###### DCPI 726/2017

[2019] HKDC 826

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 726 OF 2017

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

##### BETWEEN

YAM LAI CHAU (任禮疇) Plaintiff

and

YAM HING KUEN (任慶權) trading as UNION

AIR-CONDITIONING ENGINEERING CO.

(中聯冷氣工程公司) Defendant

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

Before: Deputy District Judge Kate Li in Court

Date of Hearing: 11, 12 and 14 June 2019

Date of Judgment: 20 June 2019

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

JUDGMENT

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

*A. Introduction*

1. The plaintiff claimed common law damages for injuries he suffered as a result of electrocution allegedly in the course of his removing the air conditioning compressor from the structures inside the air conditioning facility room on the 29th floor of a commercial building in Wan Chai (the “Location”).
2. This claim stands or falls on the plaintiff’s case of the existence of employment relationship between the parties[[1]](#footnote-1). The plaintiff claimed that he was employed by the defendant on 12 September 2014, for the specific assignment of repairing the compressor of the air conditioner inside the air conditioning facility room. Under a claim for breach of employer’s duty, the plaintiff’s complaint was two pronged. First, the defendant has failed to provide any or any electricity proof gloves to the plaintiff, and secondly, the defendant has positively confirmed to the plaintiff that the defendant has switched off the electricity supply already.
3. The defendant denied that it was on the basis of employment that he asked the plaintiff to help him on that day for the compressor repair work. The defendant averred that the attendance of the plaintiff on that day at the Location was referable to their clansman relationship; the defendant claimed that the plaintiff insisted helping out on that single occasion in return for his favour because the defendant had performed a free service to the plaintiff installing two air conditioners for his home over a year ago.

*B. Summary of my findings*

1. I dismiss the plaintiff’s case of employment, and the plaintiff’s claim is therefore bound to fail. As a matter of general principles, there could have been a potentiality of specific oral employment contract for that day for that assignment on a casual as required basis for a casual worker. Such characterization could have been most relevant to the plaintiff’s assertions on the circumstances under which he came to attend and get on handling the compressor.
2. However, most unwisely, the plaintiff adduced two questionable documents to try to reinforce his employment case. Such were adduced by his supplemental witness statement. One such document is an “*employee certificate*” allegedly written by an unknown person arranged by the defendant and signed by the defendant. The plaintiff claimed that he requested the defendant for a certificate to submit to the Housing Authority and the defendant then prepared it and gave it to him accordingly.
3. My finding is that this document is a false document. There is also another document being a Form for post secondary education subsidy. I also reject it as a false document. My finding on these two documents conclusively determines that the employment case, and in turn, this claim, must fail. I will detail the reasons further in Sections D2 and D3 below.
4. In addition to the questionable documents. There are countless unbelievable elements in the evidence given by both parties.
5. The defendant’s case itself was inherently improbable. He produced no documentary evidence and his evidence was all over the place. There was no credible evidence of any degree of strength to support his case of clansman helping out each other. His claimed clansman relationship cannot be an explanation to all the events. The defendant asserted that it was based on the relationship that the plaintiff’s helping him on the compressor, and it was also because of this relationship that the defendant signed the two blank documents (ie the employee certificate and the subsidy application form) to help out.
6. None of the parties tells the court the truth. There is no evidence on which any finding of employment can rest. This is so despite Ms Lin’s reliance on the guilty plead and mitigation submission made by the defendant in the magistracy proceedings for failing to make available employee compensation insurance in contravention of section 40 of the Employee’s Compensation Ordinance[[2]](#footnote-2). The analysis of the legal implication of the conviction and the submission in mitigation on this action will be examined in Section E below.
7. Both sides’ evidence is deeply unsettling in that lies were pervasive and instances of contradictions and inconsistencies between one piece of evidence to the next were countless. In assessing the evidence, I am mindful of the principles as set out in *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 at para 53 and have taken into account the parties being of workmen background and are of relatively low level of education. Worst of all, there was no sophistication in the parties that can allow them to present themselves as even potentially credible when they were telling lies. Sometimes, both cannot give any or any meaningful answers to the cross examination questions.

