., $8,500.00 x 13/12) per month. By doing both jobs, he earned $14,208.33 (i.e., $9,208.33 + $5,000.00) per month during this period. He does not claim any loss for this period as he earned more than his pre-accident income of $11,500.00.

25. For this period of 8 months, his total day job earnings were $73,666.64 (i.e., $9,208.33 x 8). His total night job earnings were $40,000.00 (i.e., $5,000.00 x 8). His total income was therefore $113,666.64. His pre-accident income would have been $92,000.00 (i.e., $11,500.00 x 8). His extra income was therefore $21,666.64 (i.e., $113,666.64 – $92,000.00). I shall deduct it from his eventual pre-trial loss of earnings.

26. The double pay would be part of the “relevant income” as provided for in the Mandatory Provident Fund Schemes Ordinance (Cap. 485). The corresponding gain in MPF for this period shall be $1,083.33 (i.e., $21,666.64 x 5%). I shall deduct it from his eventual pre-trial loss of MPF.

**Pre-trial loss of earnings (and MPF) from 1 February 2006 to his quitting the night job on 2 April 2006**

27. There are 3 versions as to when the Plaintiff quit his night job. First, the Revised Statement of Damages [A30, para. 6] stated “31 November 2005”. Second, in Court he says “ 31 January 2006”. Third, Waihong’s letter [Exh. P1] stated “2 April 2006”. He sticks to the second version but there is no justification for the discrepancies. This renders his evidence unreliable. I regard Waihong version (i.e., 2 April 2006) the most credible and reliable.

28. For this period of 2 months and 2 days (i.e., from 1 February to 2 April 2006), his total day job earnings were $19,030.55 [i.e., ($9,208.33 x 2) + ($9,208.33 x 2/30)]. His total night job earnings were $10,333.33 [i.e., ($5,000.00 x 2) + ($5,000.00 x 2/30)]. His total income was therefore $29,363.88. His pre-accident income would have been $23,766.67 [i.e., ($11,500.00 x 2) + ($11,500.00 x 2/30)]. His extra income was therefore $5,597.21 (i.e., $29,363.88 – $23,766.67). I shall deduct it from his eventual pre-trial loss of earnings.

29. The corresponding gain in MPF for this period shall be $279.86 (i.e., $5,597.21 x 5%). I shall deduct it from his eventual pre-trial loss of MPF.

**Pre-trial loss of earnings (and MPF) from 3 April 2006 to the day of trial on 21 November 2007**

30. He explains that he was not fit to do both the day job and the night job together due to the injury. Thus he resigned from the night job, which gave a lower income. Pursuant to the preceding paragraph, I adopt “2April 2006” as the day he quit the night job.

31. During the 10 months (i.e., from 1 June 2005 to 2 April 2006) that he had been working 2 jobs, he had been earning the full salary without deductions. This can be seen from the table of pre-trial loss of earnings [A31]. It is hard to believe that, given his complaint of weakness and exhaustion due to the injury, he had not taken a single day off. In my view, his loss of earnings was not due to his injury. I shall not allow any sum for this period.

32. I shall not allow any corresponding loss in MPF for this period.

**Loss of future earnings**

33. He is fit to take up an extra job that, coupled with his current job, can bring him his pre-accident income. I shall not allow any sum here.

**Medical expenses**

34. The Plaintiff’s medical receipts only amount to a total sum of $540.00 [A94-96]. Despite that, the Defendants are prepared to accept $646.00. I shall allow the sum of $646.00.

35. There is no evidence of tonic food. I shall not allow any sum here.

36. The Plaintiff claims joint medical report costs $948.00 [A92]. This is a subject for costs. I shall not allow any sum here.

**Traveling expenses**

37. There is no evidence of any traveling expenses. Despite that, the Defendants are prepared to accept $220 as claimed. I shall allow the sum of $220.00.

**Total sum allowed**

38. I shall allow the Plaintiff the sum of $253,787.75, which comprises:

1. $150,000.00 for PSLA (para. 16-19 herein);
2. $77,058.75 for pre-trial loss of earnings from 19 February to 12 October 2004 (para. 20 herein);
3. $3,852.94 for pre-trial loss of MPF from 19 February to 12 October 2004 (para. 21 herein);
4. $48,225.81 for pre-trial loss of earnings (and MPF) from 13 October 2004 to 31 May 2005 (para. 22 herein);
5. $2,411.29 for pre-trial loss of MPF from 13 October 2004 to 31 May 2005 (para. 23 herein);
6. $646.00 for medical expenses (para. 34 herein);
7. $220.00 for traveling expenses (para. 37 herein);
8. *Less: Deduction of $21,666.64 for extra earnings for the period from 1 June 2005 to 31 January 2006 (para. 25 herein);*
9. *Less: Deduction of $1,083.33 for extra MPF for the period from 1 June 2005 to 31 January 2006 (para. 26 herein);*
10. *Less: Deduction of $5,597.21 for extra earnings for the period 1 February to 2 April 2006 (para. 28 herein);*
11. *Less: Deduction of $279.86 for extra MPF for the period from 1 February to 2 April 2006 (para. 29 herein).*

39. Of the aforesaid award, the Plaintiff accepts that he has to give credit for payment-in of $100,000.00 received from the Defendants.

**The Plaintiff’s award in DCEC 210/2006**

40. The Plaintiff has not received any payment from the 3rd Defendant in DCEC 210/2006. The 1st and the 2nd Defendants concede that no credit shall be given for that in the present action.

**Interest**

41. Interest on PSLA shall be at 2% from the date of writ to the date of judgment and on pre-trial loss of earnings and MPF, and special damages at half of judgment rate. Interest after judgment shall be at judgment rate.

**Costs**

42. The Plaintiff has succeeded in his claim. Costs usually follow event. I now make an order *nisi* that the Plaintiff shall have the costs of the present action. This order shall be made absolute 14 days from today.

( Eddie Yip )

Deputy District Judge

Representation:

Mr. Louie Chan, instructed by Messrs. Peter C.O. Wong & Associates for the Plaintiff.

Mr. Simon Wong, instructed by Messrs. Chong & Partners for the 1st and the 2nd Defendants.