# DCPI 432/2015

[2020] HKDC 203

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 432 OF 2015

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BETWEEN

FANG CHO KWONG Plaintiff

and

YAT KWONG AUTO PARTS LIMITED Defendant

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Before: Her Honour Judge Phoebe Man in Court

Date of Hearing: 21-22 January 2020

Date of Plaintiff’s closing submissions: 3 March 2020

Date of Plaintiff’s supplemental closing submissions: 3 March 2020

Date of Plaintiff’s 2nd supplemental closing submissions: 5 March 2020

Date of Defendant’s closing submissions: 4 March 2020

Date of Defendant’s supplemental reply closing submissions: 4 March 2020

Date of Defendant’s last supplemental reply closing submissions: 6 March 2020

Date of Judgment: 9 April 2020

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JUDGMENT

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*BACKGROUND*

1. The plaintiff works as a car repair technician in a garage as an employee of Kwai Keung Motors (“Kwai Keung”). Kwai Keung is located in DD 129, Lot 3255, Ha Tsuen, Yuen Long, New Territories. The defendant is a limited company and operates Yat Kwong Garage (“Yat Kwong”). Yat Kwong is located on various lots in DD 129, Ha Tsuen, Yeun Long, New Territories. Some boundaries of Yat Kwong and Kwai Keung are adjacent to each other.
2. Yat Kwong had placed a 20-feet container (the “Container”) on a metal rack which was about 15 feet above the ground inside the premises of Yat Kwong. There is no dispute that there were ceiling parts put on top of the Container. These ceiling parts are rectangular in shape and measured about 40 feet x 4 feet, weighing about 200 pounds. There is photo evidence showing that these ceiling parts were bundled together in a stack and were placed on top of the Container.
3. It is the plaintiff’s case that:-
4. At about 11:30 am on 26 June 2013, whilst the plaintiff was carrying out some repair works to a medium goods vehicle inside Kwai Keung, a suspended ceiling part suddenly fell off from the top of the Container.
5. The plaintiff heard a loud noise and tried to run away towards the opposite direction of where the noise came from.
6. He slipped and sustained injuries whilst he was running (the “Accident”).
7. The plaintiff says the Accident was wholly caused by the negligence of the defendant in:
8. failing to take adequate precautions for the plaintiff;
9. failing to ensure the suspended ceiling part was securely fixed;
10. causing the suspended ceiling part to be placed on the top of the Container;
11. failing to give the plaintiff warning of the suspended ceiling part;
12. failing to safeguard the plaintiff who was working nearby; and
13. allowing the suspended ceiling part to fall from height.
14. The defendant denies liability. The defendant denies:-
15. any ceiling part fell from the top of the Container;
16. the ceiling part fell and hit the plaintiff;
17. the plaintiff ran away to avoid the falling ceiling part; and
18. the plaintiff slipped whilst running and sustained injuries.
19. The defendant further submitted that even if the court found the Accident did take place, there was no breach of duty of care on the part of the defendant.
20. There was no dispute that the plaintiff bore the burden of proof in proving liability and quantum in his present claim.
21. It is of note that there was no dispute that the plaintiff had sustained injuries. The plaintiff had instituted a claim against his own employer Kwai Keung under the Employee’s Compensation Ordinance (Cap 282). The claim was settled and the plaintiff had already received employees’ compensation from Kwai Keung for his injuries. The plaintiff’s present claim against the defendant (who is not his employer) is purely based on common law negligence.

