

HONG KONG / JUDGMENT

NG TIM YIP KEVIN v. CHAN HO KIN

COURT

Court of First Instance

DECIDED

9 August 2007

CASE / FILE NUMBER

HCPI948/2005

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bjbj HCPI 948/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE PERSONAL INJURIES ACTION NO.948 OF 2005

BETWEEN NG TIM YIP KEVIN Plaintiff (formerly known as NG TIM YIP) and CHAN HO KIN
(formerly trading as Defendant KENNY S ENGINEERING COMPANY (formerly known as KENNY
S COMPANY)

Before : Hon Suffiad J in Court Dates of Hearing : 23, 25 and 30 May 2007 Date of Judgment : 9
August 2007

J U D G M E N T

AUTONUMOUT The plaintiff claims damages against the defendant for personal injuries sustained by him arising out of an accident at work which occurred on 28 May 2003, when the plaintiff was dismantling drainage pipes at the car parking area on Level B Lower Ground of Elite Industrial Centre in Cheung Sha Wan, Kowloon (the Site). PLAINTIFF S CASE AUTONUMOUT It is the plaintiff s case that he started working for the defendant in about September 2002 as an apprentice in repair and maintenance of water plumbing and electrical work. The plaintiff was only 17 at the time. AUTONUMOUT On the day of the accident, the plaintiff, still an apprentice, was assigned by the defendant to dismantle drainage pipes at the Site. That work of dismantling was carried out by the plaintiff working together with another apprentice of the defendant by the name of Ah Cheong. AUTONUMOUT At about 5.30 p.m. when the two of them had dismantled a section of the drainage pipe which weighed about 100 lbs, and both of them were carrying the dismantled pipe, one at each end, the colleague of the plaintiff slipped letting fall his end of the dismantled pipe. As a result, and because the plaintiff could not get away in time, the plaintiff s right hand was crushed by the dismantled pipe thereby causing very serious injuries to the

plaintiff's right hand and fingers. AUTONUMOUT At the time of the accident, the defendant was not present at the scene. AUTONUMOUT Counsel for the plaintiff, in his opening, based the negligence of the defendant to be as follows :

- (a) insufficient manpower allocated by the defendant to carry the heavy dismantled pipe;
 - (b) failure of the defendant to be present and to properly supervise the work of two inexperienced apprentice;
 - (c) failure to give proper training and instructions to the plaintiff and his colleague;
 - (d) failure to provide a proper platform for the work of dismantling; and
 - (e) failure to provide the proper tools or equipment to properly transport the dismantled pipe.
- AUTONUMOUT Apart from negligence, the plaintiff also relies on breach of statutory duties, but it suffices to say that the particulars as to the breaches of statutory duties effectively overlap with the acts of negligence alleged. THE DEFENCE AUTONUMOUT Initially, the defendant was represented by solicitors acting for him in this matter. However, shortly before the trial, the defendant's solicitors ceased to act for him and the defendant took over the defence of this claim himself acting in person at the trial. AUTONUMOUT The defence relied on by the defendant can be summarized as follows :

- (a) The plaintiff was not an employee of the defendant but had, by an agreement in writing between them, agreed to be a self employed person; and
- (b) negligence was denied by the defendant, and in particular, the defendant relies upon the plaintiff not following his instructions in carrying out the work which led to the accident to the plaintiff. PLAINTIFF'S EVIDENCE AUTONUMOUT The plaintiff gave evidence which can be summarized as follows. AUTONUMOUT After completing Form Three of secondary education, the plaintiff did not wish to continue his studies. Thereafter the plaintiff had taken on a number of temporary jobs including hair salon worker and working at bookshops, restaurant kitchens and also at MacDonald's. AUTONUMOUT In mid September 2002, the plaintiff learnt from advertisements in the Labour Department that the defendant was recruiting full time apprentice plumber and electrician. He called up the defendant and attended a job interview at the defendant's office in Fuk Wah Street, Shamshuipo, on 21 September 2002. AUTONUMOUT The following day after the interview, the defendant called him to start work on 23 September. AUTONUMOUT On his first day of work at the defendant's office, he was told again by the defendant that he was to work as an apprentice and the work included plumbing and electrical work and maintenance and repair works including demolishing and installation of pipes. AUTONUMOUT About the 30 September, after a few days at work, he was told by the defendant to sign a one-page employment contract. A Miss Yeung at the defendant's office explained the contents of that contract to him. AUTONUMOUT Miss Yeung told the plaintiff that he had to work six days a week, with Sundays, statutory holidays and public holidays being paid holidays and that his salary was calculated on a monthly basis of \$4,000 but paid to him twice a month on the 15th day and

