DCPI 2370/2014

[2020] HKDC 166

**IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.2370 OF 2014

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

BETWEEN

YAU PO SHAN Plaintiff

and

THE EXPRESS LIFT COMPANY LIMITED 1st Defendant

SYNERGIS MANAGEMENT SERVICES 2nd Defendant

LIMITED

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

Before: Deputy District Judge S.H. Lee

Dates of 1st Defendant’s Submissions: 9 & 30 January 2020

Date of Plaintiff’s Submissions: 24 January 2020

Date of Decision: 27 March 2020

-------------------------

**DECISION**

-------------------------

1. This is my decision on paper disposal of 1st defendant’s summons dated 6 Dec 2019 for leave to appeal (**D1’s Summons**) against my judgment dated 8 Nov 2019 in plaintiff’s favour against it (**the Judgment**)[[1]](#footnote-1). I adopt in this decision the same abbreviations in the Judgment.
2. By the Judgment, I find D1 liable to pay damages to Ms Yau for injuries she sustained in the Accident.
3. At the time of the Accident, Ms Yau was a passenger inside the Lift and D1 was the lift contractor responsible for the maintenance and repairs of the Lift. Upon reaching 2nd floor, the Lift suddenly plunged at greater than its normal speed and jerked twice before it stopped and stalled violently at about 1 foot below the lobby floor causing a “bang” sound. Ms Yau got trapped in the Lift and was only released from it after firemen arrived to restore the Lift to ground level.
4. I find that the Accident was caused by some contactor problem (接觸點) of the KVAB Relay (繼電器), a relay for drive motion signaling, of the Lift. The said KVAB Relay was replaced by Wong after, and on the same day of, the Accident: para 63, 64, 66-68 of the Judgment. But the reason why the said KVAB Relay failed, or why there was contactor problem, on the day of the Accident remains unknown: para 90 of the Judgment.
5. In the Judgment, this court finds the Doctrine applicable, the plaintiff making out a prima facie of negligence against D1, such a case not having been rebutted, and drew an inference of negligence against D1 for failing to have inspected the Lift, including its KVAB Relay, and/or kept it maintained properly, in time or at all: para 109, 117-120 of the Judgment.
6. D1 now seeks leave to appeal in order to reverse my finding of liability against it in the Judgment on 3 grounds settled by its counsel Mr Jackson Poon (**Mr Poon**) and set out in its draft notice of appeal annexed to D1’s Summons.
7. By s.63A(2) of District Court Ordinance, Cap.336, leave to appeal shall not be granted unless the appeal has a reasonable prospect of success or that there is some other reason in the interests of justice why the appeal should be heard.
8. I reproduce below the said 3 grounds in full and deal with each of them in turn, starting with the 2nd ground.

Ground 2

There is no expert evidence to show: - (a) when the KVAB Relay became defective; (b) whether the problem of the KVAB Relay could be detected before the Accident by a professional technician of ordinary skill; (c) whether the Accident could have been avoided by examination of the lift by a professional technician of ordinary skill (Please see, *inter alia*, paras 63-69, 90, 94-95, 103-104, 111, 114(1) of the Judgment).

