## DCPI 101/2017

[2020] HKDC 515

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 101 OF 2017

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##### BETWEEN

WONG YAT PING Plaintiff

### and

CARITAS – HONG KONG Defendant

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Coram : Deputy District Judge YW Hew in Chambers

Date of Hearing : 9 December 2019

Date of Judgment: 11 August 2020

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DECISION

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*INTRODUCTION*

1. This is an appeal by a defendant against paragraphs 1 and 3 of the order of Master Peony Wong dated 17 July 2019 (“the Master’s Order”) in which (per paragraph 1) leave was granted to the plaintiff to amend its Statement of Claim in terms of a draft Amended Statement of Claim (“ASOC”), and (per paragraph 3) costs of the hearing were ordered to be paid by the defendant to the plaintiff.
2. At the hearing before the Master, the defendant did not object to the majority of the proposed amendments in the draft ASOC. It did however object to the inclusion in paragraph 9 ASOC of a sentence which I have set out at paragraph 18 of this Decision (“the Contested Sentence”).
3. In this Appeal, the defendant (represented by Mr Leon Ho) maintains that position and says that leave to insert the Contested Sentence should have been and should be refused, as to allow its insertion would be contrary to the principle of issue estoppel, and to the principle of wider *res judicata*/abuse of process set out in *Henderson v Henderson* (1843) 3 Hare 100. Accordingly, it is said that the paragraph 1 of the Master’s Order should be set aside “to the extent that amendments in paragraph 9 of the Draft [Amended Statement of Claim] are to be disallowed.” The defendant also naturally asks for paragraph 3 (on costs) to be set aside.
4. The plaintiff’s (represented by Mr Timmy C H Yip) stance is that there were and are no such bars to the inclusion of the Contested Sentence in the ASOC and that the appeal should be dismissed, with costs.
5. Given the issues before this court, some exposition of the background to the action is necessary.

*BACKGROUND*

1. This action concerns a personal injury claim by the plaintiff, who was employed by the defendant, as a care assistant. There is no dispute that her job included turning caps of food storage containers.
2. On 24 January 2014, the plaintiff was required, in the course of her employment, to turn caps of food storage containers and experienced an injury to her right wrist and right thumb. I shall return later as to the apparent cause of that injury, as it is that which gave rise to other proceedings defined below as the EC Action, and also to those which give rise to the instant appeal.
3. On 13 October 2015, the plaintiff (as an applicant) issued an employees’ compensation application, DCEC 2123/2015 against the defendant (as a respondent) (“the EC Action”).
4. In relation to the EC Action:-
5. On 30 November 2015, interlocutory judgment in the EC Action was entered by consent, with compensation to be assessed (“EC Consent Judgment”). This stated that “by consent … interlocutory judgment on liability be entered for the applicant against the respondent with compensation to be assessed.” However, the EC Consent Judgment was only sealed on 3 December 2018.
6. A joint orthopaedic expert report was produced dated 11 July 2016 (“Joint Report”) by Dr Lau Sing Ki Kenric (the plaintiff’s expert) and Dr Lam Kwong Chin (the defendant’s expert).
7. The plaintiff filed a witness statement dated 27 October 2016 (“the witness statement”).
8. On 17 July 2018, a hearing for assessment of compensation in the EC Action took place before His Honour Judge MK Liu (“the EC Hearing”), who handed down judgment on 20 July 2018 in [2018] HKDC 857 (“the EC Liu Judgment”). The witness statement was deemed to be evidence at the hearing, which concerned the compensation payable under s 10 Employees’ Compensation Ordinance (Cap 282) (“ECO”).
9. Subsequently, and as I have already mentioned, the EC Consent Judgment was sealed on 3 December 2018.
10. Both parties were legally represented throughout, the plaintiff at the EC Hearing by Messrs Wai & Co, who were her former solicitors in this action.
11. In the meantime, the present action had been initiated by the plaintiff by way of a writ issued on 17 January 2017. Subsequently:-
12. On 17 July 2018 the Statement of Claim was eventually filed by Messrs Wai & Co.
13. On 12 February 2019 the Director of Legal Aid reassigned the plaintiff’s case to Messrs Wan and Leung.
14. The application to amend in terms of the ASOC was then filed and, as I have mentioned, was then heard and granted on 17 July 2019.
15. Given the issues before the court, it shall be necessary to return to the details of some of these documents later in this Judgment.

*THE RELEVANT APPROACH AND ISSUES*

1. The defendant submitted, and the plaintiff did not dispute, that the relevant principles to be applied in relation to an appeal from a Master to a Judge are those at *Hong Kong Civil Procedure 2020* §58/1/2. As summarised by K Yeung SC DHCJ (as he then was) in *Chow Kam Hung v Hoi Kong Ironwares Godown Co Ltd* [2019] 1 HKLRD 356 at 366:-

“An appeal from the master to the judge in chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the judge treats the matter as though it came before him for the first time. The judge will give the weight it deserves to the previous decision of the master, but he is in no way bound by it. The judge in chambers is in no way fettered by the previous exercise of the master’s decision, and on appeal from the judge in chambers, the Court of Appeal will treat the substantial discretion as that of the judge, and not of the master.”