the end of the month in cash. His work hours would be from 9 a.m. to 6 p.m. AUTONUMOUT If overtime work was required, he would be paid additionally at the rate of \$13 per hour, but there would be no double pay at the end of the year. AUTONUMOUT The plaintiff was also told by Miss Yeung that the contents of the contract conformed and complied with labour legislation. AUTONUMOUT Thereupon the plaintiff signed the contract, but did not notice at the time the contract was dated 30 October 2002. AUTONUMOUT As of May 2003, his salary was increased to \$4,400 per month by the defendant AUTONUMOUT The plaintiff also gave evidence as to the occurrence of the accident. AUTONUMOUT His evidence was that on the day of the accident, he was assigned to work at the Elite Industrial Centre together with two other workmates by the name of Ah Tung and Ah Cheong . Ah Tung was assigned to do other work at an upper floor of the building leaving him and Ah Cheong to do the demolishing of galvanized pipes at the Site, being the car park at level B of the basement. It was the first day of work for Ah Cheong. AUTONUMOUT When they started work at 1 p.m., the defendant explained the work procedure to them at the Site and then the defendant left the Site. AUTONUMOUT For the demolition work, he and Ah Cheong were provided with a cutting machine which operated on a circular cutting blade. They were also supplied with an A shaped ladder. AUTONUMOUT He knew that for cutting galvanized pipes, he was given instructions to cut them into pieces of about 3 feet in length for easy handling since the pipes were quite heavy. AUTONUMOUT The last part of the galvanized pipe to be cut was a piece of pipe which was about 8 feet long running horizontally along the wall slightly above the level of his head as he stood on the ground, but which could be reached using the A shaped ladder. That piece of horizontal pipe also had two lengths of vertical pipes both of which were attached to the middle section of its underside. The two vertical pipes ran vertically down to the ground. Therefore the entire section of that piece of pipe (both the horizontal and vertical pipes) appeared to be a capital letter but with two downward strokes instead of one (which I will refer to as the double T section of the pipe). AUTONUMOUT That section of the pipe was sketched out by the plaintiff which sketch was exhibited as Exhibit P 1. AUTONUMOUT When they came to the double T section of the pipe to be cut, the plaintiff found that the circular cutting blade had already been badly worn out and damaged. As there was no spare circular cutting blade, he tried to phone the defendant to seek his instructions as to what should be done but could not reach the defendant by phone. The plaintiff also called Ah Tung (who was on another floor of the same building) trying to seek his assistance since Ah Tung was a more experienced apprentice than the plaintiff, but Ah Tung told the plaintiff that he had other work to do and could not help. AUTONUMOUT As a final resort, the plaintiff then decided with Ah Cheong to cut the double T section of the pipe as a whole, without cutting it into smaller sections, since the worn out cutting blade would not have been able to cope with so much cutting, and for the two of them to lower that double T section of the pipe as one entire piece onto the ground (after it had been cut) from the wall. AUTONUMOUT After cutting the double T section of the pipe in the way they decided, when the two of them were lowering it from the wall to the ground, the plaintiff estimated that the double T section of the pipe to be over 100 lbs. AUTONUMOUT The plaintiff and Ah Cheong each took hold of one end of the horizontal part of the double T

section of the pipe at the top to try to lower the entire piece of pipe onto the ground. AUTONUMOUT As they were doing so, and due to the weight of the pipe as a whole, Ah Cheong suddenly let go of his end of the pipe causing the entire piece of the double T section of the pipe to fall to the ground. The plaintiff was unable to draw back his hand in time and the pipe fell onto and crushed the plaintiff's right hand. AUTONUMOUT After the accident to the plaintiff, the caretaker of the building who was nearby called for an ambulance which took the plaintiff to hospital. DEFENDANT'S EVIDENCE AUTONUMOUT The defendant gave evidence in his defence, the relevant parts of which are as follows. AUTONUMOUT The defendant was the sole proprietor of Kenny's Engineering Company which was a sub-contractor for plumbing and electrical works operated in Fuk Wah Street, Shamshuipo. The defendant undertook most of the work himself, but, depending on the volume of work, sometimes casual workers or self-employed persons were recruited to undertake some of the works. AUTONUMOUT In about July 2002, through the Labour Department, he came to interview the plaintiff for a job. At the interview it was agreed with the plaintiff that they would co-operate either by work being sub-contracted to the plaintiff or that the plaintiff would perform the work on his own and there would not be any employer-employee relationship. If the work required more than one person to perform, the defendant would provide another employee to assist the plaintiff. The plaintiff agreed to this mode of operation and indicated that he was competent to undertake the work of repair and maintenance of plumbing and electrical works as well as replacement of water pipes etc. AUTONUMOUT In early October 2002, the defendant thought it necessary to stipulate the mode of co-operation between him and the plaintiff in writing to avoid future dispute. He instructed the female secretary in the company to draw up a service contract in Chinese and handed it over to the plaintiff for the plaintiff to discuss with his family members before deciding whether or not the plaintiff can accept the terms stated therein. Eventually, after several weeks, at the end of October, the plaintiff signed and returned the service contract to the defendant. AUTONUMOUT The service contract together with its certified translation are contained in the trial bundle. AUTONUMOUT The defendant also gave evidence of the relationship between the plaintiff and himself in relation to the service contract as follows :