*C. Factual issues*

1. The extent of factual dispute is vast. They basically agreed only on limited matters -that they knew each other since the time when the plaintiff worked for a company (Glory Apex) as a labourer. The plaintiff had worked for Glory Apex from 2000 to 2010. During that employment the defendant started work contacts with the plaintiff. Between 2010 to 2013, they maintained contact, and on the day of the incident, 12September 2014, they both attended the Location. The plaintiff has no licence required for performing air conditioning work. The defendant has such a licence (something that the plaintiff did not dispute) and he has since 1999 been in the air conditioner contracting business.
2. My analysis of the factual evidence is performed under 3 topics:-
3. How did the parties come attend the Location together on 12 September 2014?
4. Evidence regarding the two documents (ie the employee certificate and subsidy application form)
5. What happened on the day of incident?

*D1. Why did the parties come to attend the Location together?*

1. The plaintiff’s evidence was thoroughly unsatisfactory. He made evidence up along the way. His evidence was inconsistent internally. I gather from what he said as follows. He had looked for work after leaving Glory Apex. At some point, he called the defendant to ask for work. In the end of 2013, the defendant called him back to give him work. It was agreed that the wage for each day work was HK$800. Since the end of 2013, the plaintiff started to work for the defendant on an as required basis. His evidence was that for end of 2013, it was three days, March 2014 – 10 days, April 2014 – 11 days, May 2014 – 17 days, June 2014 – 10 days, July 2014 – 16 days, August 2014 – 15 days and September 2014 – 2 days. The 2 days in September was of significance ie 3 September 2014 and the date of incident – 12 September 2014.[[3]](#footnote-3)
2. The plaintiff set out, in a table of summary in his witness statement dated 30 October 2017, some particulars of his work history in working for the defendant. I noticed that most were air conditioning work.
3. The plaintiff said at court that the defendant engaged him for air conditioning work even knowing he was not licensed to do so, and a lot of people did that without licence too. He said he has learnt air conditioning work during apprenticeship in 1980s. In 1990s, he did little air conditioning work, and he only installed them but was not to repair them. He was a casual worker doing drainage work, and iron welding work. In 2000 to 2010, whilst he worked for Glory Apex, he did only drainage work as it was a drainage company. From 2010 onwards he did miscellaneous labour work on as required basis. He said that from the end of 2013, he was employed by the defendant. He said that at some point during the employment with the defendant, he collected the wages in cash on a monthly basis when meeting the defendant on the first day of the next month. He did not put the cash into bank account. He took it and used it. This was so even the cash could be over ten thousands on an occasion.
4. From the answers given at cross examination, I find that the plaintiff did not know air conditioning work such as to be engaged as an air conditioner mechanic. He told the court very little about the air conditioner work nature. When asked whether it required high skill and heavy lifting. He said it needed not. When asked whether in 1990s he has done any air conditioner work, he said very little, and added that he only installed them but not repair them. When asked whether the defendant had indeed worked on two air conditioners for him for his two premises before, he said yes, but he himself installed them already and the defendant was needed only for connecting the air conditioners. He said he did not have the tools only. He could have done it with the need for the defendant.
5. I do not believe that the plaintiff could work as an air conditioner mechanic. This already undermines a central part of the plaintiff’s case – he said he was employed by the defendant as an air conditioner mechanic.
6. I am mindful that the plaintiff might be able to help with the defendant’s air conditioning work as a labourer. To my mind, the physical demand of lifting at least may need more than one person and labourer may be needed. However, the way the plaintiff talked about air conditioning work showed such a level of “ignorance” that he could not have been working for the defendant at such a frequency as claimed in the table of work history.
7. Moving on to the defendant’s version, the defendant’s explanation as to how they came to attend the Location that day was inherently implausible. He said that in about August 2013, he rendered free air conditioning work to the plaintiff’s homes. He did not charge the plaintiff because they were clansman, from the same origin in China. Yet, the plaintiff insisted upon returning the favour. Over a year later, came the day of incident when the defendant needed an extra hand for the work at the Location. Therefore, the plaintiff returned favour for the defendant’s free service a year ago by insisting to attend the Location and accompanied the defendant. The defendant’s evidence shifted as to who initiated this. Such was unconvincing, and foreshadowed the making of more blatant lies by the defendant.
8. What follows is more problematic. As to what role the plaintiff should take on the occasion, the defendant said at court that the plaintiff was meant to hand tools to him during the operation, as an assistant, but in the witness statement he specifically stated that the plaintiff was meant only to carry the tool bag. Both accounts are non-sensical because from the defendant’s own account of events, he carried all tools in his backpack which he put down at the Location without asking the plaintiff to carry at all. All the way, in the defendant’s evidence, the plaintiff had done nothing and was just accompanying him to go up to the Location. The next thing was that the defendant warned him not to do and touch anything, as the defendant went down to pick up equipment. The defendant’s own account did not even refer to the plaintiff’s carrying or doing anything at all. The defendant’s account is unreliable and is rejected. There was simply no role and no purpose for which the plaintiff was to accompany the defendant at the Location.
9. Under the first topic, no one told the court the truth – the defendant’s account was inherently implausible and not even supported by his own evidence; the plaintiff’s account was problematic as he did not know enough air conditioner work to support an alleged employment of over 10 days a month for air conditioner technician work.
10. Whilst I am mindful that the issue of what role, ie as technician or labourer, was not critical to the finding of existence of employment, the defendant’s version is not even suggesting a role at all. My analysis under the first topic destroyed the credibility of both parties.

