DCPI No. 494/2009

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 494 OF 2009

(transferred from the High Court HCPI No. 915 of 2006)

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

BETWEEN

SINGH HARPEL Plaintiff

and

NAJIB TRANSPORT Defendant

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

Coram: HH Judge Lok in Court

Dates of trial: 5, 6 & 7 October 2009

Date of submission of further written submissions: 12 October 2009

Date of handing down of Judgment: 23 November 2009

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

JUDGMENT

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

1. This is a claim for damages for personal injuries arising out of an industrial accident on 15 October 2004.

*The Plaintiff’s case*

1. The Defendant carried on the business of providing packing and delivery services to his customers, and the Plaintiff was one of the workers employed by his firm. The office and the workshop of the Defendant were situated at Unit D, 26th Floor, Vigor Industrial Building, Block 2, 49-53 Ta Chuen Ping Street, Kwai Chung, New Territories (“the Vigor Unit”).
2. According to the Plaintiff’s pleaded case, the Plaintiff was assigned by the Defendant to work at another workshop at Unit A, 14th Floor, Roxy Industrial Centre, 41- 49 Kwai Cheong Road and 58-66 Tai Lin Pai Road, Kwai Chung, New Territories (“the Roxy Unit”) on 15 October 2004. Between 5:30pm to 6:00pm, the Plaintiff was packing some bags with the use of a mechanical pressing machine. By that time, there were a lot of packed goods inside the Roxy Unit which were placed in stacks. These stacks were about 6 feet high and 2 square feet in dimension.
3. According to the Plaintiff’s witness statement, the accident occurred in the following manner:

*“9. [The Plaintiff] was working at the compressor machine in the [Roxy Unit] packing nylon bags. After completing several packets [the Plaintiff] lifted the [lever] of the machine to release the sealed packets. [The Plaintiff recalls] that the compressor machine was switched off at the time and was being operated manually by the [lever]. [The Plaintiff] then placed several bags on the base of the machine in preparation for the packing/compressing. To do this [the Plaintiff] placed [his] right hand and arm into the gap in the machine to place and arrange the packets, the gap was about 4 to 5 inches in height.*

*10. At this time a co-worker of [the Plaintiff] was stacking packets adjacent to the compressing machine. This co-worker threw one of the packets onto the top of the stack, as the stack was not stable it collapsed onto the machine, causing the lever to close trapping [the Plaintiff’s] right hand and forearm in the machine resulting in serious crush injuries.”*

1. It is also the Plaintiff’s case that one Mr. Cally Clement (“Mr. Clement”) of Hopewell International Company was the owner of the business operated at the Roxy Unit. It is the Plaintiff’s understanding that Mr. Clement was a business partner of the Defendant. All the workers at the Roxy Unit were Africans and he was the only South-Asian working at the workshop.
2. At the trial, the Plaintiff gives a different version about the occurrence of the accident. According to his oral testimony, there were a stack of goods which were placed very near to the right side of the pressing machine. The goods were placed in two layers of wooden planks, and a bag containing goods, which was about 30 to 40 kilogrammes in weight, was placed on the top wooden plank. That particular bag was placed there 2 to 3 days before the accident by the delivery worker. At the time of the accident, the Plaintiff was packing the goods as described in his witness statement, and he was working at the front side of the machine. There was another co-worker who was performing some packing work behind him. Due to some unknown reason, the bag on top of the stack fell down on the lever of the machine, which in turn caused the compressor of the machine to descend trapping his right hand.
3. Unlike those in the Vigor Unit, the pressing machine in the Roxy Unit had no safety device. The Plaintiff also admits that, by the time of the accident, he was an experienced operator of such pressing machine.

*The Defendant’s case*

1. The Defendant admits that there was an accident on 15 October 2004 but at a different location. According to the then two employees of the Defendant, Mr. Mehmood Rashid (“Mr. Rashid”) and Mr. Azar Iqbal (“Mr. Iqbal”), they were working with the Plaintiff at the Vigor Unit at the time of the accident. They did not actually witness how the accident occurred, as Mr. Mr. Iqbal was working at the opposite side of the machine and Mr. Rashid was inside the office of the Vigor Unit at the relevant time. However, they agree that the Plaintiff had injured his hand during an accident.
2. According to Mr. Iqbal, there was a safety device whereby if the top slot-bar of the machine was opened, the machine would not operate. On the day of the accident, Mr. Iqbal noticed that the top slot-bar was removed. There was also a metal strip inserted into the safety device, with the purpose to deceive the device so that the machine could still operate even if the top slot-bar was opened. As the Plaintiff was the only operator of the machine at the relevant time, he believes that it was the Plaintiff who had removed the slot-bar and inserted the metal strip into the device. By so doing, the Plaintiff did not need to keep opening and closing the doors when putting the goods into the compartment of the machine for pressing.
3. Mr. Rashid confirms Mr. Iqbal’s evidence. According to Mr. Rashid, he had given adequate safety instructions to the Plaintiff regarding the operation of the machine. Mr. Mohammand Najib, the owner of the Defendant’s firm, also gives evidence at the trial confirming the Defendant’s case.