- (a) The service contract stipulated the plaintiff to be in the category of self-employed person, not entitled to any employee's welfare or benefit and their relationship was one of co-operating partners;
- (b) Although the service contract stipulated the time of service to be from Monday to Saturday from 9 am to 6 pm, this was only by way of guideline. In effect, the plaintiff did not have to punch in or out when he reported for work. As long as the plaintiff finished the work assigned to him, the plaintiff could leave; and
- (c) Although the service contract stipulated that the service fee was \$4,000 (per month), this was merely a basis to compute the plaintiff's pay. In fact, the plaintiff was paid \$133 per day as and when he did turn up for work for the day. AUTONUMOUT Because the service contract provided that the plaintiff was a self-employed person and as such, not being an employee,

the plaintiff was not covered by ECC insurance, the defendant had taken out a separate accident insurance policy for the plaintiff with the American International Assurance Company (Bermuda) Ltd dated 25 November 2002. The plaintiff had filled out the details on the application form for the insurance policy and his mother had to countersign. A copy of that application form (but not the policy itself) was produced in evidence. AUTONUMOUT The plaintiff was therefore engaged by the defendant as a skilled self-employed worker and was paid for each day that the plaintiff worked. If the plaintiff encountered difficulty at work, the plaintiff would sometimes decide how to overcome such difficulties himself and at other times might discuss with the defendant how to resolve the difficulties. AUTONUMOUT The allocation of manpower for performing the works was left to the defendant alone and the plaintiff did not have to employ other workers on his own. AUTONUMOUT Some months before this accident to the plaintiff, the defendant was awarded the sub-contract to replace and repair the water pipes at the multi storey car park of Elite Industrial Centre in Cheung Sha Wan Road, Kowloon. The plaintiff had therefore been dismantling a number of water pipes on other floors of the Elite Industrial Centre before this accident. AUTONUMOUT Because of this sub-contract to the defendant, the defendant was allocated a storeroom near to the Site for storing most of the tools which were required for the dismantling of the water pipes there. AUTONUMOUT One day before the accident to the plaintiff, the defendant had told the plaintiff that he was required to dismantle the pipes at the Site on the following day. AUTONUMOUT On the day of the accident, the plaintiff, Lee Tung and Ah Cheong attended the Elite Industrial Centre and took out the tools required from the storeroom. Lee Tung had to work on another floor of the Elite Industrial Centre, leaving the plaintiff and Ah Cheong to work at the Site. AUTONUMOUT Before the plaintiff and Ah Cheong commenced their work at the Site, the defendant had pointed out to them the exact location and the water pipes to be dismantled. The defendant had told them the cutting method to be adopted. He then left the plaintiff and Ah Cheong to carry out the work at the Site. AUTONUMOUT Shortly after 4 p.m. the defendant was told by the caretaker of the Elite Industrial Centre that the plaintiff and Ah Cheong had met with an accident in their work. The defendant then saw the plaintiff sitting in the management office with his right thumb bleeding. By that time an ambulance had already been summoned. AUTONUMOUT The defendant then went to the Site where the accident occurred and saw the double T section of the pipe lying on the ground. On seeing that double T section of the pipe, it was obvious to the defendant that his instructions regarding the method and sequence of dismantling and cutting the water pipes had not been followed by the plaintiff and Ah Cheong. They should have cut the pipe in smaller sections as he had instructed them to do so but failed to follow his instructions. AUTONUMOUT He then accompanied the plaintiff to the hospital by ambulance. AUTONUMOUT The defendant confirmed that the American International Assurance Company (Bermuda) Ltd did on 21 October 2003 pay to the plaintiff the sum of HK\$145,500 in compensation for this accident. FINDINGS OF FACT AUTONUMOUT In so far as the working relationship between the plaintiff and the defendant goes, I have no difficulty accepting the plaintiff's evidence that he was the employee of the defendant, even taking into account the terms of the employment contract between them. AUTONUMOUT In this respect I found the plaintiff to be a

straightforward and truthful witness, at times even somewhat naive, but nevertheless truthful and reliable in his evidence. AUTONUMOUT On the other hand, the defendant was wholly unimpressive when he said in evidence that the plaintiff was paid on a daily basis at \$133 per day. This directly contradicted the stated term of the employment contract that the plaintiff's salary was \$4,000 per month. His explanation for why the contract was so worded is not believable. AUTONUMOUT Because of this evidence of the defendant which did not conform to the wording of the contract, the defendant had to cover up that lie with another lie when asked about the number of days the plaintiff worked a month since the plaintiff would need to work at least 30 days a month for his salary to come near to \$4,000 per month. This therefore led the defendant to say in evidence that the plaintiff had to work even on Sundays when the contract made it clear that the plaintiff only had to work Mondays to Saturdays. AUTONUMOUT Moreover, although the defendant never explicitly agreed that the plaintiff was an apprentice, however, he never denied that either even in the light of the plaintiff's evidence that he was an apprentice to the defendant when the accident happened. AUTONUMOUT The amount of the salary that was paid to the plaintiff whether calculated on a monthly or daily basis, would clearly support that evidence of the plaintiff that he was an apprentice. AUTONUMOUT The defendant also agreed in evidence that he had to instruct the plaintiff in the work and had to give instructions and directions to the plaintiff how to go about the work. Indeed, the defence raised by the defendant as to the allegation that he was negligent for this accident was that the plaintiff failed to follow strictly his instructions in carrying out the work. AUTONUMOUT On that basis alone, it would be most improbable that the plaintiff could be said to be a self-employed person the term used in the contract of employment. AUTONUMOUT The law as to employment of minors state that a contract of employment entered into by a minor will be binding if it is on the whole beneficial to the minor at the time when it is entered into. (See Halsbury's Laws of Hong Kong Volume 10 (2) (2005 Reissue) at paragraph [145.021]) AUTONUMOUT In the present case, the contract of employment was entered into when the plaintiff was 17 years old, clearly a minor. AUTONUMOUT accept the plaintiff's evidence that when he entered the contract with the defendant, the plaintiff believed that he was entering into a contract of employment and that he was an apprentice to the defendant. AUTONUMOUT The terms of the contract expressly precludes the plaintiff from various kinds of employee's labour benefits as stipulated therein. AUTONUMOUT As such, I find that the contract of employment was not on the whole beneficial to the plaintiff and therefore not binding on him. AUTONUMOUT I find as a fact the plaintiff was employed by the defendant and was an apprentice of the defendant. Such apprenticeship would have been for a two year period in the normal run of things from the time the plaintiff started with the defendant in September 2002. AUTONUMOUT Turning now to deal with the findings in relation to the accident itself. AUTONUMOUT It was not disputed by the plaintiff that the defendant had given instructions to the plaintiff to cut the water pipes into short pieces of about 2 to 3 feet in length for easy handling and for safety. This was well known to the plaintiff before the accident happened. AUTONUMOUT The crux of the dispute between them as to such instructions of the defendant not having been followed was that the plaintiff says that the circular cutting blade was quite worn out by the