*D2. The two documents - employee certificate, subsidy application form*

1. The basis of the plaintiff’s involvement (ie whether as employee or not) is at the heart of the whole case. The plaintiff adduced, by way of his supplemental witness statement, two written documents to support the existence of the employment relationship. The document which was annexed as document 2 is most problematic. It was a one page document which was written on a quotation form (報價單). At the top of the form there is the letterhead of the defendant’s company (中聯冷氣工程公司), and a former address of the defendant’s company for over 10 years ago at Sheung Ye Road, Kowloon Bay as well as the contact information including a pager number. The document bears a date of 5 September 2014 (noting that this date is in between the two alleged last days of work ie 3 September 2014 and 12 September 2014). Most noteworthy is the following handwritten writing in the form:-

“任禮疇 身份證H102973(A)

是本公司做散工(冷氣技工)

每工日薪: 港币捌佰元正

7月份工作日数: 16天

8月份工作日数: 15天

9月份工作日数: 一工半

三个月合共三十二工半

总金額为港币$26,000.00

以現金支付”

1. There was a chop of the defendant’s company by which the defendant has admittedly appended his signature. (This document, though not titled, was referred to as ‘employee certificate’ at the trial and also here.)
2. The plaintiff’s evidence was that the certificate was needed for him to pass to the Housing Authority to give an income proof of 3 months. Hence, the plaintiff asked the defendant to give him on 3 September 2014 as he attended to work for the defendant on that day. He said he collected the certificate at the defendant’s office on about 6 or 7 September 2014.
3. The plaintiff was unable to answer properly when asked about the details of the certificate. Saliently, he said he could not remember what purpose the certificate was for with the Housing Authority. He did not remember whether it was indeed sent or whether the original or copy was sent. He did not know who wrote the above Chinese words. He said that he only asked, and then the defendant arranged for him and handed to him. He said that the defendant gave him the certificate only a few days later. He said that the reason for the wait was that he did not have the chop in office. The defendant had to go home to put the chop on. The certificate bears the ID card number of the plaintiff. When asked how the defendant could have the ID card number of the plaintiff, the plaintiff could not give a sensible answer. He said the defendant might have taken a look at his ID card as with all other normal employers did.
4. I find the plaintiff’s failure to give sensible answer to the above key matters telling. I have no hesitation at all to reject the certificate as a genuine and authentic document for the purpose claimed. In my view, it is a document created by the plaintiff for the purpose of bolstering the employment case in this action. It is not one as he claimed to be for sending to the Housing Authority. In this sense, the certificate is a false document.
5. The defendant’s evidence on the certificate is no less appalling. He told the court that he appended his signature on it when it was blank. He did it as the plaintiff snatched a blank invoice from his desk and asked him to help to certify him as an employee. He helped as the plaintiff was his clansman. When asked why as a person in business for so long, he could have signed blank document, he could only repeat that the plaintiff was his friend and clansman. When asked how the transactions about the certificate were conducted, the defendant told the court that the plaintiff habitually attended his office to chat. When asked what they chatted about the defendant could not give sensible answer.
6. Saliently, the defendant was lost for words and kept saying that they chatted about things like where to have meals, and everything. There was no coherent or sensible account of event as to how the plaintiff first made the request and what happened when the plaintiff attended the office to collect it. He could not give meaningful account as to how the certificate came to be on an invoice form, and how the chop was placed on the certificate.
