# DCPI 2630/2019

[2022] HKDC 479

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2630 OF 2019

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BETWEEN

LIU WENLIANG Plaintiff

and

LEUNG KWOK HUNG 1st Defendant

EMPLOYEES COMPENSATION ASSISTANCE

FUND BOARD 2nd Defendant

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Coram: Deputy District Judge B Mak in Court

Date of Hearing: 5 May 2022

Date of Judgment: 26 May 2022

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JUDGMENT

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*Introduction*

1. The plaintiff commenced this action against the 1st defendant for damages for bodily injury sustained in the course of his employment due to the defendant’s negligence and/or breach of employer’s duty and/or statutory duty.
2. As it was apparent that no employees’ compensation insurance policy known to be in force to cover the accident, the 2nd defendant was joined in with leave of the court in order to protect the interest of the Employee Compensation Assistance Fund Board.
3. Before the commencement of the trial, the plaintiff and the 2nd defendant have reached agreement on quantum. The 2nd defendant did not take issue on the question of liability and Mr Conan Shek, counsel for the 2nd defendant, confirmed that he would not cross-examine the plaintiff. Therefore, the 2nd defendant did not participate in the trial.
4. The plaintiff has served the trial bundle, Pre-trial Review Notice, the Order on Pre-trial Review, the plaintiff’s opening submission and list of authorities on the 1st defendant at his address for service and his usual and last known addresses, all with a covering letter reminding him the date of the trial. I am satisfied that the 1st defendant has had due notice of this trial and he has chosen not to appear.

*The plaintiff’s case*

1. The plaintiff was employed by the 1st defendant as a renovation worker.
2. On 22 August 2016, the plaintiff was deployed by the 1st defendant to work in the shop on Ground Floor, 20 Queen’s Road West, Hong Kong. At about 10.30 am, while the plaintiff was cutting off aluminium bars with an electric grinder provided by the 1st defendant, the cutting blade of the electric grinder broke which resulted in a fragment of the blade flew out and hit the plaintiff’s right ring finger and middle finger. The blade of the electric grinder was not installed with safety shield or guard.

*The 1st defendant’s defence*

1. Whilst the 1st defendant admitted that the electric grinder was provided by him, he denied that it was not installed with a proper safety shield and/or guard.
2. The 1st defendant also said that he had specifically reminded the plaintiff that instead of the electric grinder, he should use the scissors available at the site to cut off the aluminium bars.
3. The 1st defendant also claimed contributory negligence on the part of the plaintiff.

*Findings on liability*

1. In his evidence, the plaintiff said the electric grinder he used was provided by the 1st defendant. When he used it for the first time, it was quite old and the protective shield was already removed. He proposed to the 1st defendant to replace it with a new one but was ignored by him. As he needed the job from the 1st defendant, he still continued to work for the 1st defendant but with extra care when using the electric grinder.
2. The plaintiff further said no industrial scissors was provided by the 1st defendant.
3. I have no reason to doubt the evidence of the plaintiff. I accept his evidence in its entirety.
4. Accordingly, I find for the plaintiff on the question of liability and reject the 1st defendant’s claim for contributory negligence.