time he came to cut the double T section of the pipe. AUTONUMOUT The defendant denies that the cutting blade was worn out. In this respect, the defendant says that there was a storeroom nearby where there should have been spare blades, but even if there were no spare blades in the storeroom, it was easy enough for the plaintiff to run out of the Elite Industrial Centre to any hardware store nearby and such a cutting blade could have been bought for several dollars. AUTONUMOUT After the plaintiff had sketched Exhibit P1 and was asked to indicate on that sketch which part of the double T section of the pipe he had cut before attempting to lower that double T section of the pipe to the ground manually between the two of them, the plaintiff indicated on that sketch (Exhibit P1) that he had cut the two outstretched arms of the horizontal part of the pipe as well as the very bottom part of the two vertical pipes. According to the plaintiff that was done with the worn out cutting blade. AUTONUMOUT When further asked why he did not cut the top part of the two vertical pipes where they joined with the horizontal part of the pipe, instead of cutting the bottom of part of the vertical pipes (which would have the effect of separating the horizontal pipe from the two vertical pipes thereby lessening the weight of the dismantled pipes), the only answer that the plaintiff could give was that he did not think of that at the time. That answer I found to be wholly unsatisfactory. AUTONUMOUT There was no evidence from the plaintiff that the plaintiff had attempted to seek a spare cutting blade from the storeroom allocated to the defendant in the vicinity of the Site. AUTONUMOUT There was also no evidence from the plaintiff that either he or Ah Cheong had tried to obtain a replacement cutting blade from a nearby hardware store (bearing in mind that the Elite Industrial Centre being in Cheung Sha Wan Road, it should not have been difficult to seek out such a hardware store nearby in that area of Kowloon). AUTONUMOUT The plaintiff's evidence was that it became obvious to the plaintiff that the cutting blade was worn out even before he attempted to cut the double T section of the pipe. In such circumstances, it would have been reasonable for either the plaintiff or Ah Cheong to have either looked for a spare cutting blade from the storeroom nearby or go out of the building to buy a replacement blade while the other of them was cutting the double T section of the pipe. AUTONUMOUT There being no such evidence, I do not accept the plaintiff's evidence that the cutting blade which he was supplied with by the defendant was so worn out that he could not have used it to further cut down the double T section of the pipe into smaller pieces or sections which would have been less heavy than the entire double T section of the pipe, and therefore easier for the two of them to handle when taking it down to the ground. AUTONUMOUT I further find that there was no good reason for the plaintiff to have disregarded the instructions given to him by the defendant to cut the water pipe into smaller sections before lowering such sections of pipes onto the ground. AUTONUMOUT In so doing, the plaintiff and Ah Cheong was likely trying to take a short cut for their own convenience and to minimize or lessen the work they had to do. LIABILITY AUTONUMOUT From the findings above, there can be no doubt but that the plaintiff was an employee of the defendant and therefore at the time of the accident, the defendant was under the duty to the plaintiff to act as an employer. AUTONUMOUT The main case of the plaintiff is premised upon the cutting blade provided by the defendant for cutting or dismantling the water pipe became so worn out that they were left with no