7. As it is a false document, there are many more problems in it. Mr Ng has helpfully tried to reveal more by eliciting more detailed evidence from the plaintiff. As a result, I note that that when the date of work for September was stated to be 1.5, this ought to have to include the date of accident – 12 September as the only other date in September is 3 September. This pointed to the possibility of the document coming into being after the accident date, rather than the date that it bears ie 5 September 2014.
8. The certificate is plainly a document created by the plaintiff for the purpose of bolstering the case of employment. Strange enough, the plaintiff admittedly appended his signature on it. The explanation of his helping a ‘brother’ out is incredible and is rejected. The defendant’s explanation for all odd features of this case by reference to the parties’ being clansman is unacceptable. This certificate was inexplicably a product of their combined and intentional efforts. This points to the fact that the true set of circumstances in which the document came to being are not yet told.
9. In the same vein, the other document ie annexure 1 to the supplemental statement of the plaintiff has to be rejected as well. This document was a Return of Employee’s Remuneration for the Financial Year from 1 April 2013 to 31 March 2014. It is a form for the Student Financial Assistance Agency – Financial Assistance Scheme for Post-secondary Student. The plaintiff said his eldest son needed to apply for subsidy for his schooling and hence he completed the form for the plaintiff indicating the plaintiff’s total wages from 1 December 2013 to 31 March 2014 as $16,000. The document bears the date of 16 June 2014. The defendant appended two signatures on it. The plaintiff himself filled in the information of the defendant, his name, company name, address and phone number below the signature of the defendant.
10. This form is also a document of combined efforts of the parties. The defendant again claimed that he signed it when it was blank. He could not state any meaningful and consistent details of how the document came to be presented to him for signing and how the chop of his company was placed on it.
11. I cannot find the form as a genuine document. Like the certificate, it was adduced by the plaintiff to bolster his case of employment. Yet, how the defendant came to be involved by signing on it is unknown. This points to the existence of the true circumstances relating to their relationship that no one has told the court.
12. There are certainly more problems with the details in the form, as Mr Ng submitted, eg that even the days of work claimed in the witness statement could not give a total of $16,000 and the figures did not tally. The supplemental statement also stated that $16,000 was *monthly* wages, instead of *total* wages as the form showed. Actually, the false nature of the document was so apparent to me even without a need to go into all the inconsistency problems.

*D3. Consequences of rejecting the employee certificate and the form as false documents*

1. My rejection of the two documents conclusively left no scope for a finding of employment relationship. Here are three reasons why I will not make a finding of existence of employment relationship:-
2. All the plaintiff’s oral evidence is rejected in totality; there is no other unquestionable written documents, and there was no other witness called.
3. I make an inference from the plaintiff’s going all out to create and rely on a false document that there was something fundamentally problematic in his case of employment.
4. I rejected both parties’ account of event. The defendant has appended his signatures on the two documents but the employee certificate was written up by an unidentified person; there must be some arrangements and understanding between them that underlies the employee certificate. The truth must lie in a third version about which I have no insight. I cannot find in favour of a case of employment where there is such a strong indication that the truth is made up of a set of facts which has nowhere surfaced yet.