1. Mr Poon has, I think, merely pointed out lack of expert evidence in this 2nd ground. He has not identified any error allegedly made in the Judgment which warrants the Court of Appeal to interfere with my finding of liability against D1. As such, this 2nd ground does not begin to have any prospect at all.
2. In any event, such lack of expert (and other) evidence was recognized by this court: para 2-5 of the Judgment. Absent such evidence, Mr Lung appearing for Ms Yau at trial relied instead on the Doctrine: para 116 of the Judgment. The Doctrine is a mode of inferential reasoning, with the burden of proof remaining with the plaintiff at all times: para 75-77 of the Judgment.
3. In his submissions on this 2nd ground (and also 1st ground), Mr Poon addressed this court much, and submitted several authorities[[2]](#footnote-2), on standard of care, including that of professional negligence. With respect, such submissions are, I think, neither here nor there.
4. First, the focus of submissions of Mr Lo appearing for D1 at trial has never been on standard of care to be expected from D1. Rather, he submitted that 2 conditions for the Doctrine to apply have not been met and, if the Doctrine applies at all, any prima facie case so raised has been neutralized by D1: para 6(1), 7 & 8 of the Judgment.
5. Secondly, Mr Poon has also, I think, not identified either in the 2nd ground (or in the 1st ground) any alleged error made in the Judgment on standard of care.
6. Thirdly, this court was well aware in the Judgment that:
7. Plaintiff’s case against D1 is a case of *negligence*, and not strict liability: para 7, 72, 74 & 120 of the Judgment;
8. D1’s 2nd line of defence is that such prima facie case, if any, raised on the Doctrine has been neutralized by D1 having taken *reasonable* care in maintaining the Lift: para 8 & 110 of the Judgment;
9. Lift maintenance is works of a highly technical nature that only authorized persons can undertake under prevailing legislation: para 152 of the Judgment; and
10. D1 was at all material times a registered lift contractor with the necessary qualified personnel: para 23 & 112 of the Judgment.
11. This 2nd ground has thus, I think, no reasonable prospect of success at all.

Ground 3

Replacing the defective KVAB Relay after the Accident cannot be used as evidence of negligence (Please see, *inter alia*, paras 103-4 of the Judgment)

1. Mr Poon next submitted that measures taken after accident is at law not evidence of negligence.
2. Such improvement by way of replacing the KVAB Relay of the Lift made by Wong on the day of the Accident cannot, he submitted, be used by this court as evidence of negligence.
3. Mr Poon cited several authorities[[3]](#footnote-3) to the effect that *additional precaution* taken after accident *with the benefit of hindsight* does not ***by itself*** prove negligence *at the time of the accident*, as it is *always* easy to be wise *after* the event.
4. I agree with Mr Leon Ho now instructed for Ms Yau (**Mr Ho**) that this 3rd ground is plainly misconceived.
5. The KVAB Relay was, I find, a component or control equipment of the control system (控制系統) of the Lift situated inside control cabinet (控制櫃) of its machinery room (機房): para 67 & 104(1) of the Judgment.
6. *Before* the Accident, D1 had, I find, *already* *recognized* *problems* with the control system of the lifts of the Estate, *including KVAB Relay*, and suggested renewal works in the Report: para 19-21, 104(2) & 126 of the Judgment.
7. *Specific* provisions have, I find, *already* been *introduced* for the first time in the Tender Documents signed by D1 *before* the Accident (and in the 2011 Contract effective *as from the day of the Accident*) for D1 to arrange periodic examination of the *KVAB Relay* by way of its contractual *obligation* of *maintaining*, inter alia, the Lift: para 32-34, 36(2), 37(3), (5), (6) & 104(3) of the Judgment.
8. Hence, this court finds D1 under a duty of care at common law to Ms Yau as passenger of the Lift to inspect the Lift, *including its KVAB Relay*, properly and to keep it properly maintained to protect her health and safety: para 72 & 73 of the Judgment.
9. On the day of the Accident, Wong, I find, attended the Estate, inspected and repaired the Lift, and replaced its KVAB Relay, by way of *discharging D1’s duties* of providing *ad hoc maintenance* in response of request from D2 after Ms Yau and others were trapped in, and rescued from, the Lift: para 60 & 62 of the Judgment.
10. Thus, D1 knew *before* the Accident that it was *obliged* to ***maintain*** *the KVAB Relay* of the Lift to keep the Lift properly functioning on the day of the Accident. Wong did not replace the KVAB Relay on the day of the Accident as *improvement* or *additional precaution* to the Lift to guard against similar accident in future. There was no question of D1 being wise after the Accident.
11. The facts of those authorities cited by Mr Poon are, I think, far removed from those of this case. For the proposition of law he derived from them, they deal with, again, standard of care not complained of in the draft notice of appeal.
12. Further, I think Mr Poon had misread para 103 of the Judgment. The said paragraph was made in response to Mr Lo’s submission at para 94 of the Judgment that the word “defective” was not found in the Accident Entry. The emphasis of this court is not on the act of replacing the KVAB Relay *itself* but on its *alternatives* and the *timing* of such replacement.
13. Mr Poon had also, I think, misread para 104(5) of the Judgment, where the focus of this court is, again, not on the act of replacing KVAB Relay *itself* but rather the *discoverability* of the contactor problem of KVAB Relay being the cause of the Accident by Wong and *the relatively short time* taken by him to so discover and sort it out by replacement (with **emphasis** already made by this court in *italics* to the said paragraph).
14. Such **circumstances** in *italics* to para 104(5) of the Judgment are used by this court as one of many circumstances, including those in para 104(1)-(4) of the Judgment, to show that:
15. this is not a case of defective component *per se* as submitted by Mr Lai appearing for D2 at trial or a case of *mere* failure of KVAB Relay as submitted by Mr Lo: para 94 & 95 of the Judgment; and
16. condition (1) of the Doctrine has been met i.e. the Accident was an occurrence that would not have happened without negligence on the part of D1 in terms of inspection, maintenance and repair of the Lift, including its KVAB Relay: para 107 & 108 of the Judgment.
17. Hence, this court has never used the act of replacing the KVAB Relay of the Lift after the Accident ***itself*** as evidence of negligence as submitted by Mr Poon.
18. The 3rd ground has therefore, I think, no reasonable prospect of success either.