alternative but to ignore the instructions which had been given them by the defendant to cut the water pipe into smaller sections of about 2 to 3 feet for easy handling. AUTONUMOUT Given the findings above, there was no good reason for the plaintiff to have ignored the instructions of the defendant to cut the pipe into smaller pieces or sections for dismantling, I find this accident to have come about because of the failure of the plaintiff to follow the instructions that he was given by the defendant. AUTONUMOUT I turn now to deal individually with each of the limb of negligence as opened by counsel for the plaintiff in his opening. AUTONUMOUT Firstly, as to insufficient manpower to carry the heavy dismantled pipe (i.e. the double T section of the pipe), had the plaintiff followed his instructions to cut and dismantle that section of the pipe into smaller pieces of 2 to 3 feet in length, there could not have been any need for more manpower to carry the dismantled pipe. As the defendant can reasonably expect his instructions to be followed, he cannot be faulted in this respect. AUTONUMOUT Secondly, the failure of the defendant to be present to supervise the work of two inexperienced apprentice. AUTONUMOUT The work involved in this case was not work which involved any great complexity. It has never been challenged by the plaintiff that the defendant had given them full instructions as to how to cut and dismantle the water pipe. AUTONUMOUT Having given full instructions to the plaintiff and Ah Cheong, and if those instructions had been followed, I cannot see any good reasons why the defendant would need to be present to supervise the dismantling of the water pipe. The only thing that can be said of the defendant's absence is that his absence allowed the plaintiff and Ah Cheong the chance not to follow the defendant's instructions in cutting the pipe into smaller sections. That cannot found negligence on the part of the defendant since he had given them proper directions which were not followed by them for no good reason. AUTONUMOUT Thirdly, in so far as it is alleged that the defendant failed to give proper instructions and training, such allegation is refuted by the plaintiff's own evidence that the defendant had given him instructions to cut the water pipe into sections of 2 to 3 feet for easy handling. That allegation does not even begin to take off the ground. AUTONUMOUT Fourthly, failure to provide a proper platform for the dismantling. On the evidence, this allegation is wholly non sequitur since the accident has nothing to do with whether there was a proper platform or not. AUTONUMOUT Fifthly, failure to provide the proper tools or equipment to transport the dismantled pipe. AUTONUMOUT Once again this goes to the root of the plaintiff not following the instructions given by the defendant to cut the pipe into sections of 2 to 3 feet. If that had been done by the plaintiff, there could not have been any need for any special tool or equipment to transport the dismantled pipe. AUTONUMOUT For the reasons given, I do not find any negligence on the part of the defendant. The accident came about only because of the plaintiff's failure to follow the instructions given to him to cut the pipe into manageable sections. AUTONUMOUT As already said above, the reliance on breach of statutory duties in this case also depends on the plaintiff substantiating the particulars of negligence, which the plaintiff has failed to do. AUTONUMOUT Accordingly, the plaintiff's claim is dismissed. AUTONUMOUT Should I be wrong in coming to the conclusion that I did on the issue of liability, I shall go on to deal with the issue of quantum. INJURIES AND TREATMENT AUTONUMOUT After the accident, the plaintiff was taken by ambulance to the

Accident and Emergency Department () of Caritas Medical Centre (). AUTONUMOUT At the A Department, physical examination showed laceration on thumb, index and middle fingers of the right hand. X ray of his right hand revealed fracture of the proximal phalanx of thumb and middle finger. The plaintiff was then admitted to the Orthopaedic and Traumatology Department () of CMC for further treatment. AUTONUMOUT At the O Department of CMC, it was noted that there was open fracture of proximal interphalangeal joint of the right index finger and closed fracture of proximal phalange of right middle finger. Traumatic amputation of the right thumb at the proximal phalangeal level was also noted. AUTONUMOUT Emergency operation was immediately performed on the plaintiff's right hand.

AUTONUMOUT Surgical debridement and wound suture was done. Primary arthodesis of interphalangeal joint of right thumb was done to preserve the bony length of the thumb.

AUTONUMOUT wire splintage was done to right index finger proximal interphalangeal joint while the stable proximal phalange was treated conservatively. AUTONUMOUT A static right hand resting splint was provided during in-patient phase. AUTONUMOUT On 5 June 2003, free vascularised big toe wrap transfer with distal phalange of big toe was done to right thumb and revision amputation of the right index finger was done for the post-traumatic gangrene. Skin graft was done to the right big toe defect after harvest of toe wrap.

AUTONUMOUT The plaintiff was also referred to the Clinical Psychologist of CMC for treatment due to his emotional and behavioural problem. AUTONUMOUT On 30 June 2003, the plaintiff was discharged home from hospital and was referred to continue out-patient physiotherapy, occupational therapy and psychological consultations. AUTONUMOUT Altogether, the plaintiff received 19 sessions of physiotherapy, 11 sessions of occupational therapy and 11 sessions out patient psychological consultation. AUTONUMOUT The plaintiff was also referred to receive psychiatric treatment. AUTONUMOUT Sick leave was given to the plaintiff from 28 May 2003 to 14 October 2004. EXPERT MEDICAL EVIDENCE

AUTONUMOUT The plaintiff was examined by Dr Wong Hoi (Wong), an orthopaedic expert instructed by the plaintiff on 30 November 2004. Dr Wong prepared an expert medical report dated 25 May 2005. AUTONUMOUT The plaintiff was also examined by Dr Chin (), the orthopaedic expert instructed by the defendant on 24 August 2006. Dr Lee compiled an expert report dated 29 September 2006. AUTONUMOUT There was very little difference between the opinions given by the two orthopaedic experts. AUTONUMOUT In relation to the plaintiff's right thumb condition, Dr Wong took the view the condition of the right thumb has reached maximum medical improvement but the prognosis is poor. The plaintiff's right hand is seriously disabled with the stiffness and weakness of his reconstructed right thumb. His right hand function should be grossly affected as the thumb is important for grasping and fine manipulative work. AUTONUMOUT Wong assessed the stiffness of the right thumb to be a 4% impairment of the whole person and the decrease in sensation to be a further 5%, therefore the reconstructed right thumb amounts to 9% impairment.