1. The plaintiff submitted, and it was also not disputed by the defendant, that the court’s discretion to refuse or allow amendments to pleadings should be exercised in accordance with the following, well-known principles set out in *Li Shiu To v Li Shiu Tsang*, HCA 416/2004, Lok DHCJ (as he was then) at paragraph 14, citing *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189:-
2. All such amendments should be made as are necessary to enable the real questions between the parties to be decided.
3. Amendments should not be refused solely because they have been made by the honest fault or mistake of the applying party, it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights.
4. However blameworthy (short of bad faith) may have been a party’s failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave may be, the application should in general be allowed, provided that allowing it will not prejudice the other party.
5. There is no injustice to the other party if it can be compensated by appropriate orders as to costs.
6. As was also pointed out in paragraph 16 of *Li Shiu To*, under the CJR, regard must be had to RHC O 1A and the court needs to give effect to the underlying objectives set out therein, including increasing cost-effectiveness, ensuring that a case is dealt with as expeditiously as is reasonably practicable, promoting a sense of reasonable proportion and procedural economy, facilitating the settlement of disputes, and ensuring that the resources of the courts are disputed fairly. So an amendment application which offends the underlying objectives may require the court to balance all of the factors in the case.
7. Accordingly, I shall decide whether and to what extent the defendant’s objections to the Contested Sentence are of substance, before deciding whether and how to exercise my discretion. In that regard:-
8. The first substantive issue at the hearing of this appeal, which I have analysed in more detail in Section D below, is how and whether the principles of issue estoppel and/or set out in *Henderson, supra*, operate in relation to the Contested Sentence.
9. Further to such I shall in Section E below then proceed to deal with the question of what orders I should make, and in particular:-
10. Whether paragraph 1 of the Master’s Order should be set aside to disallow the insertion of the Contented Sentence as the first sentence of paragraph 9 of the ASOC; and
11. a secondary issue which also arose as to whether this appeal as presently formulated is academic and/or only raises issues of costs.

*DISCUSSION: ISSUE ESTOPPEL OR RES JUDICATA*

*Summary of the parties’ positions*

1. The defendant’s core complaint is that to allow the Contested Sentence to be pleaded is inconsistent with the basis on which the EC Action had been conducted, and the EC Consent Judgment obtained, by the plaintiff (there the applicant) against the defendant (there the respondent).
2. The defendant submitted that the plaintiff’s case in the EC Action (culminating in the EC Consent Judgment and the EC Liu Judgment) was that the plaintiff/applicant had sprained her right wrist and right thumb in an accident on 24 January 2014, and not on any other dates, nor was there any suggestion that her injury was caused by daily repetitive work. Reference was made to, in particular:-
3. Paragraphs 1 and 3 of the application in the EC Action (which was filed pursuant to Form 1 of the Employees’ Compensation Rules (Cap 282B)) (“the Rules”). The former expressly pleaded that the accident took place on 24 January 2014, while the latter pleaded inter alia particulars in support of the application, reading inter alia as follows:-

“3. Particulars are as follows:-

Particulars

…

(3) Date and place of accident, nature of work on which the Applicant was then engaged, nature of accident and cause of injury:-

1. On the date of the accident at around 10:00 a.m., ” the Applicant was assigned with the task of preparing food, including cutting vegetables, opening the cap of food storage containers, cleaning food storage containers etc. at ….
2. Due to a large amount performance (sic) of turning the cap of food storage containers (approximately 130-150 per day) and wrist movement action, the Applicant sprained her right wrist and right thumb as a result thereof.” (emphasis added)
3. Paragraph 2 of the EC Liu Judgment, where His Honour MK Liu had held that:-

“2. On 24 January 2014, the applicant sprained her right wrist and right thumb whilst preparing food, cutting vegetables and opening food storage containers in an accident arising out of and in the course of her employment with the respondent (“the accident”). The applicant was employed by the respondent as a care assistant at the time of the accident.” (emphasis added)

1. A similar plea had been included in the original writ and paragraph 8(a) Statement of Claim[[1]](#footnote-1). However the draft ASOC deleted that plea and inserted the Contested Sentence, which reads as follows:-

“The accumulation of the daily repeated performance of turning a large number of cap of the containers to close tight the same in the course of employment culminated in injury to the Plaintiff’s right wrist and right thumb the pain which manifested itself on the Date of Injury.” (emphasis added)