*Factual Finding - Did a ceiling part fall into the premises of Kwai Keung?*

1. The plaintiff confirmed in his oral testimony that he did not see a ceiling part falling into the premises. However, he had not called any eyewitness to give evidence for the alleged Accident. His oral testimony was that on the material day he heard a loud noise. He said he felt the vibrations of the lorry that he was working on. Instinctively, he pushed himself away towards the opposite direction of where the noise came from. As he was pushing himself away from his left foot, he injured himself.
2. The plaintiff said three photographs were taken right after the Accident occurred. The defendant disputed that these photographs were contemporaneous and thus they did not show the immediate condition after the Accident. The plaintiff himself did not take these photographs as he was hurt. Instead, he asked his employer, the owner of Kwai Keung, to take them for him. The plaintiff’s employer was not a witness in the present proceedings and did not give any evidence.
3. In these photographs, the plaintiff was not seen. Two of these photographs were “photographs of photographs”, ie they were images of photographs being put on a surface. The photographs were not dated.
4. Photograph 1 (Bundle A/229) shows some scratches on the top of a goods vehicle;
5. Photograph 2 (Bundle A/213A) shows a bunch of tied up ceiling parts on top of the Container;
6. Photograph 3 (Bundle A/228) shows a piece of white dented ceiling part lying flat, perpendicular to the front part of a goods vehicle.
7. I note the following from these 3 photographs:-
8. Photograph 1 is a close-up view of a goods vehicle. No other frame of reference can be seen to ascertain where or when the photograph was taken.
9. From photograph 2, it could be seen that next to a fuel truck with a yellow hood, there was an old container and a white van. These were not seen in photograph 3, even though the photos show the same location.
10. The piece of white dented ceiling part lying flat, as seen in photograph 3, could not be seen in photograph 2, even though they were supposed to show the same location.
11. The dented ceiling parts belonging to the defendant had rectangular edges, whereas the ceiling part alleged to have fallen as shown in photograph 3 had round edges.
12. No soft copies of the photographs were available. No metadata is available assisting as to when these photographs were taken.
13. The photographs, whether together or viewed on their own could not show a ceiling part belonging to the defendant had fallen into Kwai Keung’s premises.
14. The plaintiff’s counsel Mr Liu attempted to, by way of written closing submissions, explain how it was possible that one could interpret the photographs differently. Such explanations included pictures and graphs drawn by Mr Liu. This was met with strong objections from Mr Gidwani, counsel for the defendant. It was said that Mr Liu was giving evidence himself. Mr Liu insisted he was only making submissions to assist the court.
15. Leaving aside whether Mr Liu was giving evidence himself, what is clear is that he had already attempted to lead the plaintiff in re-examination to say that a piece of white object on top of a mini van in photograph 2 was the piece of fallen ceiling part. The plaintiff clearly answered that he did not know. The court had also asked the plaintiff whether the piece of white ceiling part as shown in photograph 3 was the white object shown on top of the mini van in photograph 2. The plaintiff answered that it could not be seen from the photographs.
16. More importantly, Mr Liu did not put it to the Mr Yung, the defendant’s witness, in cross-examination that the white ceiling part as shown in photograph 3 fell from the Container and belonged to the defendant.
17. In those circumstances, without any evidence from the witnesses to that effect, there is little value in Mr Liu suggesting that “it was possible” that a piece of white board could be the fallen ceiling part in photograph 2 or 3. It certainly does not help with the plaintiff satisfying the burden of proving the Accident did happen on a balance of probabilities. The same applies to other “possibilities” put forward by Mr Liu in his various written closing submissions as to how the photographs could be interpreted and why no image of a folded ceiling part was shown. Counsel submissions can do no better than evidence from witnesses. As the plaintiff could not explain such possibilities himself, the Court cannot simply rely on interpretations or “possibilities” offered by Counsel to hold that the plaintiff’s evidential burden has been satisfied.
18. Consequently, I do not think that the photographs on their own could assist in showing on a balance of probabilities the Accident happened in the way described by the plaintiff. The photographs also did not show on a balance of probabilities that a ceiling part fell from the top of the Container.
19. There were 3 other photographs [A/203 – 205] which Mr Liu relied on in his written submissions. However, these photographs were simply disclosed in the list of documents. It was not the plaintiff’s case that they related to the Accident. It seemed that the plaintiff was suggesting that these photographs were taken subsequently, in relation to a latter incident. It is not open for Mr Liu to interpret these photographs without the plaintiff or Mr Yung of the defendant having given evidence on them. Even if there was a latter incident (which was denied by the defence and not accepted by this court), there is no basis to say that simply because a latter incident happened, it was more likely that the Accident did happen.

*Credibility of Witnesses*

1. The plaintiff gave oral evidence for himself and Mr Yung gave evidence for the defendant. When assessing the credibility of witnesses, I bear in mind the following principles set out by Deputy High Court Judge Thomas Au (as he then was) in *Lee Fu Wing and Anor v Yan Paul Po Ting and Chan Chi Yin[[1]](#footnote-1).* In assessing the *credibility*of *a*party’s case, the court should take into consideration the following:-

“*(1)* *Whether the party’s case is inherently plausible or implausible;*

*(2) Whether the party’s case is, in a material way, contradicted by other evidence (documentary or otherwise) which is undisputed or indisputable;*