AUTONUMOUT As for his right index finger, again Dr Wong took the view that it has reached maximum medical improvement. The prognosis is fair. AUTONUMOUT The right index finger is seriously disabled and affects his leisure activities as well as activities of daily living. AUTONUMOUT Coupled with the problems from the right thumb, the plaintiff will

need to train up his left hand for most of his daily activities. AUTONUMOUT Wong assessed the amputation of the right index finger up to the proximal phalangeal joint to correspond to 7% impairment of the whole person. AUTONUMOUT For the right middle finger, Dr Wong noted there were no complaints or physical signs referable to his right middle finger injury and concluded that his right middle finger has recovered well after the treatment. No residual impairment was recommended. AUTONUMOUT As for the right big toe which has been transplanted to lengthen the plaintiff's amputated right thumb, Dr Wong noted that the plaintiff still complained of pain over the right toe when hit by object or after prolonged walking. It was also aggravated by running or jogging. The plaintiff could not perform tiptoe walking and stiffness also found over the right toes. AUTONUMOUT Wong assessed the amputation of the right big toe (for transplanting) to correspond to a 4% impairment of the whole person. AUTONUMOUT Combined together, Dr Wong assessed 20% impairment of the whole person for the injury sustained from the accident. AUTONUMOUT The physical conditions of the plaintiff's injuries are likely to be permanent, but the plaintiff may require further treatment for his anxiety and depression. AUTONUMOUT The stiffness and weakness of his right thumb and amputated right index finger affects his activities of daily living, his right hand being his dominant hand. He cannot perform fine hand manipulative work or carry heavy weight. His amputated right big toe affects his ability to run, jog or even walking on unlevelled ground. AUTONUMOUT With this degree of impairment, Dr Wong was of the view that the plaintiff cannot resume his pre-injury work. Moderate type of manual work would be more suitable to the plaintiff, since he will have difficulty in performing even computerizing, typing and writing. AUTONUMOUT Lastly Dr Wong accepted that the sick leave granted to the plaintiff was reasonable. AUTONUMOUT Lee, the defendant's expert agreed that there were stiffness and impaired sensation in the plaintiff's right thumb from his findings. That combined with the loss of the index finger at the middle of the middle phalange and the loss of the distal phalange of the right big toe supported the plaintiff's claim of discomfort in the right hand and right foot. AUTONUMOUT The outcome of the surgery was very good in view of the severity of the injury, however there is still significant impairment of the right hand function. Dr Lee also agreed that this condition of the plaintiff is permanent and no further treatment is required. AUTONUMOUT Lee agreed that the plaintiff will have difficulty returning to his pre-accident job due to such impairment, but should be able to work as a delivery worker or a driver. AUTONUMOUT Lee assessed the plaintiff's impairment to be 20% of the whole person. Dr Lee also accepted that the sick leave granted to be reasonable. AUTONUMOUT The plaintiff was also examined by a psychiatric expert, Dr Benjamin Lai (). In his report dated 25 November 2005, Dr Lai stated his findings and opinions to be as follows. AUTONUMOUT After the accident, the plaintiff had developed Post Traumatic Stress Disorder (PTSD) as well as Adjustment Disorder with depressed mood. He had also developed polysubstance abuse which is seen as secondary to the PTSD and the Adjustment Disorder. AUTONUMOUT The psychiatric conditions of the plaintiff were the results of the accident and the related disabilities. AUTONUMOUT The PTSD arose from the plaintiff being very fearful at the time of his injury, and manifested itself in the form of recurrent thoughts and dreams of the circumstances of the accident; the

plaintiff avoidance of talking about the accident; his decrease in drive for leisure activities and decreased mood; worries about his future, impaired sleep, poor temper and wakening from sleep. AUTONUMOUT The Adjustment Disorder with depressed mood came in the form of irritability, aggressive impulse, guilt feelings, feeling of uselessness, self harm, decrease in drive for leisure activities, impaired sleep and impaired appetite.

AUTONUMOUT Having received treatment from clinical psychologist and psychiatrist, Dr Lai found that at the time of his examination of the plaintiff :