*D4. What happened on the day of incident?*

1. The plaintiff’s case was that they worked together coordinating with each other, and the division of labour was that the defendant took the role of switching off the electricity and he was the one actually working on the removal of the compressor. The plaintiff said he got electrocuted when touching the wires of the compressor using his bare hands. One allegation was that the defendant failed to provide gloves to him. The other allegation was that the defendant mistakenly confirmed to him that the electricity was off, when it was not.
2. The defendant’s case is that the role the plaintiff meant to take was just very peripheral, not to actually undertake the air conditioning work. As noted above, the defendant could not say with any measure of credibility what the plaintiff’s role was. The defendant said he did not know how the plaintiff got electrocuted. The plaintiff was not supposed to work on it, and he was just supposed to stand there and wait. The defendant added in his case that before he went down to the 1st floor to pick equipment, he particularly warned the plaintiff not to touch anything. It was during the wait that the plaintiff went about his own frolic and touched the compressor.
3. In terms of evidence, both sides made up and volunteered new details when giving evidence at trial.
4. For example, the plaintiff added in evidence that he got electrocuted not when he worked in bare hands touching the wires. He said in court that he got electrocuted when he was holding a spanner to loosen up the wires.
5. In the same vein, for the defendant, to try to suggest that the plaintiff was not asked to work on the compressor, the defendant also added on details like he had already loosened up the cover of the compressor a day before. He visited there a day before the incident. There was also a change of the defendant’s evidence sought at the beginning of the evidence to the effect that the defendant changed to say that he went down to get only the acetylene cylinder, and not also the ladder. The ladder was placed beside the compressor the day before. However, the visit the day before was never mentioned in the witness statement.
6. I actually do not see how all these added details are serving the parties. In my view, with one and a half day of observing them giving evidence, it is very clear to me that these last minute details were effortfully made up by them as they felt that their version may not be accepted as true. They felt that there were weaknesses in their case and tried to overcome them by adding on more details.
7. What was most telling and striking was the events in the afternoon. Their accounts of events were different. Both are hard to be believed. The plaintiff said after rest and lunch with the defendant, they went to a shop in Wan Chai to purchase a new compressor. They walked back to the Location with the new compressor, and then the defendant left him again to travel to Cheung Sha Wan to pick up an instrument to help them lift the compressor up. He said that they resumed working together at 2 pm and worked together till about 6 pm.
8. The defendant said that they had lunch together. When they came back to the Location, he was the only one working on the compressor. Most strikingly incredible was that the plaintiff did not leave but took rest at the same Location. The defendant got on with the air conditioner work, throughout the afternoon.
9. I have no hesitation to reject both accounts of the events on what happened after the electrocution. Regarding the plaintiff’s account, it is inherently implausible that there were additional trips to purchase new compressor together, and, for the defendant to return to Cheung Sha Wan to pick up another equipment. I do not understand why these implausible details were added. The only explanation is again that he perceived weaknesses in his case and tried to make up details to overcome them.
10. Regarding the defendant’s version, it is also implausible – throughout the afternoon, the plaintiff just rested at the Location. This goes back to the question of what role the plaintiff was supposed to take at the Location. It is clear that even in its own terms, the defendant’s evidence was hardly convincing. The plaintiff actually has done and was meant to do nothing there. Yet he went there and stayed all day there.
11. Both side’s evidence under all the three topics were nothing but blatant lies. A lot of times, both parties did not know what they were saying. There were effortful attempts to add last minute details but the volunteering of new details appeared forced and ill conceived.

*E. Implication of conviction and admission made in mitigation by defendant for failing to procure insurance for employment compensation*

1. There is one significant legal issue to determine. On 10 June 2016, the defendant was convicted on his own plead for failing to arrange compulsory insurance against employer’s EC liability, in contravention of Section 40 of the Employee’s Compensation Ordinance. He was fined HK$2,000. The defendant explained in this action that he pleaded guilty just to avoid incurring legal costs to defend the charge. In his counsel’s submission for mitigation, it was stated that:-

“閣下，其實喺三年前呢，被告開始個腰部就係唔舒服，就有痛，所以開始開工呢就少咗嘅，咁其實喺呢二十幾年嚟，被告一路都有聘請過員工㗎，直至到佢剛剛案發之前，因為自己個腰骨真係唔舒服，所以就請咗個朋友返去公司度幫手。”

1. Mr Ng, for the defendant, argued that the subject matter at issue in the conviction is insurance, and the issue here is different. I hold the view that, for the purpose of analysing the implication of the conviction and the admission, the subject matters are effectively the employment issue.