*(3) Where it is shown that a witness has been discredited over one or more matters to which he has given evidence using the above tests. This is relevant to the assessment of his overall credibility; and*

*(4) The demeanour of the witness.*”

1. Throughout his evidence, the plaintiff behaved in a “tongue-in-cheek” manner. It was evident that he did not take the trial seriously. He kept smirking and half covered his mouth throughout the beginning of his evidence and only stopped upon the court reminding him that giving evidence is a serious matter. I also do not find him an honest and reliable witness for the following reasons:-
2. It was the plaintiff’s case that he only found out subsequently (“後來我才知道那聲巨響是由於事發地隔壁一間名叫日光歐洲零件行有限公司的一個貨櫃頂部上一塊用鐵皮及發泡膠製的假天花配件由高空墮下，跌落在我正在維修的中型貨車的右側。”). There was a lot of dispute as to what the plaintiff meant by “後來”. The plaintiff’s oral testimony was that he was told by his employer a few minutes after the Accident that the noise was caused by the collision of a ceiling part that fell from the Container into Kwai Keung. His evidence was that he heard a loud noise and felt the vibrations on the vehicle that he was working on. Instinctively, he tried to flee. He accepted that the loud noise and the collision must have come from a collision of objects. In photograph 3, one could see a piece of ceiling part lying right next to the front part of the goods vehicle that he was working on. It was the plaintiff’s evidence that that piece of ceiling was the one that fell from the Container into the premises of Kwai Keung. If this were true, it would have been impossible for the plaintiff not to have seen the cause of the loud noise, the ceiling part having fallen right next to where he was working. The plaintiff insisted that he did not see it as he was concentrating on drilling the licence plate onto the front of the vehicle. This is simply impossible and unbelievable. If such a big piece of ceiling part fell onto the vehicle that he was working on he must have been able to see it upon collision. He wouldn’t have had to rely on others to inform him afterwards. Even if he did not see it upon collision, he would have seen it afterwards as it lied right next to where he said he was working at the time, as shown in photograph 3. I do not accept the plaintiff’s explanation. Either he was lying about how the Accident happened or he was lying about not having seen the ceiling part.
3. The photographs alleged to have been taken right after the Accident happened simply do not fit in with the plaintiff’s account. The alleged fallen part was supposed to be folded, yet there is no folded ceiling part in any of the photographs said to be taken right after the Accident.
4. At the beginning, the plaintiff said that he had not discussed the Accident with his employer before preparing his witness statements. Upon further cross-examination, he admitted that he had scolded the defendant together with his employer about the Accident. He said he did not consider that as a discussion. His evidence was that he had not discussed with his employer about how the Accident happened. This is unbelievable: the plaintiff had instituted an employees’ compensation claim against his employer for his injuries sustained from the Accident. His employer had provided him with photographs taken by him as evidence for the plaintiff’s claim in the present action. It would have been unbelievable for the employer not to have discussed with the plaintiff about how the Accident happened. This was also contradictory to his evidence that it was his employer who told him what happened.
5. The plaintiff agreed that he was only guessing that the scratches shown in photograph 1 were caused by the collision.
6. From the above, I have no hesitation in rejecting the plaintiff’s evidence. I find the version of events put forward by the plaintiff as inherently improbable.
7. I also take into account the following in finding that the version of events put forward by the plaintiff was unbelievable:-
8. The plaintiff said that his employer had called the police after the Accident. However, the plaintiff had not produced any police statement or report of the Accident.
9. There was also no evidence that criminal prosecutions had been instituted against the defendant for the Accident.
10. The defendant confirmed in his evidence that the police informed him that they received a report that someone was injured within Kwai Keung and invited him to go over to Kwai Keung to take a look. The defendant said that at the time he could not see any ceiling part within Kwai Keung. It was the defendant’s case that he had subsequently tried to see if there was any police record but he could not find any. Mr Liu criticized the defendant for having failed to obtain a police report in this regard. However, this criticism overlooked the fact that the plaintiff bore the burden of proof. The plaintiff ought to be able to produce a police report or police photos on the incident, if indeed the Accident happened as described by the plaintiff.
11. Based on the above, I am of the view that the burden of proving the Accident happened was not discharged by the plaintiff.
12. Mr Liu in his submissions kept asking why would the plaintiff fabricate a case against the defendant. Leaving aside the fact that there could be a multitude of reasons for the plaintiff to lie (trying to get compensation from the defendant, the defendant’s bad relationship with the plaintiff’s employer), in any event that would be the wrong approach for a court to take in assessing whether the plaintiff has discharged his burden of proof. It is the defence case that the Accident did not happen. It is for the plaintiff to demonstrate with evidence that the Accident did happen on a balance of probabilities. If that burden is not met, there is little value in suggesting that there was no reason for the plaintiff to lie (which is not accepted).
13. Mr Yung gave evidence for the defendant. It is Mr Yung’s evidence that he had been having arguments and conflicts with the owner of Kwai Keung (the employer of the plaintiff) since 2012, and the plaintiff and the owner of Kwai Keung had fabricated the present claim. It is Mr Yung’s evidence that he bought 7 pieces of the ceiling parts in about 2013 in preparation for constructing a cover on top of the two containers so that he could use them as an office. He used one piece to cover up a hole on the metal rack so he could walk on it. The rest of the 6 pieces were tied up and put on top of the Container. His evidence was that what was found inside Kwai Keung could not have fallen from the defendant as the 7 pieces of ceiling parts remained after the Accident. In fact, they are still there after 6 years, as he had not managed to get permission from the Planning Department to construct the roof. He left them there as he hoped to one day construct the roof still.
14. I find Mr Yung to be straightforward and direct when he gave evidence. He remained unwavered during cross-examination. I accept his explanation on how he remembered clearly he bought 7 pieces of the ceiling parts (based on the calculations of the area to be covered on top of the Container), and how 7 pieces remained after the Accident. I also accept his evidence that the 6 pieces of the ceiling parts put on top of the Container were tied up at all times and that there were no loose ceiling parts on top of the Container. I also accept his evidence that nowhere else in Yat Kwong were there loose ceiling parts.