- (a) the plaintiff was free from recurrent thoughts and dreams of the accident;
- (b) the plaintiff had no subjective depressed mood and had kept his temper in control; and
- (c) the plaintiff had stopped his substance abuse. AUTONUMOUT However, the plaintiff still had troubled feelings, feelings of low self esteem, worries, and low drive for leisure activities. He also had guilt over his behaviour towards his family members. AUTONUMOUT Lai opined that the plaintiff was still suffering from the adjustment disorder with depressed mood and that he required further psychiatric treatment to help him further reduce the degree of psychiatric symptom and to return to gainful employment. AUTONUMOUT Even so, Dr Lai believed that some psychiatric symptom will likely persist even after further psychiatric treatment. AUTONUMOUT The permanent impairment due to the psychiatric symptom was mild and estimated to be about 5%. AUTONUMOUT The plaintiff was considered to be mentally fit to return to gainful employment which is appropriate to his physical abilities. However he is expected to have his work efficiency impaired because of his psychiatric symptoms and is likely to avoid social interaction with his co workers at work. PAIN SUFFERING AND LOSS OF AMENITIES AUTONUMOUT In assessing the damages under this head of claim, I take into account all that has been stated above as to the injuries and treatment of the plaintiff. AUTONUMOUT I further take into account the fact that the plaintiff has shown during the trial of this matter that he has, undoubtedly in the interim period between accident and trial, to some extent, trained himself in the use of his left hand, which was not his preferred hand. AUTONUMOUT This came about when he was asked by his counsel to make a sketch of the shape of the iron pipe which he was asked to dismantle. That sketch was subsequently exhibited as Exhibit P1. In making that sketch, I noted that the plaintiff used his left hand to do so. AUTONUMOUT I also take into account the fact that the plaintiff has recovered to the extent (insofar as his psychiatric disabilities are concerned) as stated in the report of Dr Lai and that he has stopped the substance abuse. AUTONUMOUT Given all the circumstances of this case, I will assess PSLA to be \$500,000. LOSS OF PRE-TRIAL EARNINGS AUTONUMOUT The pre-trial period spans from the date of accident on 28 May 2003 to trial/judgment. AUTONUMOUT He was given sick leave for sixteen and a half months up to 14 October 2004. AUTONUMOUT At the time of the accident the plaintiff was an apprentice earning \$4,400 per month. His apprenticeship started in September 2002 and if he had been successful in his apprenticeship, the plaintiff would have been a full-fledged plumber and electrician after two years apprenticeship. That would have been in September 2004. AUTONUMOUT I shall assess loss of earnings in the pre-trial period

by splitting up the pre-trial period into various stages for convenience.

- (a) From accident until September 2004 AUTONUMOUT For these 16 months, there will be full loss of earnings at \$4,400 giving \$70,400.
- (b) From October 2004 to December 2005 AUTONUMOUT During these 15 months, the plaintiff would have just completed his apprenticeship had it not been for the accident. This would have been his first year of working as a plumber/electrician. As such I am not prepared to adopt the figure of \$17,468 suggested by plaintiff's counsel as being his monthly salary. That figure was worked out from Government statistics based on average earnings per day for plumbers and electricians. AUTONUMOUT It would not be too far off to expect someone starting out in that trade to be earning a salary in the region of double what he was paid as an apprentice, bearing in mind the market conditions at the time. AUTONUMOUT A monthly salary of \$9,000 would probably be more in line for someone in the plaintiff's position at the time. AUTONUMOUT However, I will also have to take account of the fact that the sick leave was only up to 14 October 2004, therefore for these 15 months there was no sick leave for the plaintiff. AUTONUMOUT On the basis that the plaintiff could have earned \$7,000 for this period after his sick leave, I therefore assess a loss of earnings at \$2,000 per month for these 15 months giving \$30,000.
- (c) From January 2006 to June 2006 AUTONUMOUT For these six months, the plaintiff did earn \$7,000 per month working as a delivery worker. AUTONUMOUT Once again, his loss of earnings would be \$2,000 per month based on a notional earnings of \$9,000 per month as a plumber/electrician after completing his apprenticeship. AUTONUMOUT This gives \$12,000.
- (d) From July to October 2006 AUTONUMOUT For these four months, the plaintiff did not work, but at the same time he was not on sick leave. AUTONUMOUT For the same reason as above, the loss of earnings would be \$2,000 per month giving \$8,000.
- (e) From November 2006 to trial/judgment AUTONUMOUT For these nine months, the plaintiff again worked as a delivery worker earning \$8,000 per month. AUTONUMOUT The loss of earnings for these nine months will be assessed at \$1,000 per month giving \$9,000. AUTONUMOUT The pre-trial loss of earnings adding up items
 - (a) to
 - (e) above comes to \$129,400. AUTONUMOUT Loss of MPF will be awarded not on the full amount of pre trial loss but only for those assessed from October 2004 to date, since under the employment terms between the plaintiff and the defendant for the apprenticeship of the plaintiff, no MPF was provided for. AUTONUMOUT Loss of MPF therefore comes to 5% of \$50,000 giving \$2,500. LOSS OF FUTURE EARNINGS AUTONUMOUT The plaintiff was 17 at the time of the accident, and 21 at trial. AUTONUMOUT Had it not been for the accident, by the time of trial of this matter, the plaintiff, assuming that he would have completed his apprenticeship, would probably have started on his career as a skilled plumber/electrician. AUTONUMOUT In those circumstances, the suggested multiplier of 18 is not unreasonable

and will be adopted. AUTONUMOUT As for the multiplicand, no evidence was adduced as to the reasonable earnings of a plumber/electrician today. AUTONUMOUT The only evidence put forward by the plaintiff were government statistics showing that the average daily wage of a plumber in August 2005 was \$871.90 and in October 2006 was \$843. The same government statistic also shows that the average daily wage of an electrician in August 2005 to be \$722.30 and in October 2006 to be \$740. AUTONUMOUT Counsel for the plaintiff suggested taking a median of those daily wages above and assuming 22 working days in a month comes out with a figure of \$17,468 as being the monthly salary for a plumber/electrician to be used as the present monthly earnings for one in that industry.

