# DCPI 1012/2020

[2023] HKDC 1013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1012 OF 2020

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BETWEEN

CHUNG HO MING Plaintiff

and

CHAN WAI YIP 1st Defendant

THE KOWLOON MOTOR BUS

COMPANY (1933) LIMITED 2nd Defendant

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 27, 29 and 31 March 2023

Date of Judgment: 25 July 2023

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JUDGMENT

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*INTRODUCTION*

1. This is a personal injury (“PI”) claim brought by the plaintiff (“P”) against the 1st and 2nd defendants (“Ds”). Both issues of liability and quantum are in dispute.

*BACKGROUND*

*The Accident*

1. On 5 December 2017 at about 3:18 pm, P, a 69-year old man, was a passenger on board of a route 42A double decker public bus bearing registration number UF7528 (“the Bus”), when he fell from the staircase (“the Staircase”) therein, and as a result, sustained injuries to his left shoulder (“the Accident”).
2. The 1st defendant (“D1”) was the driver of the Bus at the material time whilst the 2nd defendant (“D2”) was the registered owner of the Bus, as well as the employer of D1.
3. Shortly before the Accident occurred, P boarded the Bus at the Mei Foo Bus Stop situated at Lai Chi Kok Road, Cheung Sha Wan (“the Bus Stop”).
4. P’s pleaded case in regard to the Accident can be found in the statement of claim (“SOC”) filed on 8 February 2021. It has been described as follows:-

“At the material time, the Plaintiff was climbing up the staircase to get his seat. However, after the Plaintiff had walked up the 3rd step of the staircase, the 1st Defendant suddenly stopped Public Bus UF7528 and caused Public Bus UF7528 a great shake. As a result, the Plaintiff lost balance and fell down onto the lower deck.”: (See SOC, §2(b))

1. P further pleaded in the reply (“the Reply”) filed on 26 October 2021 that the Accident happened due to the following:-

“The Plaintiff avers that the 1st Defendant increased the speed or applied the break [sic] suddenly and turned right to leave the bus stop which caused the bus had [sic] a great and sudden shake. As a result, the Plaintiff lost balance and fell down onto the lower deck.”: (See the Reply, §3.3)

1. Mr Tommy Cheung, P’s counsel, in §2 of his opening submissions has put P’s “factual case” as follows:-

“(a) In circumstances where the lower deck of the Bus was fully occupied, and when P was climbing up the staircase of the Bus whilst holding as usual the handrail and carrying his trolley and bag, the Bus driven by D1 halted and P lost balance and fell onto the lower deck as a consequence (the “Fall”);

(b) The Fall caused P to sustain left shoulder dislocation with massive tear of the rotator cut tendons; and

(c) Such injuries necessitated treatments of inter alia the treatments at the orthopaedic clinic/unit, physiotherapy, occupational therapy etc, after P was sent by ambulance to the Accident & Emergency Department of Princess Margaret Hospital. Option of shoulder joint arthroplasty was also advised, however P refused due to inter alia P’s advanced age and his fear of the operations risk.”

1. P’s contention is that D1 was negligent and D2 should be held vicariously liable for the Accident.

*P’s claim for damages*

1. P’s claim for damages has been particularized in the revised statement of damages dated 17 May 2022 (“RSOD”) which consisted of a claim for general damages under pain, suffering and loss of amenities (“PSLA”) at HK$250,000; pre-trial loss of earnings at HK$655,320; future loss of earnings at HK$77,400; and special damages at HK$12,715, making a total claim at HK$995,435 (excluding interest and costs).

*DISCUSSION*

*P’s case*

1. P’s primary case, according to Mr Cheung, is that he was a “vulnerable elderly and/or was encumbered by things (ie his trolley and bag), and thus required special care to be taken by D1 as the bus driver, who however did not make arrangements for the same”.
2. P’s second proposition is that D1 has, on the facts of the present case, failed to discharge his duty as a reasonable and competent driver in all the circumstances, in that he failed to drive the Bus *“smoothly, without abnormal and sudden movement”*.
3. As a result thereof, P says that he is entitled to recover the above amount of damages from Ds.

*Ds’ case*

1. Ds’ primary case is that there was no sudden movement or braking which caused P’s fall from the Staircase of the Bus. Instead, the Bus was travelling at a normal speed when it left the Bus Stop which had a gentle incline. P fell down from the Staircase of the Bus purely due to his decision to go to the upper deck of the Bus when it was moving and his failure in holding onto the handrails provided while climbing up the Staircase whilst carrying too many heavy items in his hands.
2. Ds therefore contend that P is not entitled to recover any damages from the Accident.

*LIABILITY*

*Applicable principles*

1. In general, for a bus passenger to succeed in a claim for negligence against a bus driver and/or his bus company, the passenger must establish that something more than a usual/expected and unremarkable movement of the bus caused him to fall. That is so even if the passenger was climbing a staircase or was otherwise unseated: see *Sum Shu Lam v Poon Tak Shing, City Bus Ltd* HCPI 89/1997 (Deputy Judge McMahon (as he then was); 11 November 1999), at p14.
2. In *Fletcher v United Counties Omnibus Co Ltd* [1998] PIQR 154, the English Court of Appeal held that, whilst bus companies and bus drivers must take steps to ensure the reasonable safety of their passengers, that duty is satisfied by the provision of appropriate safety support within the buses. In reaching that conclusion, Simon Brown LJ quoted the following passages from the South African case *Azzopardi v State Transport Authority* [1982] 30 SASR 434:-

“*Most passengers cope with the movement of the bus simply by positioning their feet and balancing, perhaps place a hand on a seat or other handhold as the movement of the bus is felt. The occasional passenger may feel the need to grasp a handhold securely.* In ordinary experience passengers do not fall if the bus is driven with ordinary care and skill. It seems to me *that in the absence of some indication that a particular passenger is specially vulnerable or of some other special factor, the bus driver is not required to wait until all passengers are seated or have otherwise stationed themselves*.” [emphasis added]

1. In *Fletcher*, *Simon Brown LJ* further quoted from *Wragg v Grout and London Passenger Transport Board (1966)* 116 L. Jo. 752:-