*Assessment of the evidence*

1. Having carefully considered the evidence of the Plaintiff’s and the Defendant’s witnesses, I reject the Plaintiff’s version of events based on the following reasons.
2. Firstly, I cannot understand the reason why there is such a material inconsistency between the Plaintiff’s evidence in his witness statement and that in his oral testimony. Obviously, a co-worker throwing a packet causing a bag at the top of the stack of goods to fall is very different from the version of events given in his oral testimony. According to the Plaintiff at the trial, the bag was placed at the top of the stack of goods 2 to 3 days ago. At the time of the accident, the stack of goods were placed in front of the Plaintiff at the right side, whilst his co-worker was working behind him performing some packing work. In such circumstances, the co-worker could not have caused the bag at the top of the stack of goods to fall. Unlike his evidence in the witness statement, the Plaintiff simply does not know why the bag fell on the lever of the pressing machine. Hence, even if the court were to accept the Plaintiff’s evidence at the trial, there is no basis for the court to find liability on the part of the Defendant without knowing the exact cause of the accident.
3. In any event, I reject the Plaintiff’s evidence. In this regard, I have already taken into account the fact that the Plaintiff may have some difficulty in expressing himself by reason of his limited education, and yet I cannot understand why there is such a glaring inconsistency in his accounts of the accident.
4. The inconsistencies do not end here. The Plaintiff in his oral testimony claims that after working for the Defendant for 6 to 7 days, Mr. Najib told him that Mr. Clement was his business partner. However, the Plaintiff did not mention this important fact in his witness statements, in which the Plaintiff said that he was not certain about the relationship between the Defendant and Mr. Clement.
5. The Plaintiff also claims that the Defendant had quite often assigned him to work at Mr. Clement’s workshop at the Roxy Unit. However, it is clear that all the workers in the Roxy Unit were Africans who spoke very little if no English. Taking into account the problem of communication, I cannot quite understand why Mr. Clement could not ask or train his own workers to operate the pressing machine in the Roxy Unit, rather to rely on the persistent assistance of the Defendant in providing an additional worker, who had serious handicap in communicating with other co-workers, to operate such machine.
6. Finally, Mr. Rashid and Mr. Iqbal had left the employment of the Defendant quite some time ago. They have no interest in the outcome of the present proceedings, and so there is no reason for them to fabricate the evidence against the Plaintiff.
7. In his submission, Mr. Clough for the Plaintiff argues that there is no reason for the Plaintiff to fabricate the evidence in particular that about the location of the accident. However, as the Defendant’s case is that the Plaintiff had deactivated the safety device of the pressing machine in the Vigor Unit and the Defendant can easily provide proof that the machines in the Vigor Unit were installed with such devices, there is some reason for the Plaintiff to say that the accident happened in another premises with a view to undermine the Defendant’s case about the deactivation of the safety device.
8. Mr. Clough further submits that as Mr. Clement would be a crucial witness to disprove the Plaintiff’s case, the Defendant should have called him to testify in court. As the Defendant has failed to do so, the court should draw an adverse inference against the Defendant’s case.
9. I also reject such submission. When the Defendant’s proprietor, Mr. Najib, is cross-examined at the trial, he tells the court that Mr. Clement’s company, Hopewell International Company, had since the accident moved to the same Vigor Industrial Building but on different floor. He can also contact Mr. Clement if necessary. However, Mr. Clough has not asked him why he did not call Mr. Clement to testify on behalf of the Defendant. As I see it, there may be a lot of genuine reasons why the Defendant cannot secure the attendance of Mr. Clement at the trial. As Mr. Clough has not challenged Mr. Najib on this particular issue, the latter is not given an opportunity to offer an explanation. As the Plaintiff has failed to lay down the proper foundation for this challenge, I refuse to draw an adverse inference against the Defendant’s case based on the absence of evidence from Mr. Clement.