1. The thrust of the defendant’s submissions was that:-
2. The plaintiff’s case in the EC Action was that her injury was caused by a single accident on 24 January 2014 per s 5 ECO. For if the plaintiff had been claiming in the EC Action that her injuries were caused by daily repetitive work, instead of by an accident on 24 January 2014, she should have pleaded an occupational disease under s 32 and Schedule 2 ECO.
3. The factual premises on which liability was admitted in the EC Consent Judgment therefore created an issue estoppel[[2]](#footnote-2) and *res judicata* (ie that the plaintiff was injured by an accident on 24 January 2014) on which the defendant could rely in the present proceedings.
4. To allow the insertion of the Contested Sentence would be to allow the plaintiff to advance a different allegation of a long-term work environment issue, would offend the relevant principles of issue estoppel and as set out in *Henderson*, and hence would be clearly abusive. As regards such, the Contested Sentence also amounted to a collateral attack on the EC Consent Judgment and the EC Liu Judgment, including paragraph 2 thereof.
5. The defendant had apparently sought to raise similar objections to the inclusion of the Contested Sentence at the hearing before the Master. However, the learned Master was of the view that the Contested Sentence was not a collateral attack against paragraph 2 of the EC Liu Judgment, because that was only a background fact, rather than a fact that had been found by the court.
6. The plaintiff’s response, in summary, was that:-
7. It was necessary to construe the EC Consent Judgment in this case to see what was encompassed within. Properly construed, it did not reflect all of the issues, including injury by accident, which would give rise to issue estoppel to preclude insertion of the Contested Sentence within the ASOC. Moreover, an injury by accident is not just limited to the situation of a single incident which causes the injury, but also includes a situation where the injury or change is “occasioned partly, or even mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence” (*Oates v Earl Fitzwilliam’s Colliers Co* [1939] 2 All ER 498 per Clauson LJ at 502). It was also said that the fact that the plaintiff had to carry out daily repetitive work had been pleaded in the EC Action in application paragraph 3(3)(ii)[[3]](#footnote-3).
8. The Joint Report formed the basis for the present amendments, as the 2 orthopaedists had an agreed diagnosis of de Quervain’s disease. That Joint Report only became available after the EC Action had been commenced, and the EC Consent Judgment had been obtained. From the Joint Report it seemed that there was “confusion” about the plaintiff’s injury and whether she had accurate knowledge of her injury.
9. The Contested Sentence was not abusive and did not contravene the principle of *res judicata* in the wider sense (see discussion below on the *Henderson* principles) as it was not an attempt to relitigate a decided issue. Reliance was placed on the plaintiffs’ interpretation of the EC Consent Judgment and its consensual nature, it also being pointed out that:-
10. While both parties could have applied to set aside the EC Consent Judgment, neither party did so. Rather, they proceeded to the compensation hearing and it “… might be implied that [the parties] did not regard the opinions in the [Joint Report as] materially affecting the issue of liability in the EC Action.”
11. Adopting the Joint Report in the EC Action did not amount to a misuse or abuse if the same Joint Report were relied on in the present action which “necessitated the amendments, including the Contested Sentence”.

*The relevant legal principles relating to issue estoppel and to the approach in Henderson v Henderson*

1. I have had regard to the following relevant principles as contained in the following authorities cited by the parties, including Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at paragraphs 17-26, citing *inter alia* *Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Johnson v Gore-Wood & Co* [2002] 2 AC 1[[4]](#footnote-4), and the judgment of the Court of Appeal in *Ngai Few Fung v Cheung Kwai Heung* [2008] 2 HKC 111.
2. Issue estoppel arises where, even if a cause of action is not the same in a later action as it was in an earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties. So it:-

“… may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen the issue”[[5]](#footnote-5).

1. Hence:-

“Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) Were not raised in the earlier proceedings or (ii) Were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.”[[6]](#footnote-6)

1. Also relevant to and relied on in the present appeal is the concept of what our Court of Appeal at paragraphs 16 and 22 of *Ngai Few Fung, supra*, has termed the *Henderson* ‘abuse of process’ principle, but which Lord Sumption JSC also analysed as being a wider concept of *res judicata* at paragraph 24 of *Virgin Atlantic, supra*. This principle arises from *Henderson v Henderson* (1843) 3 Hare 100, 115 and precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier proceedings.
2. The test and rationale for such were set out in paragraphs 16 to 19 of *Ngai Few Fung, supra*, wherein our Court of Appeal cited Lord Bingham’s and Lord Millett’s observations on the rationale of the *Henderson* principle, as had been more recently set out in *Johnson, supra*[[7]](#footnote-7), as follows:-

“(1) “The principle is to serve the public interest in that there should be finality in litigation and that a party should not be twice vexed in the same matter.”

(2) “This is reinforced by the current emphasis on efficiency and economy on the conduct of litigation, in the interests of the parties and the public as a whole.”

(3) “The onus is on the party alleging abuse.”

1. “The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.”[[8]](#footnote-8) (emphasis added)
2. “It is, however, not necessary, before abuse may be found, to identify any additional elements such as a collateral attack[[9]](#footnote-9) on a previous decision or some dishonesty. But where those elements are present the later proceedings will be much more obviously abusive.” (emphasis added)
3. “There will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party.” (emphasis added)
4. “It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”[[10]](#footnote-10) (emphasis added)
5. “It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not been previously adjudicated on … In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.”[[11]](#footnote-11)”
6. Further to this, the Court of Appeal also observed at paragraphs 19 and 22 of *Ngai Few Fung, supra,* that in Hong Kong, the right to access to the court is also guaranteed by the Basic Law and the Bill of Rights and that it:-

“… is not permissible to adopt a mechanistic approach by simply saying that since the cause of action or defence could have been raised in an earlier proceedings then it should have been raised so that the subsequent raising of those issues in the later proceedings will necessarily become abusive.” (emphasis added)