“It must be common knowledge that when a bus was being driven in a normal fashion movements of the body of the bus could be felt and that as it went around (a) bend even at a moderate speed it would not be unusual for it to sway …… *Anyone standing or just about to sit down would be inconvenienced by the sway and might momentarily lose his balance: that was even more true of anyone mounting the stairs while holding two bags in one hand as the Plaintiff did and momentarily not holding on the rail. It was impossible to say that if a person did fall down that was evidence of negligence against the bus driver*.” [emphasis added]

1. In *Moy Ngain Gyi v Leung Chi Kuen* [2017] 3 HKLRD 782, I held that it would be an impossible burden if bus drivers owed a duty to ensure that the passengers did not sit inappropriately and if the driver had to check the passengers were properly seated and were properly safeguarding themselves when driving. At §§32-36, I followed *Fletcher* and held that, unless there were “special passengers” who required special care, the duty of bus companies and drivers was satisfied if (a) the Bus was driven “smoothly, without abnormal and sudden movement”; and (b) the Bus was equipped with adequate handrails and safety supports which the passenger could have made use of.

*Issues in relation to liability*

1. Insofar as the question of liability is concerned, the main issues that the court has to resolve in this case include:-
   1. How did the Accident happen?
   2. Was the Accident caused by the negligence of D1, for which D2 should be vicariously liable?
   3. If Ds should be held liable for P’s injuries (which is denied by Ds), should P nevertheless be held liable in contributory negligence towards his own injuries? If so, to what extent?

*Factual matters not in dispute*

1. Ms Ann Lui, Ds’ counsel (who appeared with Mr Jonathan Tsang at the trial), has helpfully summarised the following facts which are not in dispute between the parties in her closing submissions. I would respectfully adopt them (with appropriate modifications of mine) as follows:-
   1. The Accident happened on a Tuesday afternoon at around 15:18 which was not during the rush hours. It was a fine and clear day; the road condition was normal and dry; traffic flow was normal; and the visibility was good;
   2. The Bus was a route 42A KMB double decker. Shortly before the Accident occurred, P boarded it at the Bus Stop. According to the contemporaneous records produced by D2, ie a Openmatics Onboard Unit (“BOM”) which had recorded every movement of the Bus at all material times, the time when P boarded the Bus was at around 15:18[[1]](#footnote-1);
   3. P was carrying a “recycle bag” or “environment friendly” bag made of cloth (“the Bag”) and a foldable trolley made of metal (“the Trolley”) at the time when he boarded the Bus;
   4. He allegedly fell from the 3rd step of the Staircase soon after the Bus started moving away from the Bus Stop; and
   5. On the lower deck of the Bus, on the driver’s side and behind the entry to the Staircase, there is an area to accommodate standing passengers with railings (“the Standing Area”). On the side opposite to the driver’s side, there is an elevated open compartment (“the Compartment”), and a designated area for any disabled passenger using a wheelchair (“the Wheelchair Area”).

*P’s evidence*

1. It can be seen that P’s case has been embellished over time from the time right after the Accident to the time of trial.
2. In P’s statement to the Police dated 7 December 2017[[2]](#footnote-2) (“P’s Police Statement”), which was made two days after the Accident, P stated that:-

(1) He was standing in the middle of the queue as he was boarding the Bus;

(2) He was carrying the Bag with some vegetables (一斤芥蘭、西芹), fish, meat, etc. with his left hand;

(3) He was also holding the Trolley, which was folded up, with his left hand;

(4) He was holding onto the handrail along the Staircase with his right hand as he was climbing to the upper deck;

(5) As he reached the 3rd step of the Staircase, after one or two seconds, he felt the Bus “shaking” (搖晃); and

(6) He lost grip of the handrail with his right hand, lost balance, and fell to the floor of the lower deck of the Bus.

1. The above account of events is to be contrasted with the contents of the SOC which was filed some 39 months later on 8 February 2021 by P’s solicitors (which was accompanied by a statement of truth signed by P):-
   1. There was no mentioning of the age of P, nor the fact that he was carrying the Bag and the Trolley;
   2. The allegation was that, “after the Plaintiff had walked up the 3rd step of the staircase, the 1st Defendant *suddenly stopped* Public Bus UF7528 and caused Public Bus UF7528 a great shake. As a result, the Plaintiff lost balance and fell down onto the lower deck*.*”: (See §2(b) of SOC) [emphasis added];
   3. The particulars of negligence as pleaded against D1, the Bus driver, were:-

“(a) Failing to exercise reasonable care and attention whilst driving Public Bus UF7528 with any care and attention at all;

* + 1. Failing to exercise or maintain any or any proper or effective control over Public Bus UF7528;
    2. Failing to pay attention and to ensure the safety of the passengers including the Plaintiff whilst he was walking up the staircase to get his seat of Public Bus UF7528 at the scene;
    3. Driving in a reckless, erratic and hazardous manner;
    4. Failing to keep any proper lookout or to have any or any sufficient regard to the traffic condition of the scene; and
    5. Driving in an excessive speed before applying a sudden brake.”: (See §3(a) to (e) of SOC).

1. I note here that no particulars at all regarding the alleged “old age, vulnerability or encumbrances” of P; nor that any allegation of a sudden increase in the speed of the Bus (whether due to the fact that it was travelling upwards on an inclined slope or otherwise); nor the allegation that D1 ought to have expressly reminded P the need to carefully/properly handle his carry-on items as P was boarding the Bus, by reason of his purported “old age, vulnerability or encumbrances”, or otherwise had been mentioned in the SOC.