*Liability based on the Defendant’s version of events?*

1. As I reject the Plaintiff’s evidence, I cannot find liability on the part of the Defendant based on the Plaintiff’s case. However, this is not the end of the matter. The Defendant admits that the Plaintiff injured his hand during an accident in the Vigor Unit. Hence, although I reject the Plaintiff’s pleaded case, it is still possible for the court to find liability on the part of the Defendant based on the latter’s version of events.
2. It is the Defendant’s case that the Plaintiff had placed a metal foil to deceive the safety device of the pressing machine at the time of the accident. As a result, the compressor of the machine still descended trapping the Plaintiff’s hand whilst he was packing the goods. Based on such version of events, the accident was caused mainly by the Plaintiff in negligently operating the machine and deactivating the safety device. However, it is possible for the Defendant to be liable if his firm had negligently failed to provide proper supervision over the work of the Plaintiff. The difficulty with such line of argument is that such particulars of negligence have not been included in pleadings. Neither has the Plaintiff raised such issue in the witness statements, nor has his counsel asked any questions from the witnesses on the issue of liability based on the Defendant’s scenario. In other words, the issue has not been canvassed at the trial.
3. In my judgment, it is not appropriate for the court to find liability on the part of the Defendant based on its own version of events. In this regard, the facts here are very different from those in *Poon Hau Kei v Hsin Chong Construction Co. Ltd. Taylor Woodrow International Ltd. Joint Venture* [2004] 2 HKC 235.
4. In *Poon Hau Kei*, a worker sustained severe injuries from a fall while working at a height in a construction site, and he commenced proceedings against the principal contractor, the fire services installations sub-contractor and his employer for negligence, breach of occupier’s liability and breach of statutory duty. The injured worker pleaded that: (i) he had not been provided with any safe means of working at a height; (ii) he had been provided instead with an unsuitable ladder; and (iii) he fell off that ladder while standing at the top of it. He gave evidence at trial to that effect. On the other hand, the principal contractor pleaded that the accident was caused solely or contributed to by the negligence of the worker and alternative pleas were put forward as to what the worker had been standing on and then fell off. The first was that he had been standing on a folding step-ladder. The second was that he had been standing on a fluorescent light trough suspended high above the platform on to which the worker fell. At trial, the judge rejected the worker’s evidence that he had been standing on a ladder and found that he had been standing on the light trough. The trial judge found the principal contractor and the other defendants liable but assessed contributory negligence on the part of the worker at 25%. The Court of Appeal allowed the principal contractor’s appeal and dismissed the worker’s claim, holding that the trial judge should have dismissed the claim and not proceeded on the basis of a version of facts different to that advanced and pleaded by the worker. The worker appealed to the Court of Final Appeal.
5. The Court of Final Appeal allowed the appeal and restored the trial judge’s decision. According to the final appellate court, provided it did so in a fair manner, the court was entitled to decide in favour of a party on the basis of a scenario that that party had not pleaded but his opponent had pleaded. In that particular case, the principal contractor pleaded the light trough scenario as one in which the accident was caused solely or contributed to by the negligence of the worker. What the judge found at first instance as to the mixed causes of the accident was therefore covered by the pleadings. Further, while the focus of the principal contractor at trial was on the ladder allegation stated in the worker’s evidence, that did not mean that the cross-examiner could not put to the worker what his side had pleaded against the worker. In fact, the worker was cross-examined by counsel for the principal contractor to the effect that standing on the light trough would amount to contributory negligence. Finally, the trial judge’s indication that the light trough scenario had been fully canvassed in evidence and submissions by the parties with no prejudice to anyone ought not to be overturned on appeal except for a very strong reason or reasons and there was no such reason in that case.
6. One can immediately see the destination between the facts in *Poon Hau Kei* and those in our present one. Here, it is uncertain as to the basis of the Plaintiff’s claim if the court were to accept the Defendant’s version of the accident. No particulars of negligence has been included in the pleading. What is more important is that no question has been asked by the Plaintiff’s counsel based on the Defendant’s version of events. In such circumstances and unlike the facts in *Poon Hau Kei*, the Defendant in the present case does not know the case that it has to meet based on the Defendant’s version. Without being asked any question as to its liability in the case that it was the Plaintiff who deactivated the safety device in the machine, the Defendant has not been given any opportunity to deal the Plaintiff’s claim based on the Defendant’s factual scenario. In my judgment, this would be most unfair to the Defendant.
7. In fact, Bokhary PJ approved the following passage in the judgment of the Court of Appeal in *Poon Hau Kei*:

*“In circumstances where the version of events as pleaded or advanced by a party is found not to be accurate or true, and another version is held to represent the true position, a court must be careful when asked to make a finding of liability (or some other legal consequence) based on this other version. Before attempting to do so, the court must first be satisfied that the issue has been properly put before it and identified so that the other party becomes fully aware of the case he has to meet. This is usually done by the matter being made clear in the pleadings. Next, the court must also be satisfied that the ‘new version’ is one that the other party has been given a full opportunity to deal with. Both elements must exist before a court can then proceed to make a finding of liability or some other legal consequence based on the ‘new version’. There may of course be other considerations as well, but these two are usually the most important.”* (see para. 12 of the judgment of the Court of Final Appeal)

1. In other words, Bokhary PJ approved the two necessary requirements set out in the judgment of the Court of Appeal. However, as the Court of Final Appeal took the view that the “new version” of facts was covered by the pleadings and that the principal contractor had been given opportunity to deal with the worker’s claim based on the alternative version, it ruled the case in favour of the worker.
2. As I have mentioned above, the Plaintiff in the present case has not pleaded the basis of his claim based on the Defendant’s version of events. Neither has the Plaintiff’s counsel asked the witnesses any of the questions relating to such issue. Without knowing the case that the Defendant has to meet and without being given an opportunity to deal with the Plaintiff’s allegation, it is not appropriate for the court to find liability on the part of the Defendant based on its own version of events.

*Other related issues*

1. This would have been sufficient to dismiss the claim. However, it is possible for this case to go elsewhere and a contrary view may be taken about the liability of this case. Hence, in order to avoid further hearing, it would be appropriate for me to deal with the other outstanding issues as well.

*(i) Contributory negligence*

1. The first outstanding issue is contributory negligence. As I find that the accident happened in the way as described by the Defendant’s witnesses, the Plaintiff must be guilty of contributory negligence even if the Defendant is liable for the accident. However, as the issue about the Defendant’s negligence has not been canvassed at the trial, it is not possible for me to apportion the blameworthiness of the respective parties for the accident. Hence, by reason of the absence of supporting particulars in the existing pleadings and the lacuna in the evidence, it is simply impossible for me to deal with the issue of contributory negligence even if the Defendant is liable for the accident.

*(ii) Quantum of the Plaintiff’s claim*

*(a) The injuries and permanent disabilities suffered by the Plaintiff*

1. It is easier for me to deal with the issue of quantum. The Plaintiff had earlier brought a claim for employees’ compensation against the Defendant in respect of the accident on 15 October 2004. Both the Plaintiff’s and the Defendant’s respective orthopaedic experts, Dr. Patrick Wong and Dr. David Cheng, had given oral evidence at the trial of such claim before HH Judge Leung. As both parties accept that the findings made by the learned judge would be binding on this court, the parties had agreed earlier to dispense with the attendance of the medical experts at this trial. Further, the Plaintiff has not been asked any question on the issue on quantum when he is testifying at the witness box. Hence, the evidence on quantum mainly comes from the Plaintiff’s witness statements, the medical experts’ reports and the findings made by HH Judge Leung in the related employees’ compensation claim.
2. In assessing the quantum of the Plaintiff’s claim, it is useful for me to set out the following passages in the judgment of HH Judge Leung about the Plaintiff’s background and the events after the accident:

*“ 2. Singh (the Plaintiff) was born in India in August 1984 and was aged 20 at the time of the accident. He had primary education. He came to Hong Kong in the 1990’s. The reported employment history here started in about 2000 when he worked as a packing worker. By the time of the accident, he had worked for Najib, also as a packing worker, for a few months. He earned a salary of HK$6,000.*