*Quantum*

1. The remaining issue is the question of quantum.

*Pain, suffering and loss of amenities (PSLA)*

1. The plaintiff was admitted to Tseung Kwan O Hospital on the day of the accident. He was found to have a 1 cm laceration wound over dorsal aspect of the right hand. Emergency operation was done on 23 August 2016 with ligament repaired over the right middle finger. He was discharged on 25 August 2016.
2. The plaintiff received physiotherapy treatment at Tseung Kwan O Hospital between 4 October 2016 and 21 April 2017 and also received occupational therapy treatment between 31 August 2016 and 1 June 2017.
3. On 20 February 2017, a work capacity evaluation as a renovation worker was done. The results showed that his work capacity could not match with his job demands and with significant degree of limitation. He also showed limitation in bilateral/unilateral carrying and lifting tasks. His activities tolerance was also fair.
4. On 4 May 2017, another work capacity evaluation was done. The results showed that his work capacity could not match with his job demand and with significant degree of limitation. Despite the overall improvement, there was still limitation in carrying and lifting tasks. There was also improvement in his activity tolerance.
5. In the last session of occupational therapy on 1 June 2017, the plaintiff still complained of exertional pain over metacarpal phalangeal joint of right index and middle fingers, with Numeric Pain Rating Scale: 2- 3/10. He also experienced similar numbness over his right middle finger with diminished light touch sensation.
6. The plaintiff was granted sick leave from 22 August 2016 to 16 February 2017, from 13 April 2017 to 21 August 2017 and 28 September 2017 totalling 311 days.
7. The plaintiff was jointly examined by Dr Authur Chiang Si Chung (engaged by the plaintiff) and Dr Choi Sum Hung (engaged by the 1st defendant) on 21 July 2020.
8. Both doctors found that the plaintiff sustained laceration of the right hand with cut sagittal band of radial side (the side of the thumb) of extensor digitorum communis of the right middle finger. There was no residual swelling or deformity noted except for slight rotation of the right middle finger towards the index finger. The range of movement of the right index was full. There was slight decrease in the end range of flexion of the proximal interphalangeal and distal interphalangeal joints of the right middle finger. The overall range of movement of the right middle finger could still be considered as satisfactory. The muscle power of the right hand was satisfactorily preserved. The mild weakness in the abduction and abduction of the right middle finger might be accepted as residues from the repair of the sagittal band. The overall strength of the right index finger and middle finger could be considered as satisfactory.
9. On testing the grip strength of the right hand, it was noted to be more than 50% weaker than that of the left hand. Given the well preserved range of movement and motor power of the right index finger and middle finger and the absence of other abnormalities in the right thumb and the other fingers of the right hand, the expected motor power of the right hand would be comparable to or slightly less than that of the left hand. Dr Chiang opines that the grip strength was overstated.
10. Dr Chiang opined that the plaintiff had likely acquired a satisfactory recovery.
11. Dr Choi opined that the plaintiff should have very mild functional deficit in the form of slight reduction in endurance of his right hand after long strenuous activity.
12. Both doctors opined that the plaintiff should be able to work in the pre-injury job.
13. Mr Leon Ho, counsel for the plaintiff, sought to refer to the following cases:-
    * 1. *Wong Yun San v Cheung Yue Yiu t/a Radio Engineering Co*, DCPI 1909/2007, 21/7/2008, unreported;
      2. *Yiu Pau Yau v Co-Ray Design & Construction Ltd*, DCPI 864/2006, 3/5/2007, unreported; and
      3. *Ng Tat Ping v Cho Shui Leung t/a Fu Keung Engineer Company*, HCPI 646/2000, 13/6/2001, unreported.
14. In *Wong Yun San* (*supra*), the plaintiff’s left index and middle fingers were injured when he was using a circular saw to do woodwork. He was found to have sustained a crush injury to his left middle and index fingers. There was pulp loss in his left index finger and a deep laceration in the middle finger exposing extensor tendon over proximal interphalangeal joint. Despite treatment, there was residual stiffness in the left middle finger, numbness in the pulp of the left index finger and nail deformity in the left index finger. Power grip of the left hand was weakened. There was also a skin nodule over the wound of his left middle finger. The medical expert opined that he should be able to return to work as a general decoration worker but with limitation. The court awarded $150,000 under this head.
15. In *Ng Tat Ping* (*supra*), when the plaintiff was carrying sheets of stainless steel, the metal sheets cut into the middle and ring finger of his left hand. He was found to have a 1 cm laceration on his left middle finger with 2 tendons cut partially. There was a 1.5 cm laceration on his left ring finger with 2 tendons completely severed. The orthopaedic surgeon found 2 “L” shape scars remaining on his proximal phalanges of his middle and ring finger. There was impaired flexion of his ring finger and a mild impairment in the extension of his middle finger. He had a moderate decrease in power in his right hand grip. The court observed that he could not hold a complete fist. There was a slight shortening of his left ring finger. The court awarded $150,000 under this head.
16. In *Wing Yin Wa v Chan Shing*, HCPI 1125/2000, 31/1/2002, unreported, the plaintiff’s left middle finger was cut by the chopper held by the defendant. She was found to have a 2 cm U-shape cut over the dorsum of her left hand with the left 3rd proximal phalangeal joint exposed, a complete cut of the left middle finger extensor tendon and the detachment of cartilage of the left third metacarpal head. Although the extensor tendon had been repaired and healed, the cartilage on her 3rd knuckle joint could not be saved and was removed. A sum of $200,000 was awarded under this head.
17. The injuries sustained by the plaintiff were not as serious as the plaintiffs in *Wong Yun San* (*supra*), *Ng Tat Ping* (*supra*) and *Wing Yin Wa* (*supra*). Furthermore, the degree of recovery of the plaintiff is far better than the plaintiffs in those cases.
18. Taking into account of inflation, I would award a sum of $120,000 under this head.