1. All the above allegations were new and had only been raised by P subsequently.
2. In the course of the proceedings, Ds made some requests for further and better particulars (“F&BP”) on the SOC. In P’s Answer to the F&BP dated 23 June 2021 (“P’s Answer”), it was then pleaded that:-
   1. He was holding onto the handrails with both of his hands as he was climbing up the Staircase;
   2. He was carrying a trolley with his right hand (without any mention of the Bag); and
   3. “When the Plaintiff was walking upstairs to the upper deck of the Public Bus UF7528 (“the Bus”), the driver suddenly *applied the brake hardly* [sic] and caused the Bus a great shake. The Plaintiff then lost balance and fell from the stairs onto the flooring of the lower deck” [emphasis added].
3. In the Reply filed by P on 26 October 2021, it has been pleaded that:-
   1. “[…] The Plaintiff avers that the 1st Defendant *increased the speed or applied the brake suddenly* and turned right to leave the bus stop which caused a great and sudden shake…” [emphasis added]. (I note here that, more than 3 years and 10 months after the Accident, it was alleged by P for the first time here that the Accident was caused by the *“increase in speed”* of the Bus.);
   2. It was denied that “*5.9 km/h was a slow speed when the Bus was turning right to leave the bus stop*”;
   3. The pleadings of P also seemed to suggest that P took the view that the Accident happened between 15:17:33 and 15:18:41, when the speed of the Bus decreased from 3.7 to 0 km/h, given how they had inserted the word “Accident” (in bold and underline) between these two entries of time, and given their alternative case on the sudden braking of the Bus;
   4. For the first time, it was pleaded that P was carrying the Bag on his left shoulder. The claim that he was carrying a trolley with his right hand which was first mentioned in the Answer was repeated;
   5. It was admitted that the Bus was equipped with adequate handrails and safety supports;
   6. It was alleged that the Plaintiff was holding onto the handrails with both of his hands as he was climbing up the Staircase;
   7. It was then alleged, for the first time, that, “*[D1] was aware that the Plaintiff was an elderly man whose motion was not swift and agile*”. As such, it was alleged that D1 was negligent by reason of the following:-

“(a) Failing to take any special and/or adequate care of the Plaintiff who was an elderly man and passenger at the material time;

(b) Failing to ensure that the Plaintiff completely sat down on a seat in the upper deck of the Bus before suddenly increasing the speed of or applying a sudden brake; and

(c) Failing to act as a competent and prudent driver in the circumstances.”: (See §3.6 of the Reply)

1. In P’s witness statement (“P’s WS”) filed on 26 November 2021, it has been stated that:-
   1. He was carrying a small amount (少量) of fresh produce in the Bag on his left shoulder, and he was carrying the Trolley (folded up) with his right hand;
   2. He was the last passenger to embark upon the Bus;
   3. At the time he boarded the Bus, there were no available seats on the lower deck, and therefore he had “no choice” but to proceed to the upper deck (我只好選擇前去上層);
   4. As he was climbing up the Staircase, he was holding onto the handrails with both of his hands; and
   5. As he was on (or approached) the 3rd step of the Staircase, the Bus suddenly braked or accelerated, causing the Bus to “shake” (搖晃), thereby causing him to lose his balance and to fall backwards down onto the lower deck of the Bus.
2. During opening submissions of his case, Mr Cheung for P then explained for the first time that:-
   1. P’s case now focuses on the sudden change in speed, ie the purported high rate of acceleration. P relies on the BOM records to show that there was a (purported) “sudden” increase in speed from 0 to 5.9 km/h in 1 second;
   2. P now agrees that the Bus was not actually travelling at a high speed at the material time; and
   3. P also now alleges, for the first time, that since the scene of the Accident involved a slight slope/incline, the speed of the Bus when climbing the slope should have been even slower.
3. Mr Cheung further clarified that he no longer relies on the particulars of negligence regarding the duty of care owed by D1 to passengers “in general”. However, given that P was *“elderly, vulnerable, and encumbered”*, P claims that D1 owed a “special duty of care” towards him. (It is to be noted that it had never been pleaded that such a “special duty of care” was owed to P due to the purported fact that he was “encumbered”).
4. In examination-in-chief, P adopted the contents of P’s WS as his evidence. No further question was asked of him by his counsel. He was then cross-examined by Ds’ counsel extensively on both the issues of liability and quantum.
5. I agree with Ms Lui’s submissions that at trial P mostly gave convoluted, evasive, and defensive responses to the questions put to him during cross-examination. His evidence, as accurately summed up by Ms Lui in her closing submissions, is as follows:-
   1. Prior to the Accident, he was fit, healthy and agile. He had no problems in dealing with day-to-day living on his own, and he often went out/took the bus on his own without any need for assistance from his family and friends, nor walking aids. In fact, he quite frequently went shopping at the wet market on his own, and was familiar with the 42A bus route as he took this bus around 3 times per week. On the date of the Accident, he went shopping at the wet market after meeting a friend for lunch (飲茶), and was taking the Bus to go home;
   2. The Bag was made of cloth/canvas and was part of, but detachable from, the Trolley;
   3. The length of the Bag was around 14.5 inches, width was about 12 inches. He was only carrying some light vegetables and fish inside the Bag. He described the contents of the Bag as “very light”;
   4. The Trolley, when folded up, was about 12 inches in length, 12 inches in width (not counting the wheels), and a maximum of 2 catties in weight (ie around 1.2 kg) (although P at times said that it was only a bit more than 1 catty). He also described the weight of the Trolley as “very light”;
   5. He knew that there were seats available on the upper deck from his observation while he was still waiting to board the Bus at the Bus Stop;
   6. He had the Bag on his left shoulder and the Trolley in his right hand;
   7. He does not remember clearly whether he was the last person to board the Bus;
   8. After he boarded the Bus he held onto the horizontal handrail next to the Staircase;
   9. From his observation there were no seats left on the lower deck;
   10. He then decided to proceed to the upper deck as it would be “even more dangerous” had he stayed on the lower deck. He was the last person to climb up the Staircase at the material time;
   11. The Bus started moving when he was on the first step of the Staircase;
   12. He was holding onto the handrails of the Staircase with both of his hands as he was climbing up the Staircase;
   13. Shortly thereafter, he felt a “great shake” (大力搖晃), and he then fell from the 3rd step of the Staircase to the lower deck of the Bus;
   14. He does not actually know whether the “great shake” was caused by sudden acceleration or braking, as he “could not see”. From his “feeling” it could have been sudden braking; and
   15. He was aware of the Compartment, the Wheelchair Area, and the Standing Area on the lower deck of the Bus. He confirmed that there was no wheelchair in the Wheelchair Area at the material time of the Accident. He disagreed that he could have made use of the Compartment to place the Bag and the Trolley. He was evasive as to whether there was space or capacity to stand in the Standing Area.