1. *After the accident, Singh was sent to hospital. According to the medical records of the hospital, there was swelling in his right hand. X-ray showed no fracture or dislocation. In view of the swelling and impending compartment syndrome, an emergency operation of fasciotomy was performed. He was managed with analgesics and dressing care. He was discharged 5 days later. When the swelling subsided, he was re-admitted for suturing of the surgical wounds. He was discharged 2 days later and was referred physiotherapist for mobilisation exercise. He was followed up at the outpatient clinic in the following month. Singh was granted sick leave from the date of the accident to 21 September 2005, slightly over 11 months.”*
2. The Plaintiff’s subjective complaints are that his hand gets tired easily, his hand is weak and he also experiences stiffness and numbness in his right hand.
3. According to the testimony of Dr. Cheng at the trial of the related employees’ compensation claim, the Plaintiff’s wound has healed satisfactorily. The hand function has fully restored. Apart from some residual pain, Dr. Cheng finds no permanent impairment. The Plaintiff has also been examined by the neurological experts engaged by the parties. According to them, the complaints of the Plaintiff cannot be explained by any neuropathological disorder or objective findings. There had probably been some compression on the median nerve of the Plaintiff shortly after the accident, but it had probably recovered. There is now only “mild electrophysiological evidence of a median nerve entrapment without supporting physical deficits”. Such mild abnormality should account for at most some sensory discomfort in the median three and a half fingers but motor loss is not expected.
4. At the trial of the related employees’ compensation claim, HH Judge Leung accepted the expert evidence of Dr. Cheng and the two neurological experts. In other words, the learned judge found that the Plaintiff had exaggerated his symptoms and disabilities. Apart from some sensory discomfort in the fingers of the right hand, the Plaintiff should not have suffered any loss of function or significant stiffness in the fingers. I will therefore proceed to assess the Plaintiff’s claim based on such findings.

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

1. From the said medical findings, the Plaintiff’s injury is relatively minor. Apart from some residual pain and numbness in his right hand, the Plaintiff should not have suffered any significant permanent disabilities.
2. In his final submissions, Mr. Sham, counsel for the Defendant, refers me to the following decisions: *Chan Cheuk Yiu v Chan Ho Kwan,* unreported, HCPI 879 of 2000 (decision of Master M. Yuen on 30 June 2001), *Yu Yixin v Leung Chi Tin Andy*, unreported, DCPI 1306 of 2007, (decision of HH Judge M. Ng on 13 March 2008), *Mehmood Khalid v Million Harvest Wharves & Logistics Ltd. & ors.,* unreported, HCPI 401 of 2006 (decision of Saunders J on 20 June 2007), *Chong Hok Sung v Li Kam Ming & anr.*, unreported, HCPI 393 of 1995 (decision of Master Chung on 19 May 1997), *Tsang Ka Hung Barry v Tang Yuk Ling*, unreported, DCPI 525 of 2007 (decision of HH Judge M Ng on 20 January 2009). On the other hand, Mr. Clough has not cited any decisions on PSLA.
3. In my judgment, the Plaintiff’s injury is less serious than those of the plaintiffs in *Yu Yixin* and *Mehmood Khalid* but more serious than that of the plaintiff in *Tsang Ka Hung*. I award $120,000 as damages for PSLA in the present case.

*(c) Pre-trial loss of earnings*

1. Prior to the accident, the Plaintiff was employed as a packer or labourer by the Defendant earning about $6,000 a month. After the accident, the Plaintiff was granted sick leave for about 11.2 months from 15 October 2004 to 21 September 2005. In the case that liability is established, there is no dispute that the Plaintiff is entitled to claim for loss of earnings during the sick leave period which can be assessed as follows:

$6,000 x 11.2 months : $67,200

plus 5% loss of pre-trial MPF : $3,360

total : $70,560

1. As I prefer the evidence of the Defendant’s witnesses, I accept that the Defendant had actually offered to employ the Plaintiff to work on the same term after the expiry of the sick leave period. As the Plaintiff wanted to go back to India and turned down the offer himself, he is not entitled to claim for any further pre-trial loss of earnings.

*(d) Loss of earning capacity*

1. At present, the Plaintiff is working as a delivery worker for a textile company earning an income which is the same as that of his pre-accident employment, and so he is not claiming for any future loss of earnings. He nevertheless makes a claim for loss of earning capacity.
2. As I have mentioned above, apart from some residual pain and numbness in the fingers of the right hand, the Plaintiff has not suffered any significant permanent disabilities. With no serious impact on his work and such residual pain and numbness are not apparent to his prospective employers, I do not find that the Plaintiff’s residual disabilities would put him in a disadvantage position in the labour market. Hence, I disallow such claim.

*(e) Other expenses*

1. The Plaintiff claims a sum of $10,000 for medical expenses and travelling expenses. In the Revised Answer to the Re-revised Statement of Damages, the Defendant is prepared to agree such claim subject to the production of supporting receipts. Unfortunately, no such receipt has been produced at the trial. Neither is there any evidence in the Plaintiff’s witness statements nor in his oral testimony confirming the spending of such expenses. In the absence of supporting evidence, I only allow a sum of $802 which is the amount of medical expenses agreed at the trial of the related employees’ compensation claim before HH Judge Leung.