1. As it was not apparently disputed that the above constitute the approach to be applied pursuant to the *Henderson* principles (which term I shall use henceforth), I have not in this judgment found it necessary to deal with, nor do I deal with, the question of whether the *Henderson* principle is based on abuse of process[[12]](#footnote-12), or whether while it is concerned with abuse of process it actually forms part of the law (ie the “wider concept”) of *res judicata*[[13]](#footnote-13)*.*

*The construction of the EC Consent Judgment*

1. There was no dispute between the parties that consent judgments (such as the EC Consent Judgment) can decide issues that are binding on the parties in subsequent and/or other proceedings[[14]](#footnote-14). As these issues might be relevant to issue estoppel and/or for the purposes of the *Henderson* principles, I first turn to determining what was decided by way of the EC Consent Judgment.
2. In my view, it is clear from a reasonable reading of the EC Consent Judgment that, in the relevant context, it was admitted that the injury was caused solely by an accident that occurred on 24 January 2014. It is also clear from such that the EC Consent Judgment made no reference to any previous incidents/work pattern being relevant to such accident. I reach this conclusion for the following reasons.
3. Firstly, the EC Consent Judgment recorded that “by consent … interlocutory judgment on liability” would “be entered for the applicant against the respondent” between the parties in the EC Action, with compensation to be assessed[[15]](#footnote-15). While it did not explicitly set out each and every ingredient of the “liability”, this does not mean that the term “liability” simply remains free-standing without any particular import, and/or that no underlying issues are therefore encompassed within it.
4. In *Manzour Hussain v Bavarian Chemicals Co Ltd*, CACV 37/2003, unreported, 3 October 2003, the employer had filed, pursuant to Form 2 of the *Employees’ Compensation Regulations* (Cap 282A)(“the Regulations”), a report based on information provided by the appellant, within which it was stated that as a result of an “industrial accident [that] happened whilst at work…” the appellant had “slipped carelessly and his leg got in contact with the acid”. DCEC proceedings were then commenced and consent judgment had been entered “for liability” in them. However, the employer then became aware of previously unavailable matters, including medical evidence, which cast doubt on whether the appellant’s injury had actually been caused by such sequence of events. The employer applied to set aside the consent judgment in the DCEC proceedings as it was of the view that the injury to the employee had not been “caused by an accident arising out of and in the course of employment”. At first instance Her Honour Judge HC Wong had granted the application and ordered inter alia that the consent judgment be set aside. The Court of Appeal dismissed the appeal. In doing so, Stone J. (sitting as a member of the Court of Appeal and with whom Woo JA agreed) held that a submission by the appellant’s counsel:-

“… that there was no necessity to set aside the [consent judgment in the DCEC proceedings] on liability because the issue effectively would be at large in terms of a quantum assessment, and thus be reflected in any award, is, with respect, flawed. I fail to see how the premise of the medical evidence now sought to be called sensibly can co-exist with a judgment on liability which is conclusive upon the very issue such medical evidence seeks to contradict.” (emphasis added)