*D1’s evidence*

1. D1’s evidence given in court is consistent with both his statement to the Police dated 6 March 2018 (“D1’s Police Statement”) and his witness statement prepared by his solicitors for the present proceedings dated 24 November 2021 (“D1’s WS”).
2. It can be gathered from both objective contemporaneous records (ie the BOM records) and D1’s testimony given in the course of trial that he did not abruptly apply the brake of the Bus, nor did he suddenly accelerate. In other words, D1, at the material time, was driving the Bus smoothly and without abnormal or sudden movement.
3. The BOM records reveal the following indisputable facts about the speed of the Bus at the time of the Accident:-
4. An increase of speed from 0 km/h (ie from a stationary position) to 5.9 km/h from 15:18:41 to 15:18:42 (entries 3492-3493)[[3]](#footnote-3); and
5. From the speed of 5.9 km/h to 0 km/h (ie stationary) in 4 seconds from 15:18:42 to 15:18:46 (entries 3493 – 3497)[[4]](#footnote-4) .
6. The above contemporaneous and objective records have categorically demonstrated that there was no sudden acceleration or sudden braking of the Bus at the time of the Accident.
7. D1’s evidence, after taking into account the contents of D1’s WS and his *viva voce* evidence given during the trial, can be summarized as follows:-
   1. At the material time, there were 10 odd passengers at the Bus Stop boarding the Bus (during trial he said around 6-7 passengers in front of P, and around 6-7 passengers behind P), and P was in the middle of the queue;
   2. P was carrying the Bag (containing quite a lot of fresh produce, and seemingly quite heavy) and the Trolley (folded up) as he boarded the Bus;
   3. D1 thought that P was probably in his 60’s and he saw P was walking rather slowly;
   4. After P boarded the Bus, D1 was able to observe that P walked inside the cabin of the Bus, was holding onto the horizontal handrail next to the Staircase, and eventually stood still. As such, D1 shifted his focus and attention to the other passengers, who were still boarding the Bus;
   5. After the remaining 6-7 passengers boarded the Bus, D1 could no longer see P as his view of P was blocked by other passengers;
   6. Before D1 started to pull the Bus away from the Bus Stop, he checked the middle mirror and saw that all passengers on board were standing still, but he could not see P anymore;
   7. After all the passengers at the Bus Stop had boarded the Bus, D1 started to drive the Bus away from the Bus Stop at a slow speed;
   8. About two seconds later, when the Bus had hardly left the Bus Stop, D1 heard noises from the Staircase;
   9. D1 therefore gradually brought the Bus to a stop, and walked towards the inside of the cabin to check on P, who was already lying on the floor of the lower deck;
   10. At the material time of the Accident, D1 did not know that P was climbing up the Staircase, nor did he actually see how the Accident occurred;
   11. From D1’s recollection, the traffic flow was smooth at the time of the Accident, and there were no special or exceptional circumstances on the road. Accordingly, there was no reason for him to either brake abruptly or accelerate suddenly/at a high rate. In fact, he accelerated at a slow rate (only up to 5.9 km/h) as he was leaving the Bus Stop;
   12. Although the Bus Stop was situated on a slightly inclined slope, it was entirely safe and appropriate for the Bus to stably accelerate from 0 to 5.9 km/h whilst leaving the Bus Stop, especially in light of how there was no traffic congestion or other vehicles otherwise blocking the front of the Bus at the material time. During cross-examination, D1 explained that he could have accelerated at an even slower rate, but there was simply no need to do so;
   13. At the material time of the Accident, it was during non-rush hours, therefore, the Bus was not full. Before the Bus arrived at the Bus Stop, D1 was able to observe that there were still seats available on the lower deck (although D1 could not be sure about whether there were seats left after all the passengers had boarded the Bus from the Bus Stop);
   14. Before the Bus arrived at the Bus Stop, D1 was able to observe that there was plenty of standing space in the Standing Area and the Wheelchair Area, and no one was standing there and there was no wheelchair on board. The Standing Area could accommodate around 6-7 people, and the Wheelchair Area could accommodate around 4 people (standing, and without luggage or wheelchair). Even after all the passengers had boarded the Bus at the Bus Stop, there was still plenty of standing space inside the cabin;
   15. At the material time, passengers were allowed to place items that were not too large or heavy in the Compartment. Carry-on bags, backpacks, and grocery bags would all have been acceptable;
   16. The Police did not bring any charges against D1 after investigation into the Accident; and

* 1. There were no other complaints regarding sudden braking or acceleration from other passengers on board the Bus at the material time.

1. Photographs of the Bus taken by the Police and D2, as well as the layout plan showing the configurations of the lower deck of the Bus, make and model, further corroborate the fact that the Bus was well equipped with adequate handrails, hanging straps, and other safety supports for both standing and seated passengers, together with the Compartment for passengers’ small carry-on items, and sufficient space for quite a few standing passengers in the Standing Area and the Wheelchair Area (when no wheelchairs are on board of the Bus).
2. The Bus stopped at the Bus Stop from 15:18:11[[5]](#footnote-5) until 15:18:41[[6]](#footnote-6). The relevant Octopus card records[[7]](#footnote-7) showed that P boarded the Bus at 15:18:24. This further corroborates with D1’s evidence that P was in the middle of the queue whilst boarding the Bus.
3. In any event, P has admitted in the Reply that the Bus was equipped with adequate handrails and safety supports[[8]](#footnote-8).

*Findings of the court*

1. First, I agree with Ms Lui for Ds that, the starting point to examine a plaintiff’s case against the defendant(s) in a PI action is to look at his pleadings and to see whether the plaintiff is able to discharge the burden of proving the particulars of negligence and/or breach of duty, on a balance of probabilities, by the evidence he produces at trial.
2. As a matter of general legal principles for civil cases, the plaintiff must clearly set out his case on pleadings. He also bears the burden to adduce satisfactory evidence to prove his pleaded case on a balance of probabilities (*Tsang Chung Ming v Caritas – Hong Kong* [2019] HKCFI 1035, §15): see also *Wat Kwing Lok v The Kowloon Motor Bus Company (1933) Ltd*, HCPI 936/2005 (20 November 2007) at §17:-

“The mere fact of the occurrence of the accident is not sufficient to give rise to a presumption of negligence on the part of the defendant. The burden of proof is on the plaintiff to show on ‍a balance of probabilities that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault. If, and only if, the plaintiff proves that the unusual event is more consistent with fault on the part of the defendant than the absence of fault, the evidential burden then shifts to the defendant to show, on a balance of probabilities, that the accident happened without negligence on its part.”