*Disposition – Liability*

1. Based on my analysis, I find that the plaintiff has not discharged his burden in proving on a balance of probabilities that there was an Accident as alleged. The defendant is thus not liable for the plaintiff’s claim.

*Breach of Duty*

1. As I find the defendant not liable for the plaintiff’s claim, it is not liable for the damages sought and there was no breach of duty. However, for completeness, I set out my findings on breach of duty and quantum below, if I had found that the Accident happened as alleged.
2. The defendant accepts that there is a duty of care owed by the defendant to the plaintiff based on the traditional neighbourhood principle. The defendant however denied that there was a breach of that duty for the following reasons:-
3. There was evidence that the ceiling parts were tied up.
4. There was a corner metal part preventing the ceiling parts from falling into Kwai Keung.
5. The ceiling part weighed about 200 pounds and was 45 feet, thus it was unlikely that it was blown away.
6. The ceiling parts would not roll away or move on its own.
7. No one could access the Container to accidentally push off the ceiling parts.
8. A subcontractor was engaged to move and fasten the ceiling parts.
9. I disagree with the defendant’s submission that there was no breach of duty of care if the Accident did happen as alleged. If the Accident did happen, it would have been clear that all the actions taken were insufficient to have prevented the ceiling parts from falling off. I am thus of the view that if the Accident did happen, there would have been a breach of duty of care on the defendant’s part.

*Contributory Negligence*

1. The defendant’s case was that the plaintiff’s injuries were partly contributed by a failure on the plaintiff’s part to have worn safety shoes and partly due to his inappropriate response to the Accident. The plaintiff said that at the time of the Accident, he was wearing safety shoes. The defendant put the plaintiff to strict proof. The plaintiff provided a photograph of the same type of protective shoes worn by his employer as evidence. The plaintiff said that he had already thrown out his safety shoes as they were too heavy for him to wear post-injuries.
2. The defendant bore the burden of proving that there was contributory negligence. There was no expert evidence on how protective shoes would have lessened or prevented the injury. There was also no expert evidence to show that the plaintiff’s response was inappropriate or would have led to the alleged injury. It is insufficient for the defendant to say that the severity of the plaintiff’s injuries pointed more to the plaintiff not having worn protective footwear at the time when the Accident happened. I am not satisfied that the defendant has satisfied the burden of proving there was contributory negligence, should I have held that the Accident had occurred as alleged.

*Quantum*

1. For completeness I consider the quantum of the plaintiff’s claim should I have found liability is established.

*PSLA*

1. in the event liability is established, the plaintiff claims HK$200,000 for PSLA. The defendant says an amount of HK$100,000 is appropriate. I have considered the written submissions of both the plaintiff and the defendant and the cases therein and am of the opinion that as the injury involved a screw fixation surgery, even though there was no fracture, an award of HK$200,000 would be appropriate under PSLA.