1. It is therefore generally valid to look into and consider the relevant factual and legal background to determine what underlying issues can be said to have been “conclusively” decided by the present EC Consent Judgment on “liability”.
2. Secondly, and given the approach in *Manzoor Hussain, supra*, I consider that it is relevant, when considering the issue of what underlies the Defendant’s “liability”, to bear in mind the following:-
3. The legal context within which the EC Consent Judgment was entered, such as the structure of the ECO itself, pursuant to which a defendant may be made liable for a claim raised for *inter alia* an “accident” (s 5 ECO) and/or for “occupational disease” (s 32 and Schedule 2 ECO), and the relevant rules and principles relating to pleading an action under the ECO. I shall return to these matters in relation to this case.
4. Within that legal context, the contents of the pleading and application (including the Particulars thereof) filed pursuant to the ECO within the EC Action (which I have set out at paragraph 17 above), since such would clearly be relevant in determining what was the basis for the “liability” admitted within the EC Action by way of the EC Consent Judgment.
5. In particular, and in relation to why it is valid to have regard to the contents of the application/pleadings within the EC Action:-
6. I am of the view that Stone J.’s judgment in *Manzoor Hussain, supra* is relevant and apposite to the present case, as that judgment also concerned the question of what was decided by way of a consent judgment on “liability” in an application pursuant to the ECO. There, the Court of Appeal had clear regard to the underlying averments and facts set out in the employer’s report filed pursuant to s 15 ECO and Form 2 of the Regulations when determining what “liability” had been so incurred or admitted by way of the consent judgment in that DCEC action, and hence in deciding to allow the employer’s application to set aside that consent judgment on “liability”. A *fortiori*, there can be no reason for refusing to have reference to the contents of the pleadings/application in a DCEC action, particularly when those are filed in support of the underlying claim pursuant to the Rules.
7. *Ng Yee Wah v Lam Chun Wah* [2009] 2 HKLRD 427 (CA) does not appear to me to constitute binding authority that this court cannot refer to the pleadings as part of the relevant background when considering what the EC Consent Judgment might encompass. Rather, on a holistic and reasonable reading of the case and decision of Stone J (see paragraphs 14 to 19 and 41 to 43), what his Lordship held was that it was not possible to construe the relevant consent order in the 2003 action in that case (which was merely for “agreed damages”[[16]](#footnote-16) in a complicated action concerning multiple allegations) as giving rise to the alleged issue estoppels relied on. It would be surprising if his Lordship had indeed held by way of a single sentence containing no substantive discussion or citation of authority, and *prima facie* contradicting well-known canons of construction of consensual agreements, that it is never permissible to look at the pleadings as a matter of objective background fact to decide what is covered by a consent order. I do not think he so held. Moreover and in any event, his Lordship also went on to mention that having had regard to the content of the pleadings from the 2003 action, they did not assist to establish that the consent order included such admissions.
8. Thirdly, and with that said, at the same time I consider that Mr Leon Ho for the defendant was correct in submitting that the EC Consent Judgment can only create issue estoppel in relation to matters which are essential to the “judgment on liability”. The question, as Mr Timmy Yip for the plaintiff put it, was whether I am certain that the EC Consent Judgment covered the relevant issue which is pertinent to the questions of issue estoppel and/or the *Henderson* principles ie that the applicant/plaintiff’s injury was caused by a single accident on 24 January 2014 (and if necessary, per s 5 ECO).
9. Fourthly, and also given the above, I am satisfied that the following matters clearly demonstrate that it was admitted and determined as an issue, by way of the EC Consent Judgment, that the applicant/plaintiff’s injury was caused by a single accident on 24 January 2014 pursuant to s 5 ECO, and that such matter would have been essential to the judgment on “liability”:-
10. The ECO permits an “accident” to be pleaded and relied on pursuant to s 5 ECO. When a “personal injury by accident” is relied on as bringing about injuries, the date of each and every accident (if more than one is relied on) must be pleaded in paragraph 1 of Form 1 of the Rules. If more than one date is relied on then all those dates should be clearly and separately set out so as to sufficiently identify the causes of action *viz* each and every event that gives rise to the claim under s 5 ECO. The Particulars at paragraph 3 of Form 1 of the Rules are meant to provide material facts in support of those said cause(s) of action in the claim/application: *Li Zhuoman v Easy-Access Transports Services Ltd*, DCEC 2695/2015, unreported, 23 December 2016, HH Judge Levy at paragraphs 26-27.
11. An occupational disease can be pleaded pursuant to s  32 and Schedule 2 ECO. Item A8 of Schedule 2 ECO also provides as follows:-

|  |  |  |  |
| --- | --- | --- | --- |
| Item | Description of occupational disease | Nature of trade, industry or process | Prescribed period for purposes of section 32 |
| A8 | Traumatic inflammation of the tendons of the hand or forearm (including elbow), or of the associated tendon sheaths | Any occupation involving manual labour, or frequent or repeated movements of the hand or wrist | 1 year |

1. In that context, and on reading the application in the EC Action including the relevant Particulars (which I have set out at paragraph 17 above), it is clear to me that the applicant/plaintiff’s case therein, which was admitted and determined as an issue in the EC Consent Judgment, was that a single “accident” had occurred on 24 January 2014 causing her the injury, which occurred only due to the performance of a “large amount” of turning caps on the day of the accident. The pleadings do not, when sensibly and holistically read, suggest that the ECO claim is premised on previous work performance which accumulated/culminated in an injury or accident on that date and/or (including as a possible alternative) of any occupational disease of any sort (whether under s 32 ECO or otherwise), or that such concepts are in any way relevant.
2. While, as submitted by Mr Yip for the plaintiff, the EC Consent Judgment does not refer to any particulars under s 5 ECO, that is neither here nor there given the matters above.
3. As was also submitted by Mr Yip for the plaintiff, per *Oates v Earl of Fitzwilliam’s Colliers*, *supra*, there may be situations where an injury is or was occasioned partly/mainly by the progress or development of an existing disease. However, when properly analysed above, the pleadings/application in the EC Action, which led to the EC Consent Judgment, include no such relevant plea or suggestion.