1. See also, to similar effect: *Liu Cairong v Parker Cleaning Services Company Ltd*, HCPI 189/2013 (23 February 2015) at §26, the plaintiff has the burden of proving the particulars of negligence or breach of duty, on a balance of probabilities. If the court should be uncertain as to why and how exactly the plaintiff injured himself, or if there should be insufficient evidence pointing to negligence or breach of other relevant duties on the part of the defendants, the court should dismiss the plaintiff’s claims.
2. The above principles were applied recently in *Haider Awais v Intrafor Hong Kong Limited and Anor* [2022] HKCFI 3043.
3. In assessing the credibility of the respective witnesses who had given oral evidence in this case, I have taken into account the matters stated in the often cited passage in *Hui Cheung Fai v Daiwa Development Limited*, unreported, HCA 1734/2009 (8 April 2014; DHCJ Eugene Fung) at §§77-82. I shall not repeat them here save to say that the principles had been well established and applied in many subsequent cases, including *Tsang Chung Ming, supra*.
4. Where the plaintiff has put forward one version of the event, which is different from a previous version of the event also put forward by him, “the judge’s function was not to decide which of the Plaintiff’s versions of the incident was more preferable. His role was to determine whether, on the balance of probabilities, the Plaintiff’s current version of the incident was correct. That involved considering whether the Plaintiff’s previous versions undermined his current version to such an extent that it could not be said that the Plaintiff’s current version of the incident was probably correct…”: *Chan Chi Shing v Tsang Fook Metal Engineering*, CACV 238/1999 (21 December 1999) at p.3, as applied in *Liu Kin Pong v Kee Wah Food Production Limited*, HCPI 632/2014 (6 July 2017) and *Haider Awais*, *supra*.
5. In *Liu Kin Pong*, *supra*, at §18, the court found that the plaintiff’s many different previous versions of the accident had clearly undermined his version given at trial, and it was accordingly held that his description of the event was not credible nor reliable.
6. With the above principles in mind, I find the evidence produced by P (or the case P’s counsel tried to run on his behalf) at trial simply does not match with P’s pleaded case or P’s Police Statement. It was simply not credible nor reliable.
7. For example, there are no pleadings of facts or particulars of negligence to the effect that a special duty of care was owed to P due to the purported fact that he was “encumbered”; nor was there any plea that the Bus ought to have been travelling at a slower speed than usual due to the fact that the Bus Stop was situated at an inclined slope; nor that D1 ought to have expressly reminded P to handle or take care of his carry-on items carefully in light of his purported old age and vulnerability.
8. I find the above matters were only afterthoughts and embellishments which P or his solicitors tried to add onto P’s case after the event and/or at the trial. As P had not taken out any application to amend his pleadings, I should either disregard or give very little weight to such matters as they are not part of P’s pleaded case. In any event, as a matter of fact, I do not find those matters raised by P at trial credible in light of the contemporaneous evidence produced by D2 and the oral evidence given by D1.
9. Second, the contemporaneous evidence produced by D2 clearly refutes P’s case that D1 had (i) accelerated at an inappropriate speed; or (ii) braked suddenly.
10. While there was no closed circuit television (“CCTV”) or cameras/dash cams installed inside the Bus (and hence there is no relevant video footage showing how the Accident occurred), D2 however has produced the BOM records of the Bus for the date of Accident from 15:14:57 to 15:25:00[[9]](#footnote-9). In particular, the records between 15:18:11 to 15:18:46[[10]](#footnote-10) showed the relevant driving data of the Bus at the time of the Accident. In my view, the following extracted BOM records clearly show that the Bus did not either brake abruptly or accelerate suddenly at the material time:-

|  |  |  |
| --- | --- | --- |
| **Time** | **Action** | **Entry Reference** |
| 15:18:11 | The Bus arrived at the Bus Stop with the front door open. | No.3462 |
| 15:18:38 | The Bus remained stationary at the Bus Stop but the front door was closed. | No.3489 |
| 15:18:39 to 15:18:41 | The Bus remained stationary at the Bus Stop. | No.3490-  3492 |
| 15:18:42 | The Bus accelerated to 5.9 km/h while leaving the Bus Stop. | No.3493 |
| 15:18:42 to 15:18:46 | The Bus gradually came to a complete stop within these 4 seconds. | No.3493-  3497 |

1. Based on the above objective and contemporaneous records, I find that the Bus was moving smoothly, gradually and slowly when it departed from the Bus Stop at the material time. I further find that there was no sudden “great shake”, braking or acceleration of the Bus as claimed by P.
2. Third, having observed both P and D1’s demeanour when they gave their evidence in court, I find D1 had given his evidence in a straight-forward, reasonable and calm manner. This is in stark contrast to P who was evasive, confusing and at times emotional when he gave his evidence.