AUTONUMOUT I have some reservation as to using 22 working days to work out the monthly multiplicand since it can be seen from the statistics provided that the daily wage of a plumber has dropped by almost \$30 between August 2005 and October

2006. It would therefore appear that the climate in the industry is still poor. AUTONUMOUT Given the still poor climate in the industry, I would only be prepared to adopt \$15,000 as the average earning per month for calculating future earnings loss. AUTONUMOUT The evidence also shows that the plaintiff is now earning \$8,000 per month working as a delivery worker. He started that job in November 2006 when he was paid \$7,500 per month. His salary has increased to \$8,000 now. There are times when he will also be paid some overtime although no amount was given in evidence. AUTONUMOUT Taking into account the overtime pay, and bearing in mind that the \$8,000 is the actual earnings of the plaintiff alone, and not the average earnings of delivery workers in general, I would give some margin and assess the monthly loss of earnings in this case to be \$6,000. AUTONUMOUT The future loss of earnings therefore comes to $\$6,000 \times 18 = \$1,296,000$. AUTONUMOUT The loss of MPF relating thereto would come to 5% of the above figure giving \$64,800. AUTONUMOUT Total loss of future earnings and MPF comes to \$1,360,800. LOSS OF EARNINGS CAPACITY AUTONUMOUT With the injuries to his right hand, in particular his right thumb, I readily accept that the plaintiff will have severe handicap in the labour market in future should he lose his present employment for any reason. AUTONUMOUT \$90,000 has been claimed in the pleadings for loss of earnings capacity. This amount translates to about 11 months of the salary he is at present earning. AUTONUMOUT On that basis, the amount claimed would appear to be reasonable given all the circumstances of this case and the fact that the plaintiff still has a long way to go insofar as his working life goes. AUTONUMOUT Accordingly, the amount claimed will be allowed. OTHER SPECIAL DAMAGES AUTONUMOUT Total amount claimed under this heading of damages comes to \$10,395 made up as follows :

- (a) medical expenses totally \$5,736;
- (b) travelling expenses of \$1,500; and
- (c) tonic food \$3,000. AUTONUMOUT I have no difficulty with the medical expenses claimed as they are all receipted by government or public hospitals. AUTONUMOUT The travelling expenses would also appear to be reasonable considering that the plaintiff had attended the

O Department of CMC as an outpatient on eight occasions, occupational therapy on 11 occasions, physiotherapy for 19 sessions and a further seven attendances for dressing/injection. AUTONUMOUT As for the tonic food, that amount claimed is an estimate and not supported by any receipts. Courts are usually prepared to award a reasonable amount for tonic food depending on the circumstances of each case. AUTONUMOUT In this case, the amount of \$3,000 claimed even when gauged against just the sick leave period of 16 months granted to the plaintiff, it translates to under \$200 being spent per month on tonic food. That would appear to be reasonable in the circumstances of this case, and will be allowed. AUTONUMOUT The full amount of \$10,395 claimed under this head would be allowed. FUTURE MEDICAL EXPENSES AUTONUMOUT There is a claim by the plaintiff for future medical expenses in the amount of \$216,000. AUTONUMOUT That amount is calculated based on \$500 per session in the private sector for psychological treatment on the basis of two sessions per month and using the same multiplier of 18 as for loss of future earnings. AUTONUMOUT While there is a suggestion in the report of Dr Lai that the plaintiff still required some psychiatric treatment, no details have been given by Dr Lai as to the extent of such treatment in his report. AUTONUMOUT Moreover, the tone employed by Dr Lai in his report certainly did not go as far as to suggest the extent of the psychiatric treatment now claimed by the plaintiff. AUTONUMOUT I also take into account that all along, the plaintiff had attended government or public hospitals for the psychiatric treatment given to him and there is no suggestion by Dr Lai that the plaintiff requires to be treated in the private sector or that the treatment received by the plaintiff in the public sector was not adequate or sufficient. AUTONUMOUT In all the circumstances of this case, the claim for future medical expenses has not been made out by the plaintiff and will not be allowed. DEDUCTION AUTONUMOUT It was submitted by counsel for the plaintiff that the payment of \$145,500 received by the plaintiff from American International Assurance Company (Bermuda) Ltd being compensation for this accident under the policy of insurance taken out by the defendant should not be deducted from the amount of quantum assessed in this case. AUTONUMOUT The evidence in this case showed that firstly, the premium for the insurance policy was paid by the defendant. Secondly, it was unchallenged evidence of the defendant that since under the service contract between them, the plaintiff was not an employee and therefore no employees compensation insurance was taken out to cover the plaintiff, he thought it prudent to take out and pay for this insurance policy to cover the plaintiff for any accident the plaintiff may suffer at work. AUTONUMOUT In those circumstances, I can see very little difference between what has been received by this plaintiff from what a normal plaintiff would have received by way of employees compensation. AUTONUMOUT For this reason, I would have deducted the amount of \$145,500 from the amount of quantum assessed. COSTS AUTONUMOUT There will be a costs order nisi that the plaintiff pays the defendant his costs of defending this claim, to be taxed if not agreed. (A.R. Suffiad) Judge of the Court of First Instance, High Court Mr Osmond K.F. Lam, instructed by Messrs Huen & Partners, for the Plaintiff The Defendant in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ o}3 jY)B +L>b W`km0 o}3 W`km & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document

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