*Pre-Trial Loss of Earnings*

1. Loss of Earnings and MPF were agreed at HK$250,742.22 and HK$12,537.36, should liability be established.

*Loss of Earning Capacity*

1. There was no dispute that this head covers the risk that at some future date during the plaintiff’s working life he will lose his employment and will suffer financial loss because of his disadvantage in the labour market.
2. The defendant’s medical expert opined that the plaintiff could continue with his previous job with a loss of earning capacity at 1%. The plaintiff’s expert on the other hand opined that the plaintiff would suffer permanent adverse effect on his work performance as he has to take on lighter duties with a loss of earning capacity at 1.5%.
3. It is a fact that the plaintiff had continued working with his employer up until the present day, with no reduction in salary due to reduced working capacity (alleged by the plaintiff). He also agreed that he anticipated that he could work until retirement. From the surveillance video, no apparent limp was shown and there was no apparent difficulty suffered by the plaintiff whilst he was working.
4. In light of the above, I am of the view that there is only very little risk that the plaintiff will suffer financial loss by reason of disadvantage in the labour market and will order a nominal amount of HK$15,000 under this head, should liability be established.

*Special Damages*

1. Parties agreed on the medical fees of Tuen Mun Hospital, Dr William Yuen, Hong Kong Baptist Hospital, Adventist Hospital, Mr Ng Bonesetters, Dr Chan Chi Kin, Ted Wong Physiologist at HK$89,020.
2. The defendant opposes the HK$65,250 claimed for Chinese bonesetter fees incurred with Dr Cheng Kwok Wah. This amount equates 261 visits at HK$250 each. The defendant says there was no evidence to prove the therapeutic effect of such treatment and the amount is inordinately high. However, the medical experts in their joint report considered that “the given treatment was appropriate”. It might be said that the treatment referred only to medications and physiotherapy as only those were expressly mentioned in paragraph 62. However, the doctors did mention Chinese medical practitioner treatments in paragraph 44 of the report. I am of the view that the medical experts did not opine that those treatments were inappropriate. I will allow them up to the date of the medical report, as the doctors opined that the plaintiff had already reached maximal medical improvement as at 6 September 2019. I will therefore allow the 148 times of treatment at HK$250 each before the joint medical report, at a total of HK$37,000 should liability be established.
3. The plaintiff claims travelling expenses of HK$8,000 and tonic food for HK$10,000. Despite a lack of receipts, I find a total of HK$5,000 for travelling expenses and HK$5,000 for tonic food as reasonable.

*Summary of Quantum of Damages (Should liability be established)*

1. Accordingly, I would have allowed the following damages sought by the plaintiff, should liability have been established by the plaintiff.

|  |  |
| --- | --- |
| Heads of Damage | Amount |
| PSLA | HK$200,000.00 |
| Pre-Trial Loss of Earnings & MPF | HK$250,742.22  HK$12,537.36 |
| Loss of Earning Capacity | HK$15,000.00 |
| Medical Expenses | HK$126,200.00 |
| Travel Expenses | HK$5,000.00 |
| Tonic Food | HK$5,000.00 |
| Total | HK$614,479.58 |

1. If the plaintiff had successfully established liability, I would have awarded interest at 2% pa on general damages for PSLA, from the date of service of the writ to the date of judgment, and at half judgment rate on the award of pre-trial loss of earnings and special damages, from the date of the accident until the date of payment of employees’ compensation, and thereafter, on the remaining balance (after the deduction of employees’ compensation) up to the date of the judgment.
2. For the avoidance of doubt, as the plaintiff had failed to establish its case, none of the above damages or interest would be payable.

*CONCLUSION*

1. The plaintiff’s claim is dismissed. I make a costs order *nisi* that costs of the action (including all costs reserved) be paid by the plaintiff to the defendant, to be taxed if not agreed, with certificate for one Counsel.
2. The plaintiff’s own costs be taxed in accordance with legal aid regulations.

( Phoebe Man )

District Judge

Mr Liu Cheong Wang, Jerome, instructed by Wong & Tang, assigned by the Director of Legal Aid, for the plaintiff

Mr Gidwani Victor and Mr Jethro Pak, instructed by KCL & Partners, for the defendant

1. [2009] 5 HKLRD 513 [↑](#footnote-ref-1)