1. In my judgment, P’s oral evidence given in court when compared against his previous versions of events as stated in P’s Police Statement, P’s WS, the SOC and the Reply (which were accompanied by a signed statement of truth) clearly demonstrates that he is not a credible, reliable or honest witness. I therefore would reject his evidence.
2. Fourth, the core of P’s case is a sudden increase or decrease in the speed of the Bus which caused him to fall from the Staircase therein. It was suggested during cross-examination of D1 by Mr Cheung for P that, the fact that it took the Bus 4 seconds to stop from 5.9 km/h to 0 km/h (somehow) shows that the Bus was travelling too abruptly or quickly accelerated from 0 km/h to 5.9 km/h within one second when it was departing from the Bus Stop. I find such contention not logical at all. I do not think any reasonable driver would consider that a bus travelling at a crawling speed from 0 to 5.9 km/h within one second as excessive. Equally, I do not consider that a bus which took 4 seconds to come to a complete halt from 5.9 km/h to 0 km/h would be considered as abrupt braking.
3. P also contends that the BOM records, *inter alia*, showing an increase of speed from 0 to 4.1 km/h within 2 seconds (entries 3329-3331), and the same recordsshowing an increase of speed from 0 to 8.1 km/h within 3 seconds (entries 3422 to 3425), would serve as evidence that the increase from 0 to 5.9 km/h within one second was somehow at too high of a rate of acceleration. With respect, I do not consider such contentions valid at all. The acceleration of the starting speed of the Bus when leaving a bus station or from a stationary position during a traffic jam must depend on a lot of factors such as the gradient of the road, the road condition and the prevailing traffic condition at the time. As D1 has explained in his oral evidence, when there are other vehicles in front of the Bus, or in situations of traffic congestion, he would have no choice but to travel at a slower rate than usual. In my view, D1’s explanation is entirely reasonable and plausible.
4. Fifth, in fairness to P, in light of *Chan Chi Shing* (CA), *supra*, the court is at liberty to consider whether the most current version of events provided by P (ie the one given during trial) is credible or not. The court may also consider whether the previous versions of events provided by P have undermined his “latest” version of events: see *Liu Kin Pong, supra*, hence rendering the latest version of events incredible or otherwise unreliable.
5. In this regard, I have no hesitation to reject P’s latest version given in court which is based on the fact that P was “old” (but upon P’s own evidence, not vulnerable nor encumbered, which would require D1’s special attention). I also have no hesitation to reject his evidence that the weight he was carrying in the Bag was “very light” as that was inconsistent with what he stated in P’s Police Statement nor was it consistent with the observations made by D1 in his statement to the Police.
6. Sixth, based on the photographs produced by D2 at trial, there is no reason why, in my view, P could not have made use of the space in the Wheelchair Area or Standing Area on the lower deck of the Bus. D1 has confirmed in his evidence that, since the Accident happened during the non-rush hour, the Bus was not full and although he was not sure if there were still seats left on the upper deck after all the passengers had boarded the Bus at the Bus Stop, he was able to observe that there was plenty of standing space in the Standing Area as well as the Wheelchair Area. As such, there was no reason why P could not have made use of those spaces when he knew that he was carrying the Bag full of groceries (according to P’s Police Statement and the observations of D1) on one hand and the Trolley on the other. While he was entitled to choose to move to the upper deck to find a seat, he cannot blame the driver of the Bus nor D2, if it was due to his own fault or negligence that he could not grab hold of the handrails provided when the Bus was travelling at a normal and steady speed when climbing up the Staircase.
7. In this case, the objective fact remains that (i) D1 did drive the Bus smoothly and without abnormal or sudden movement; and (ii) the Bus was equipped with adequate handrails and safety supports which P could well have made use of: see also *Fletcher*; *Phillips Turner*.
8. On the other hand, there is no objective fact to show that D1 had been at fault for “failing to keep a proper lookout” as the traffic and road conditions were smooth at the material time, and there was simply no cause for unnecessary braking or acceleration. In this sense, *Moy Ngan Gyi* is clearly distinguishable.
9. Last but not the least, in my view, D1 had already taken great care to ensure that all of the passengers on board were safe and sound before he drove the Bus off from the Bus Stop. Further, he had waited till all the passengers were on board before he moved the Bus and he had driven the Bus in a most careful and prudent manner. He had also made sure that P was holding onto the horizontal handrails on the aisle of the Bus before other passengers getting on board had blocked his view. He drove the Bus off on the incline in a reasonable and appropriate speed with no sudden jerking or shaking as claimed by P. In my judgment, the Accident could not have been foreseen by him and he should not be blamed for the Accident.
10. To conclude, on the evidence, I find:-
    1. P may have been 69 years of age, but he was certainly not vulnerable as he was able to walk normally like any fit and healthy man of his age;
    2. P was not encumbered;
    3. P was not someone who would invoke a “special duty of care” from D1; and
    4. in any event, D1 already ensured the safety of all his passengers before driving the Bus off from the Bus Stop.
11. Further, on the evidence, I find P could have:-
    1. made use of the Compartment to store the Bag and the Trolley;
    2. stood in the Wheelchair Area on the lower deck with the handrails;
    3. stood in the Standing Area on the lower deck with the handrails; and
    4. stood in other areas on the lower deck where handrails are available, even if seats were not available.
12. Accordingly, I find the Accident was caused entirely by P’s own negligence for not being able to hold onto the handrails provided when ascending the Staircase. Ds should not be held liable in negligence and/or breach of any duty owed to P at all.
13. As I find D1 not liable for the Accident, D2 is not vicariously liable for the Accident in its capacity as D1’s employer also.
14. Based on my findings above, the issue of contributory negligence does not arise in this case.

*QUANTUM*

1. In light of my findings on liability above, Ds should not be held liable for the injuries sustained by P and any damages resulting from the Accident at all. However, for the sake of completeness, I shall briefly deal with the issue of quantum here in the event that I am wrong on the issue of liability.

*Injuries and treatments*

1. After the Accident, P was sent by ambulance to the A&E of Princess Margaret Hospital (“PMH”). According to P, he underwent 3 surgeries and had spent one night in the hospital before he was discharged on 6 December 2017.

1. However, according to the report from PMH, only closed reduction was done upon admission. X-ray showed anterior dislocation of left shoulder with no fracture. After the closed reduction, no shoulder dislocation and fracture could be detected anymore. He received occupational therapy (“OT”) which reported steady progress. He was discharged from OT on 13 March 2018.
2. P was followed up at the orthopaedics and traumatology department (“O&T”) of PMH for left shoulder pain since April 2018. He still complained of residual left shoulder pain and weakness. There was still no fracture found on X-ray. There was also no intra-articular radiopaque loose body but mild degenerative changes were present. The ultrasound of the left shoulder showed a massive rotator cuff tear involving the entire supraspinatus tendon and part of the infraspinatus tendon, likely due to chronic subacromial impingement by subacromial enthesophyte. In other words, a chronic degenerative condition rather than an acute problem caused by the Accident.
3. No significant improvement of his symptoms were reported after physiotherapy (“PT”) and OT. OT opined that there was some discrepancy between his current job capacity and his previous job demands as a chef and was thus advised to take early retirement. He was discharged from PT with home exercise and was given sick leave by PMH from 18 April 2018 to 3 October 2018 plus one day on 16 January 2019.
4. Prior to the Accident, P had been following up at the Yan Chai Hospital (“YCH”) since November 2016 for low back pain. Options of shoulder arthroplasty were suggested after the Accident and arranged by the doctors at YCH but P declined the operation in subsequent follow-up appointment.