*Issue estoppel*

1. Given my conclusion above, it is clear that the nature of the “accident” was determined by the EC Consent Judgment. While such was entered by consent, prima facie the plaintiff would be estopped from relitigating the claim and advancing an alternative case to such: *Paul Baxendale-Walker v APL Management Ltd* [2018] EWHC 543 (Ch D) at paragraphs 40-41.
2. It was not apparently disputed, and in any event I am of the view, that allowing the inclusion of the Contested Sentence in the present proceedings would be allowing the plaintiff to run an alternative factual case which was not raised in the EC Action, namely that the injury resulted from the accumulative and repeated minor trauma to the plaintiff’s right wrist and right thumb, which manifested itself on 24 October 2014. This point was not raised in the EC Action.
3. Are there “special circumstances” which justify the plaintiff being allowed to run this alternative case to that contained in the application in the EC Action, despite the issue estoppel created by the EC Consent Judgment? Or, if it is said that the relevant point was not raised, could it have been raised with reasonable diligence, and in the circumstances should it have been raised?
4. On the totality of the evidence and taking into account the parties’ submissions there are, in my view, no such special circumstances and the point could clearly have been raised with reasonable diligence, and should have been raised in the EC Action. This is for the following reasons.
5. Firstly, the plaintiff was legally represented (albeit not by her current representatives, who only become involved in early 2019 and several months after the EC Consent Judgment had finally been sealed) throughout the EC Action.
6. Secondly, by the time of the Joint Report it was therefore clearly possible for the plaintiff to advance the case in the Contested Sentence of a “accumulation of the daily repeated performance … [culminating] in injury … [manifesting] itself on the Date of Injury”. Within paragraphs 13 to 22, 77 to 91, 98-106 of the Joint Report it was clear that the experts (including in particular the plaintiff’s own expert Dr Lau) had raised and addressed the following issues:-
7. causation of the injury and its underlying diagnoses, including whether it was an acute personal injury from a single incident, or the likelihood that it was rather repeated prior minor injuries with the symptoms taking place and being acutely exacerbated on 24 January 2014 (as was suggested by Dr Lau); and
8. whether the pain was due to cumulative trauma or an occupational disease.
9. Indeed, and further to that, the plaintiff herself subsequently referred in the witness statement in the EC Action to her repeated performance of having to turn 130 to 150 caps everyday, and how the doctor had diagnosed such as an occupational disease.
10. The point about the injury resulting from cumulative/accumulative trauma, past work experience, and/or (if relevant) an occupational disease could and should, with reasonable diligence, have been raised in the EC Action by the time of the Joint Report, and in any event by the time the plaintiff/applicant signed her witness statement.
11. Thirdly, and in spite of these matters, the plaintiff did not then seek to apply to set aside or vary the EC Consent Judgment in any way. Rather, around 2.5 months after her witness statement had been signed on 27 October 2016, she proceeded to file the writ in the present action which also mentioned an “accident which happened to her on 24th January 2014”. Around 18 months later she proceeded to the EC Hearing (at which the witness statement was deemed to be evidence) and obtained the EC Liu Judgment against the defendant for compensation in which His Honour stated that the accident occurred on 24 January 2014. The issue dealt with in the EC Liu Judgment was the question of the loss of earning capacity permanently caused by the injury. However, given the reasoning in *Manzoor Hussain, supra*, the findings on quantum therein were necessarily premised on the relevant acceptance of “liability” within the EC Consent Judgment. Moreover, on the same day as the EC Hearing, the plaintiff had filed the Statement of Claim in this action (which contents I have set out above). Finally, after the plaintiff had obtained the EC Liu Judgment, the plaintiff sealed the EC Consent Judgment.
12. Fourthly, there is no explanation, or no cogent explanation, from the plaintiff herself as to why, despite the contents of the Joint Report and her witness statement, no such case was advanced and/or no such consideration was given to advancing it, including by applying set aside or vary the EC Consent Judgment. All that the plaintiff has said on oath is that when she first gave instructions to her present legal representatives on 4 March 2019, “it was clear that there were several notable errors and omissions” in the Statement of Claim prepared by her former solicitors, and that her former handling solicitor was no longer a practicing solicitor.
13. Mr Yip pointed out on behalf of the plaintiff that the defendant itself had also not applied to set aside the EC Consent Judgment based on the contents of the Joint Report. He also pointed out the defendant’s own expert, Dr Lam, had delved into such issues in the Joint Report. I note some of Dr Lam’s comments reflect that the plaintiff was not actually injured on a “single specific incident or trauma” on 24 January 2014 and that he had also concluded that the injury was also not due to a compensable occupational disease (see paragraphs 83, 85, 99, 105). However, I do not see how or why such matters, or the plaintiff’s evidence, can constitute “special circumstances” which would mean that injustice would be caused if the principle of issue estoppel were allowed to operate. Ultimately, it was the plaintiff who (being legally advised at all times) initiated and had carriage of the EC Action, by which she sought compensation for the injury she had allegedly suffered at work. She had also instructed her former solicitors to issue the writ and the Statement of Claim in the present action, which were consistent with her application/pleadings in the EC Action and the EC Consent Judgment. I do not see why the plaintiff can derive any benefit from any alleged inaction on the defendant’s part. I also therefore do not see any injustice if she is held to her case, as was set out in the application/pleadings in the EC Action, and as was crystallised in the EC Consent Judgment.
14. The principle of issue estoppel therefore operates to prevent the plaintiff from asserting the alternative case which is set out in the Contested Sentence.