*(f) Set-off of the Defendant’s costs in the related employees’ compensation claim*

1. The Defendant was awarded costs which were taxed in the sum of $180,274 in the related employees’ compensation claim, and the Defendant now seeks to rely on such judgment debt by way of equitable set-off to reduce or extinguish the amount of damages which, if liability is established, may be awarded to the Plaintiff.
2. In the related employees’ compensation proceedings, the Plaintiff was not legally aided as he is in these common law proceedings.
3. Such defence of set-off has been pleaded in the Revised Answer to the Re-Revised Statement of Damages but not in the Amended Defence. However, according to Practice Direction 18.1 para. 62, Answer to Statement of Damages should stand as part of the pleadings, and so the Defendant should be allowed to raise such issue at the trial. In fact, there has been no surprise to the Plaintiff.
4. S. 18A(4) of the Legal Aid Ordinance, Cap. 91, provides that, for a legally-aided plaintiff, the charge created on any damages or costs in favour of the Director of Legal Aid shall not prevent a court allowing them to be set-off against other damages or costs in any case where a solicitor’s lien for costs would not prevent it. Hence, the fact that the Plaintiff is legally-aided is not a relevant factor to deny set-off.
5. Mr. Sham is relying on the case of *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492 to argue in favour of such set-off. In *Lockey*, the legally-aided plaintiff commenced an action in damages for negligence against the defendant. In an interlocutory application, the district registrar made an order that the costs of the application be to the defendant “not to be enforced without the leave of the court save as to set-off as against damages and/or costs.” The plaintiff appealed against such order. The issue in the appeal was whether, in a case where one party is legally-aided, an order for costs in favour of the other party can direct that those costs be set-off against either damages or costs to which the legally-aided party has become, or may in future become, entitled in the action. The English Court of Appeal answered such question in the affirmative and dismissed the appeal.
6. As I see it, the same principle should apply in the present case and the Defendant should be allowed to set-off the costs awarded in the related employees’ compensation proceedings against the damages entitled by the Plaintiff in the present claim.
7. In opposing the set-off, Mr. Clough for the Plaintiff argues that *Lockey* cannot assist the Defendant’s case as: (i) the statutory framework for legal aid in England and Wales is completely different from that in Hong Kong; and (ii) the set-off in *Lockey* related to an order in the same proceedings whereas the costs order in our present case related to different legal proceedings. Further, Mr. Clough relies on the ancient decision of *Richard v James* (1848) 2 Ex 471 and argues that for there to be an effective set-off, such set-off must have been due at the time of the commencement of the suit.
8. I reject Mr. Clough’s submission. Firstly, Mr. Clough cannot point out the difference between the statutory frameworks in the two jurisdictions which justify the non-application of set-off in our present case. Secondly, the Defendant is relying on the principle of equitable set-off which is a much wider concept than legal set-off. So long as the plaintiff’s claim and the defendant’s claim are closely connected that it would be inequitable to allow the plaintiff’s claim without taking into account the defendant’s claim, equity would intervene to impeach the plaintiff’s claim.
9. By reason of the aforesaid, if liability is established, the Defendant should be allowed to set-off the costs awarded in the employees’ compensation proceedings against the damages entitled by the Plaintiff in the present case.
10. Hence, if a contrary view is taken elsewhere about the liability issue, the quantum of the Plaintiff’s claim can be summarised as follows:

(i) PSLA : $120,000

(ii) Pre-trial loss of earnings : $ 70,560

iv) Medical expenses : $ 820

sub-total : $191,380

less compensation awarded in ECC proceedings : $ 63,202

less costs awarded to the Defendant in ECC proceedings: $180,274

tota; : (- $ 52,096)

In other words, the Plaintiff is not entitled to any damages even if liability is established in the present case.

1. Based on my ruling on the issue of liability, I dismiss the Plaintiff’s claim. I also make an order *nisi* that the costs of the action be to the Defendant with certificate for counsel and the Plaintiff’s own costs to be taxed in accordance with legal aid regulations. The order *nisi* shall be made absolute 14 days after the date of the handing down of this judgment.

(David Lok)

District Judge

Mr. Neal Clough, instructed by Messrs. Massie & Clement, for the Plaintiff

Mr. Walker Sham, instructed by Messrs. Peter W. K. Lo & Co., for the Defendant