*Expert evidence*

1. A joint medical report dated 18 January 2022 was prepared by Dr Tio Man Kwun Peter (“Dr Tio”) appointed by P and Dr Ho Ching Lun Henry (“Dr Ho”) appointed by Ds (“the JMR”).
2. They jointly examined P on 5 January 2022. Pursuant to the order of Master Eleanor Yeung dated 12 July 2022, the JMR is to be adduced as evidence without calling the makers thereof.

1. According to the JMR, Dr Tio and Dr Ho agreed that:-

P suffered from a left shoulder dislocation with a massive rotator tear of tendon as a result of the Accident;

the medical treatment rendered to him was appropriate and he has reached maximal medical improvement;

the sick leave granted to him (ie 304 days from 5 December 2017 to 3 October 2018, and thereafter for one day on 16 January 2019) was acceptable; and

assessments by other specialists would not be necessary.

1. Dr Tio opined that the prognosis of P is guarded with residual pain, stiffness and weakness, etc. expected with the massive rotator cuff tear, such that P’s ability in performing overhead activities, physical exertion and heavy manual works with his left shoulder would be significantly impaired. Dr Ho on the other hand considered that the prognosis in P’s case should be good.
2. Dr Tio considered the whole person impairment and loss of earning capacity should be at 10% while Dr Ho assessed that at 2.4%.
3. Dr Tio opined that P would have significant difficulty in resuming his duty as a part-time chef due to the significant degree of impairment of his left shoulder function while Dr Ho considered that P should be able to resume working as a part-time chef.
4. Dr Tio commented that there were signs of pre-existing degenerative changes in both of P’s shoulders, and that the pre-existing condition of his left shoulder should be considered as Category 1 as defined in *Chan Kam Hoi*.
5. Dr Ho on the other hand commented that there was chronic degeneration of the left shoulder. The acromioclavicular joint was degenerated as shown by the presence of the prominent osteophyte at such a joint on the latest x-rays, which could cause attrition and impingement of the rotator cuff tendon, and that such pre-existing condition should fall under Category 2 as defined in *Chan Kam Hoi*, ie with natural progression, there was a strong possibility that it would have brought about his present state if he continued to lift heavy objects as a chef. P agreed under cross-examination that he had degeneration changes on both sides of his arms as well as his legs.
6. I accept Dr Ho’s opinion on P’s pre-existing condition in this case as I find P’s condition was well supported by the objective evidence in the form of X-ray records. They are also consistent with the fact that P had been working as a chef for most of his working life and therefore such degeneration on his shoulders are very likely. Given the above, it would be up to the court to apply a discount on the awards of PSLA and loss of earnings to P, if any, in light of Dr Ho’s opinion in relation to the P’s pre-existing degenerative condition.
7. Dr Ho opined that insofar as whole person impairment and loss of earning capacity are concerned, arising from P’s left shoulder condition, 80% should be apportioned to the Accident and 20% to the pre-existing shoulder degeneration.
8. I agree with Dr Ho’s view and consider that a 20% discount should be applied to the awards on PSLA and loss of earnings in this case.
9. Dr Ho also observed that P declined the offer of surgery to replace the left shoulder and thus further medical treatment would be unnecessary.
10. Significantly, Dr Ho observed that while there was reduced movement and wasting of the muscles around his left shoulder, there was hardly any asymmetry in the upper limb measurements. Dr Ho opined that this indicates P has been using his left upper limb in his daily activities despite his alleged left shoulder complaints, the physical disability due to the left shoulder injury has therefore been mild. I would agree with Dr Ho’s observations on this as the measurements are objective evidence which P cannot deny.
11. Lastly, I note that the “massive rotator cuff tear” on his left shoulder could be repaired by surgery but P declined to undergo such surgery offered by YCH.

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

1. Mr Cheung, P’s counsel, has invited the court to take into account the following cases he submits, where the plaintiffs had suffered from similar injuries:-
   1. In*Chan Long Kin v Lam Kam Cheong* HCPI 1186/2014 (17.11.2016), the plaintiff, aged 29 at the time of the accident, sustained fractures of the right superior pubic ramus, L5 lumbar vertebrae transverse process, left distal fibula, and soft tissue left shoulder injury. He underwent open reduction internal fixation surgery on the ankle. He later developed adjustment disorder, with some clinical symptoms of post-traumatic stress disorder and obsessive compulsive disorder. PSLA was awarded at HK$475,000;
   2. In*So Yuk Kam v Lau Kam Yuen trading as Ngai Shing Construction*HCPI 5/2011 (24.5.2013), the plaintiff sustained a right shoulder dislocation with fracture, much associated pain and bruising to his face and knee. The plaintiff was left with a significant impairment, continual right shoulder pain and stiffness that could not be entirely ameliorated by physiotherapy, and an inability to lift heavy objects. The plaintiff had also lost his ability to return to work as a welder. PSLA was awarded at HK$450,000;
   3. In *Huang Xinsheng v SCS HK Logistics Ltd* [2022] HKDC 1104, the plaintiff sustained relatively minor injuries, and returned to heavy manual work. There was satisfactory function in the right shoulder, there was no abnormality in the left heel, and there was good recovery for the right little finger. PSLA was awarded at HK$220,000;
   4. In *Or Chun Kwong v Fu Sau Lun, Jason* HCPI 384/2005 (8.12.2006), the plaintiff sustained a right shoulder acromio-clavicular joint subluxation. Having underwent 3 operations, the plaintiff returned to his previous employment. PSLA was awarded at HK$200,000; and
   5. In *Yiu Yuen Yee v Johnson Cleaning Services Company Limited* [2019] HKDC 1110, the plaintiff suffered from a tendon tear to the left shoulder which required immediate surgery. Three years of sick leave was granted and the plaintiff had residual symptoms of intermittent pain, weakness and stiffness. The plaintiff returned to work but switched to another job paying a lower salary (ie reduced from HK$11,500 to HK$8,000). PSLA was awarded at HK$150,000.
2. Ms Lui on the other had has invited the court to consider the following 2 cases for PSLA:-