Ground 1

The findings in the Judgment show that D1 had properly examined the lift in 5 occasions in Oct 2014, the month preceding the Accident. Therefore, D1 had exercised reasonable care and the Doctrine should not be used against D1 (Please see, inter alia, paras 75, 150(3)-(6), 151 of the Judgment)

1. Mr Poon submitted that the findings of the Judgment show that D1 had properly examined the Lift on 15, 17, 23, 28 & 29 Oct 2011. According to the Logbook, qualified staff of D1 had carried out inspection on the above 5 occasions, discovered the source of problem and took repair works to rectify the discovered problem correctly. He laid particular emphasis to para 150(5) of the Judgment.
2. The evidence, he submitted, shows that the KVAB Relay failure could not have been discovered and prevented in advance despite there were proper inspections and maintenance by qualified personnel on these 5 occasions. He also laid particular emphasis to para 150(6) of the Judgment.
3. There is, he submitted, no evidence from plaintiff to show that the KVAB Relay failure could have been detected and prevented by a competent technician before the Accident.
4. Hence, it is submitted that D1 had exercised reasonable case and the Doctrine should have been rebutted.
5. This 1st ground is, I think, also without merit.
6. As Mr Poon relied on para 150 & 151 of the Judgment for this 1st ground, I think he referred to the **5 Incidents** on **16, 17, 22, 28 & 29** Oct 2011. On each of the 5 Incidents, according to entries of the Logbook, passengers were trapped in the Lift and later rescued by firemen, and that D1 had sent staff attending to the Lift, with Wong attending on **17** Oct 2011: para 46 & 47 of the Judgment.
7. I think Mr Poon had again misread para 150 & 151 of the Judgment, which were made in response to Mr Lung’s submissions at para 144 & 147 of the Judgment.
8. Anyone who reads column (5)[[4]](#footnote-4) of the 5 entries on the dates of the 5 Incidents of the Logbook would notice that problems or parts *other than* KVAB Relay (collectively **Other Problems**) were put down by D1’s attending staff as the sources of the problem, or reasons for the breakdown, of the Lift on the 5 Incidents.
9. In gist, Mr Lung submitted at para 144 & 147 of the Judgment that D1’s attending staff on each of the 5 Incidents, including Wong attending on 17 Oct 2011, gave “incorrect diagnosis” of Other Problems on the Logbook, and gave “incorrect repairs” to the Lift, when in truth the Lift suffered from the same and common root problem of KVAB Relay failure that went “undetected and uncured” on each of the 5 Incidents.
10. This court rejected Mr Lung’s submissions above by giving 8 reasons at para 150 of the Judgment and **found** at para 150 & 151 of the Judgment that:
11. the Other Problems put down in the Logbook by D1’s attending staff were indeed the “correct” reasons for the breakdown of the Lift on the 5 Incidents;
12. proper parts or works had indeed been replaced or done after the 5 Incidents as proper response to the Other Problems;
13. the 5 Incidents had thus their *known* causes i.e. Other Problems ***different*** from that of KVAB Relay failure put down by Wong in the Logbook as the cause of the Accident; and
14. there is **no** *common* or *same* root cause of KVAB Relay failure for the 5 Incidents (and the Accident) as submitted by Mr Lung.
15. Specifically, at para 150(5) & 150(6) of the Judgment, this court was giving its ***reasons*** that:
16. D1’s attending staff on the dates of the 5 Incidents had *sufficient qualification* and *enough time* to discover correctly Other Problems they had put down in the Logbook as the reasons for the breakdown of the Lift and to rectify such problems properly, as Wong did identify correctly KVAB Relay failure, and put it down correctly on the Logbook, as the reason for the breakdown of the Lift on the day of the Accident; and
17. Given that Wong was *able to discover* (as plaintiff accepts) *correctly* KVAB Relay failure as the cause for the Accident (and *within a* *relatively short period* of 7 hours on the same day), he should also have identified it as the cause of the breakdown of the Lift on 17 Oct 2011 *had it been the true cause on that day as submitted by Mr Lung*. The fact that Wong did not do so on 17 Oct 2011 suggests that KVAB Relay failure was not such cause on 17 Oct 2011.
18. Hence, on my findings at para 150 & 151 of the Judgment set out above, the 5 entries of the 5 Incidents on the Logbook do not show at all that D1’s attending qualified staff, including Wong on 17 Oct 2011, had inspected *the KVAB Relay* of the Lift on the dates of the 5 Incidents and,even if they do, they do not show either *how* they had gone about doing that. These 5 entries at best only showed Other Problems having being discovered and dealt with!
19. As this court pointed out at para 114 of the Judgment and as Mr Ho stressed in submissions, save except for the Test Report *more than 7 months before* the Accident but not specifically covering KVAB Relay, there is no evidence of the detailed works and manner of maintenance, inspection, examination, testing and repairs that were *actually* carried out by D1 on the Lift *and its KVAB Relay* at all material times before the Accident. Read correctly, my findings at para 150 & 151 of the Judgment regarding such entries in the Logbook for the 5 Incidents cannot, and do not, fill the said evidential gap.
20. Therefore, D1 had, I think, plainly *failed* to **adduce evidence** of its regular and proper inspection and maintenance of the Lift, *including its KVAB Relay*, at all material times before the Accident that is *capable* of ***rebutting*** the *prima facie* case raised against it by the Doctrine as this court concluded at para 118 of the Judgment.
21. This 1st ground holds, I think, no reasonable prospect of success too.
22. For sake of completeness, there is, I think, no other reason why D1’s appeal should be heard in the interests of justice.

*Disposition*

1. I dismiss D1’s Summons and make an order nisi that D1 do pay the plaintiff the costs of and incidental to D1’s Summons with certificate for counsel, to be taxed if not agreed.
2. Finally, I thank Mr Poon and Mr Ho for their submissions.

(LEE Siu-ho)

Deputy District Judge

Written Submissions by Mr Leon Ho (instructed by Messrs. K. H. Teh & Co.) for the Plaintiff

Written Submissions by Mr Jackson Poon (instructed by Messrs. Huen & Partners) for the 1st Defendant

1. [2019] HKDC 1495 [↑](#footnote-ref-1)
2. *Clerk & Lindsell on Torts*, 22nd Edition, para 8-149; *Cheung Wai Mei v The Excelsior*, unreported, CACV 38/2000, 22 Nov 2000; *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 [↑](#footnote-ref-2)
3. *Charlesworth & Percy on Negligence*, 14th Ed, para 8-55; *Pipe v Chambers Wharf* [1952] 1 Lloyd’s Rep 194; *Gray v The Admiralty* [1953] 1 Lloyd’s Rep 14 [↑](#footnote-ref-3)
4. Column 5 being “cause of fault or work done &/or parts replaced” [↑](#footnote-ref-4)