*The Henderson principles*

1. In view of my conclusions above on issue estoppel, it is strictly speaking not necessary for me to deal with the application of the *Henderson* principles in the instant case. However, I shall do so for the sake of completeness as these principles were the subject of considerable discussion at the hearing, and as the exercise, being a broad, merits-based judgment, would seem to require that I assess, by and large, the same evidence.
2. Given my conclusions in the section above on issue estoppel, I am satisfied that the question of the manner in which the plaintiff was injured was decided by way of the EC Consent Judgment, and hence consider that the said claim is a collateral attack on the EC Consent Judgment, given the nature and effect of the latter, the nature of basis of the claim made in the EC Action, and the absence of any concrete grounds relied on to justify the collateral challenge. This is so notwithstanding the suggestion that greater weight will be accorded to the nature and effect of a judgment in a contested civil trial, than to an interlocutory judgment or order, or a consent order approved by the Court: *Tsang Chin Keung v Employees Compensation Assistance Fund Board (No 2)* [2003] 1 HKC 499 at §33.
3. I am also satisfied, given the matters that I have set out above, that the claim in the Contested Sentence could have been raised in the EC Action.
4. In making a broad, merits-based judgment I have taken into account the facts of the case as set out above, including in particular the contents of the Joint Report and the witness statement and when they became available, the steps taken by the parties in both the EC Action and this action, and the plaintiff’s evidence. Given the nature of the judgment I have to make in accordance with the *Henderson* principles, I accord more weight to the fact that the defendant was also aware of the contents of the Joint Report yet did not take any steps in relation to such and the EC Consent Judgment. However, bearing in mind the principles of finality in litigation and the focus on efficiency and economy in the interests of the parties, I hold that the defendant has established that it would be unjust to the defendant, and the plaintiff would be abusing the process of the court, were she allowed to relitigate the decided question of how the injury was caused.

*DISCUSSION: WHAT ORDER IS TO BE MADE*

*The exercise of this court’s discretion*

1. Having concluded that the Contested Sentence offends the principle of issue estoppel and is also abusive by reason of the *Henderson* principles, and given the principles as set out in paragraphs 12 to 14 above, I can see no reason why I should exercise my discretion to allow the Contested Sentence to be pleaded within the ASOC.
2. However, and as I have pointed out in Section C above, I consider that I should first deal with the issue of whether this appeal as presently formulated is academic and/or only raises issues of costs.

*Is the appeal academic and/or does it only raise issues of costs?*

1. This question arose due to the following procedural history of the present matter.
2. On 18 July 2019, the day after the Master’s Order had been made, the ASOC was filed in accordance with paragraph 1 of the Master’s Order.
3. The defendant had filed a Notice of Appeal dated 23 July 2019 seeking to set aside paragraphs 1 and 3 of the Master’s Order (as have been explained in paragraph 1 above). However, no application was or has been made by the defendant for a stay of execution of any relevant paragraphs of the Master’s Order.
4. Instead, and apparently in accordance with paragraph 2 of the Master’s Order, the defendant chose to file an Amended Defence on 15 August 2019 (“the Amended Defence”). The Amended Defence did however plead a response to the Contested Sentence (which is within paragraph 9 of the ASOC), by denying it and averring inter alia that “the plaintiff is estopped from asserting that she sustained injuries in circumstances other than spraining her right wrist and right thumb in an accident on 24 January 2014.”
5. I therefore requested that the parties address me on the question of whether the appeal was academic and/or only raised costs issues, and in view of the answers to such, what order(s) I should make, and why.
6. Having considered those submissions, I am of the view that the current appeal is not academic nor does it only raise costs issues, and that I can make the orders sought by the defendant, rather than (as the plaintiff has suggested) orders striking out the Notice of Appeal and dismissing the appeal.
7. Firstly, I agree with Mr Ho’s submission that an amendment made without leave of the court amounts to an irregularity which can be cured retroactively under RDC O 2 r 1, that the court would then decide whether and how it would exercise the powers entrusted to it to remedy any such irregularity, that fundamental and serious irregularities cannot be cured, and that the same power is subject to the same principles which govern an ordinary application made under the relevant rule: see *Gilbert v Gosdorf Pty Ltd* [2001] NSWSC 502 per Harrison M at paragraphs 7 and 15(21) , and *Ho Yoke Kwei & anor v Ong Eng Hin* [1997] 4 MLJ 292 per Augustine Paul JC at 304, 306-308.
8. Pursuant to that, I also agree with Mr Ho that it would not be academic for me to make an order setting aside leave to include the Contested Sentence in the ASOC. As I have found above for the defendant on the matter of issue estoppel, as well as on the *Henderson* principles, my making of the order requested by the defendant would mean that the plaintiff is unable to rectify what is a fundamental and serious irregularity (aka the inclusion of the Contested Sentence without leave) under RDC O  2 r 1. As Mr Ho has also pointed out, the defendant could also make a fresh application to strike out the Contested Sentence based on such reasoning. Whatever the case, the course of the remainder of the proceedings, including the scope of issues and evidence to be adduced, would clearly be affected. It also follows that the appeal also does not give rise only to costs issues.
9. Secondly, in the present case the appeal is not rendered nugatory by the fact that the defendant did not apply for a stay of the Master’s Order, filed the Amended Defence, and did not apply for other orders in relation thereto.
10. I agree with Mr Ho’s submission that, while the Master’s Order stands, this meant that the plaintiff could insert and rely on the Contested Sentence for the time being. After all, pleadings may be amended and can, once filed, as analysed above be the subject of further rulings as to their (ir)regularity. Moreover, it was and always has been objectively clear that the defendant continued to oppose the inclusion of the Contested Sentence by prosecuting this appeal, and had even pleaded estoppel (which issue was raised and has been dealt with in this appeal) in response to the Contested Sentence in the Amended Defence.
11. *Huaxin (Hong Kong) Co Ltd v Cheerful Corporation & ors* CACV 343/2003, unreported, 1 March 2005 concerned the question of whether the appeal was competent as the respondents to the appeal (being the 2nd and 3rd defendants) were no longer parties to the action, having in the interim been removed from such by the plaintiff’s own application to amend the pleadings. The majority of their Lordships held that the appeal was therefore no longer competent unless and until that amendment order was set aside. However, the present situation is quite different, as I am not concerned with the removal of parties by the defendant to its own appeal against those parties, but rather with the insertion of the Contested Sentence by the plaintiff in the ASOC, which insertion and factual averment the defendant has clearly contested all along.
12. In the present case it is therefore open to me to make the orders sought by the defendant on its appeal, pursuant to which the parties may well (if so advised) take other procedural steps.
13. Given the above, I would observe for the sake of completeness that *Gay v Yip Shut Yuen* [2004] 1 HKC 615 is not relevant, as that considered an appeal for security for costs in respect of a trial which had already taken place, and that in relation to *The Bank of East Asia Ltd v Labour Buildings Ltd & anor* HCMP 769/2002, unreported, 19 January 2006, Carlson DHCJ. his Lordship’s reasoning simply seems to have been that his refusal to grant the stay sought did not render the appeal entirely academic, but rather rendered it a costs-only appeal.