1. In *Yiu Yuen Yee v Johnson Cleaning Services Company Limited* [2019] HKDC 1110, the plaintiff suffered from a tendon tear to the left shoulder which required immediate surgery. The plaintiff underwent a left shoulder arthroscopic cuff repair, superior labral repair and arthroscopic acromioplasty. Three years of sick leave was granted and the plaintiff had residual symptoms of intermittent pain, weakness and stiffness. PSLA was awarded at $150,000; and
2. In *Limbu Jas Maya v HK Scafframe System Ltd*, unreported, DCPI 2790/2008 (20 May 2010), the plaintiff tripped and fell over when she was at work at a construction site. She suffered laceration over her right forehead and an anterior dislocation of her right shoulder. She performed closed reduction operation and was discharged the next day. The court accepted that the shoulder condition should not significantly affect the plaintiff’s daily activities except for overhead activities. Damages for PSLA were assessed at $160,000.
3. In the present case, P suffered a left shoulder dislocation after the Accident. He underwent a closed reduction operation for dislocation and was discharged the next day. Subsequent examinations show that there was chronic degeneration at the acromiocavicular joint of his left shoulder as shown by the presence of the prominent osteophyte, which could cause attrition and impairment of the rotator cuff tendon.
4. Having compared P’s injuries with those in the cases cited by the respective counsel, I am of the view that P’s injuries are similar to those suffered by the plaintiffs in *Huang Xinsheng, supra* and *Or Chung Kwong, supra*. P’s injuries in my view are also compatible with those suffered by the plaintiffs in *Yiu Yuen Yee, supra* and *Limbu Jas Maya, supra* cited by Ds’ counsel.
5. Based on the above authorities and making adjustments for inflation, I would award a sum of HK$200,000 for PSLA before the 20% discount for P’s pre-existing condition. After the 20% discount, the PSLA award would be at HK$160,000, had it not been for my finding on liability.

*Pre-trial loss of earnings*

1. P claims that he worked as a part-time chef at a restaurant, earning a monthly salary of HK$9,600 with a monthly night travel allowance at HK$720, making his average monthly income at the time of the Accident at $10,320. P claims that he was paid in cash but Ds put P to strict proof of such contentions.
2. Ds’ further and alternative submission is that P was already 69 years old at the time of the Accident, and hence was well beyond the usual retirement age for a chef.
3. As P’s income at the time of the Accident was supported by a letter from his former employer, I have no reason to doubt that it was genuine. In any event, given the relatively robust health of P at the time of the Accident, I do not see why he was not capable of working as a part-time chef for at least a few more years had it not been for the Accident.
4. But for the Accident, I am sure he could have continued to work as a part-time chef for a few more years until his general health condition would not allow him to do so. By the time of the trial in March 2023, he has already reached 74 years old. Except for his shoulder injury, P appears to be enjoying robust health to me. As I have observed in *Leung Yiu Sheung v Pa Ling Logistics Co Ltd* [2019] HKDC 546, it is not uncommon to see chefs working well in their 70s. Thus, I consider that, had it not been for the injuries sustained by him in the Accident, he would have continued to work until he is 75.
5. Thus, but for my finding on liability, I consider P will be able to recover loss of earnings during his sick leave period (which was around 10 months) and thereafter I consider that he should be able to return to his part-time job as a chef as opined by Dr Ho. After all, his inability to return to the part-time work was partly due to his refusal to undergo surgery on his left shoulder.
6. However, I would allow an extra 6 months after the expiry of the sick leave period for P to find a part-time job as a chef.
7. Thus, the pre-trial loss of earnings in my view will be as follows after taking into the 20% discount for P’s pre-existing condition:-

HK$10,320 x 16 months x 80% = HK$132,096

*Future loss of earnings*

1. In light of P’s relatively advanced age by the time of trial and based on Dr Ho’s opinion, I do not consider that he is entitled to any damages for future loss of earnings.

*Loss of earning capacity*

1. No loss of earning capacity has been claimed by P and therefore no award will be made under this head.

*Special damages*

1. Had I found for P on liability, I would have awarded a sum of HK$10,000 which will cover the agreed sum of HK5,715 for medical expenses and the remaining sums to represent P’s claims for travelling expenses and tonic food (which are not supported by any receipts or objective documentary evidence).

*Interest*

1. The interest rate on PSLA will be calculated at 2% from the date of service of the writ to the date of judgment. Interest on special damages (including pre-trial loss of earnings and special damages items) should be calculated at half of judgment rate from the date of the Accident to the date of judgment.

*CONCLUSION*

1. By reason of the aforesaid, I find P has failed to establish his case on a balance of probabilities against Ds. His claim is therefore dismissed.
2. Had I found in favour of P on liability, I would have awarded the sum below as damages in this case:-
3. PSLA HK$160,000
4. Pre-trial loss of earnings HK$132,096
5. Loss of future earnings nil
6. Loss of earning capacity nil
7. Special damages HK$10,000

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Total: HK$302,096 ==========

*Costs*

1. Costs will follow the event.
2. I make an order *nisi* that P should pay Ds the costs of this action to be taxed if not agreed with certificate for one counsel. In the absence of any application from the parties to vary the same within 14 days, the order *nisi* will become absolute.

( Andrew SY Li )

District Judge

Mr Tommy Cheung, instructed by Messrs B Mak & Co., for the plaintiff

Ms Ann Lui and Mr Jonathan Tsang, instructed by Messrs Mayer Brown, for the 1st and 2nd defendants

1. Trial Bundle (“TB”)/A148-149 [↑](#footnote-ref-1)
2. TB/A136 [↑](#footnote-ref-2)
3. TB/A149 [↑](#footnote-ref-3)
4. TB/A149 [↑](#footnote-ref-4)
5. TB/A148 [↑](#footnote-ref-5)
6. TB/A149 [↑](#footnote-ref-6)
7. TB/A165 [↑](#footnote-ref-7)
8. TB/A35/§3.6 [↑](#footnote-ref-8)
9. TB/A141-163 [↑](#footnote-ref-9)
10. TBA/148-149 [↑](#footnote-ref-10)