*Total loss of earnings*

1. Mr Leon Ho, counsel for the plaintiff, urged this court to adopt the findings of His Honour Judge Kent Yee in the EC proceedings in respect of the monthly wages of the plaintiff in the sum of $21,600 and that the plaintiff was granted 310 days of sick leave on the basis of issue estoppel, citing *Chan Chi Shing v Chau Shu Kuen* [2009] 2 HKLRD 259.
2. The applicability of the doctrine of issue estoppel is dependent on the very nature of the issue to be decided.
3. As far as the number of days the plaintiff was unable to work is concerned, His Honour Judge Alex Lee (as he then was) in *Pak Sai Ming v J V Fitness Limited*, DCEC 494/2016, unreported, has this to say:-

“15. … in the assessment of damages under Cap 282, the applicant has the benefit of the deeming provision about temporary incapacity as contained in s10(1) of the Ordinance. However, the same provision is not available to the applicant in the parallel common law claim so that when it comes to the trial of the latter, the applicant will have to prove the appropriateness of the sick leave by adducing evidence. As such, I do not think that the finding of this court on the appropriateness of the applicant’s sick leave period would bind the parties in the common law proceedings.”

1. Madam Justice Au-Yeung in the parallel common law claim of the same parties in *Pak Sai Ming v J V Fitness Limited*, [2019] HKCFI 2268 at para 66 also took the view that “the determination of sick leave under Section 10 of ECO does not strictly apply to the present proceedings”.
2. I note that the doctrine was applied in *Chan Chi Shing* (*supra*) in relation to the pre-accident income of the plaintiff.
3. With respect to Mr Ho, therefore, I do not accept that in relation to the number of days the plaintiff was unable to work, this court is bound by the finding on sick leave of His Honour Judge Kent Yee in the EC proceedings. As a matter of fact, Mr Ho is not relying on the said finding in the computation of the plaintiff’s total loss of earnings.
4. The plaintiff said he tried to resume work in February 2017 but could not hold the tools steadily due to the injury to his right hand. He only received $500 on wage. He again attempted to resume work in June and October 2017 but still could not cope due to the injury.
5. He looked for a job as a renovation worker in 2018 but to no avail.
6. In January 2019, he managed to find a job as a delivery worker earning $5,720 per month for 8 months.
7. It was not until September 2019 that he was able to resume working as a renovation worker earning $20,000 per month. He is planning to work as such until 65 years of age.
8. I accept that the plaintiff had endeavoured to resume to his occupation before the accident but was only able to do so in September 2019.
9. The plaintiff was paid $1,200 per day before the accident but was only paid $1,000 per day when he resumed working as a renovation worker in September 2019.
10. It is not shown to me that the reduction of wage was due to the injury. The reduction may well be due to some other reasons such as the age of the plaintiff.
11. Both Dr Chiang and Dr Choi opined that the plaintiff should be able to work in the pre-injury job.
12. On balance, I do not accept that the reduction in wage is caused by the injury.
13. I adopt the finding of His Honour Judge Kent Yee in the EC proceedings that prior to the accident, the monthly earning of the plaintiff was $21,600.
14. For the above reasons, I find that the plaintiff has suffered a loss of earnings for the period from 22 August 2016 to 31 August 2019 (36 months 10 days) in the sum of $777,477.60 which is made up of:-

$21,600 x 1.05 x 36 months 10 days $823,737.60

Less: $500 + $5,720 x 8 months $46,260.00

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$777,477.60

*Special damages*

1. The plaintiff has incurred medical expenses of $3,591, traffic expenses of $1,040 and tonic food of $3,000 totalling $7,631 and I so allow.

*Conclusion*

1. In summary, I award the following damages in favour of the plaintiff:-

PSLA $120,000.00

Total loss of earnings $777,477.60

Special damages $7,631.00

Less: Compensation awarded in the

EC action ($244,359.00)

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Net total: $660,749.60

*Interest*

1. Interest on PSLA shall run at 2% per annum from the date of writ to the date of judgment and thereafter at judgment rate until payment.
2. Interest on the total loss of earnings and special damages shall run at half judgment rate from the date of accident to the date of judgment and thereafter at judgment rate until payment.

*Costs*

1. As between the plaintiff and the 1st defendant, I make a costs order *nisi* that the 1st defendant shall pay the plaintiff the costs of this action (including all costs reserved) with certificate for counsel, to be taxed if not agreed.
2. The 2nd defendant was joined in due to the failure of the 1st defendant to take out proper employees’ compensation insurance, I make a costs order *nisi* that the 1st defendant shall pay the 2nd defendant the costs of this action (including all costs reserved) with certificate for counsel, to be taxed if not agreed.
3. Unless an application is made by summons for variation within 14 days from the date hereof, the costs orders *nisi* shall become absolute.
4. The plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations.

( B Mak )

Deputy District Judge

Mr Ho Leon, instructed by Legal Aid Department, assigned by the Director of Legal Aid, for the plaintiff

The 1st defendant was not represented and did not appear

Mr Shek Conan, instructed by Gallant, for the 2nd defendant