*Orders made*

1. In view of the above, I allow the appeal and make the following orders:-
2. paragraph 1 of the Master’s Order be set aside to the extent that the amendments in paragraph 9 of the draft ASOC are to be disallowed; and
3. paragraph 3 of the Master’s Order be set aside.
4. As the defendant has prevailed, it appears to me appropriate to make an order *nisi* that the costs of the appeal and of the hearing before Master Peony Wong on 17 July 2019 be paid by the plaintiff to the defendant forthwith, to be taxed if not agreed, with certificate for counsel, and that the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations. Such order is to be made absolute if no application to vary the same is made within 14 days.
5. Lastly, I thank both Mr Ho and Mr Yip for their assistance.

( YW Hew )

Deputy District Judge

Mr Timmy C H Yip, instructed by Wan and Leung, assigned by the Director of Legal Aid, for the plaintiff

Mr Leon Ho, instructed by Au & Associates, for the defendant

1. “The Plaintiff had sprained her right wrist and right thumb in the course of employment performing the said task as a result thereof on the Date of Accident (“the Accident”)” (emphasis added). On a reasonable reading of the Statement of Claim the “said task” refers to the “daily task of preparing food, including cutting of vegetables and opening of the cap of food storage containers, cleaning and storing the containers, etc. at the Site”. [↑](#footnote-ref-1)
2. At the hearing of the application, the plaintiff disclaimed any reliance on cause of action estoppel. [↑](#footnote-ref-2)
3. The exact contents are set out thereof at paragraph 17 (1) of this Decision. A similar plea had been included in paragraph 9 of the Statement of Claim, which by way of the ASOC became paragraph 8(a). [↑](#footnote-ref-3)
4. *Sub nom* [2001] 2 WLR 72 which is the report referred to in *Ngai Few Fung, supra*. [↑](#footnote-ref-4)
5. Per *Arnold*, *supra*, at 105D-E as cited in *Virgin Atlantic, supra*, at paragraph 20. [↑](#footnote-ref-5)
6. Per *Arnold*, *supra*, as summarised in *Virgin Atlantic, supra*, at paragraph 23. [↑](#footnote-ref-6)
7. Per Lord Bingham in *Johnson, supra*, at 90 of the WLR report cited in *Ngai Few Fung, supra,* or 31 of the AC report referred to in *Virgin Atlantic, supra*, at paragraph 24. [↑](#footnote-ref-7)
8. Also cited by Lord Sumption JSC at paragraph 24 of *Virgin Atlantic*. [↑](#footnote-ref-8)
9. I deal later in this Decision with the question of what constitutes a collateral attack. [↑](#footnote-ref-9)
10. Per Lord Bingham in *Johnson, supra*, at 90 of the WLR report cited in *Ngai Few Fung, supra,* or 31 of the AC report referred to in *Virgin Atlantic, supra,* at paragraph 24. [↑](#footnote-ref-10)
11. Per Lord Millett at 90 of the WLR report cited in *Ngai Few Fung, supra,* or 59 of the AC report referred to in *Virgin Atlantic, supra*. [↑](#footnote-ref-11)
12. As per paragraph 22 of *Ngai Few Fung, supra*. [↑](#footnote-ref-12)
13. As per paragraphs 24 and 25 of *Virgin Atlantic, supra* wherein *inter alia* Lord Sumption JSC’s analysis was that both concepts are juridically very different, “as res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court’s procedural powers” which are “distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive … estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process.” [↑](#footnote-ref-13)
14. See for example *Baxendale-Walker v APL* [2018] EWHC 543 (Ch D) at paragraphs 40 to 41. [↑](#footnote-ref-14)
15. See paragraph 9 above. [↑](#footnote-ref-15)
16. The actual phrasing was that “judgment be entered for the Plaintiff against the 1st defendant for the sum of HK$3,418,091.20 as agreed damages” as can be seen from the first instance judgment of Poon J (as he then was) in *Ng Yee Wah v Lam Chung Wah & anor*, HCA 2457/2007, unreported, 22 September 2008. [↑](#footnote-ref-16)