*E1. Implication of conviction*

1. I find that the authority relied on by Mr Ng most instructive. In *Lee Yam Kan v Ng Pui Kuen trading as Wing Sing Scaffolding Engineering* & Anor, HCPI 196 of 2014, dated 15 March 2016 at paragraphs 12-15, the implication of any breach of statutory duties conviction on civil matter of negligence is one of shifting of burden of proof to the defendant to prove absence of negligence. In paragraph 13, Deputy High Court Judge Paul Lam SC held:-

*“13. It is not disputed that, in law:*

1. *The criminal convictions shift the legal burden of proof. Hence the legal burden is on the defendants to prove that they had not breached the said statutory duties.*
2. *The weight that should be given to the criminal convictions must depend on the circumstances to be decided by the judge at the civil trial.”*
3. In paragraph 43 of Ms Lin’s opening submission, the conviction and the admission were approached as a matter of credibility or estoppel. It is salient to note that Ms Lin did not approach the matter as a matter of shifting of burden of proof to the defendant. From Sections E1-E2 of the opening submission of Ms Lin, one can see that the plaintiff proceeded on the basis that the burden of proof for the employment issue rested in him. The plaintiff has not asserted reverse burden until a suggestion was made for the first time as a matter of factly at paragraph 26 of Ms Lin’s Closing submission.
4. The plaintiff could not proceed with reversed burden as a matter of factly only at closing.
5. Nevertheless, for the sake of fuller exposition of issues, I make the following observation on the assumption that burden on employment issue is reversed and on the assumption that this was the basis adopted by the parties:-
6. in terms of the conviction, I am minded to agree that the principle of reversing of burden, though arising in the context of breach of statutory duties on safety related matter and negligence claim, operates here on the issue of employment.
7. I am also minded to agree that on the issue of employment, there is some force in one’s argument that the burden of proof shifted to the defendant.
8. I find that most of what the parties told the court were blatant lies in wholesale terms. I am unable to reasonably find any version of facts advanced by the parties as true.
9. There are also evidence pointing to a set of facts which is beyond these two competing versions. The writing on the certificate was of an unidentified person.
10. The issue of employment may have to be decided on the burden which the defendant failed to discharge.[[4]](#footnote-4)
11. In conclusion, an alternative analysis arising from the magistracy conviction is therefore that the defendant fails on the issue of employment.[[5]](#footnote-5)
12. However, liability for negligence also depends on the finding of breach of employer’s duties. As noted above, I reject the plaintiff’s evidence, including topic 3 as in how the incident happened, in totality. The plaintiff remains the one to discharge burden of proof of the rest of the issues, and so he fails.

*E2. Implication of admission of employment made in mitigation*

1. In terms of the submission made in mitigation, I am minded to accept that the subject matter of the conviction encompasses employment, and the admission made by the defendant was also his unqualified admission to the existence of employment relationship. That said, it is trite that parties’ own view of the relationship is one of the indicia to consider, and is not conclusive. Legal relationship is a matter for the court to find after evaluation of the indicia of employment in the context of all features of the relationship. Parties’ own classification has no significant evidential value (*Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951 at para 59). Hence, in my view, the prior admission of the defendant, goes only to credibility of the defendant.

*F. Other matters considered*

1. I have considered all relevant matters including the following, and I have given them appropriate weight and treatment:-
2. But for the false documents, there seems to be an inherent plausibility of employment. The parties were in their fifties; they are both workmen having contacts on work basis. For them to both attend and appear at the Location which required air conditioning work seems to be only for work related reason. In my view, it is also inherently plausible that two are usually needed for air conditioning work. The taking out of a machine from a structure ought to be one demanding some heavy weight lifting. There is an inherent plausibility that the plaintiff was brought in as labourer, or otherwise assisting in less skilled role. So the key issue is the basis of the plaintiff’s involvement. I consider that it is inherently plausible that the basis is employment under oral contract for the specific assignment of that day on a casual and as required basis. However, given my findings particularly those on the two documents, I have duly considered this plausibility but am unable to find the plausibility of employment as a truth.
3. I notice that there are medical notes[[6]](#footnote-6) which recorded that the plaintiff reported to the hospital that he was fixing air conditioner when injured. These reports of the plaintiff ought to have been made in the few months after the incident. Nevertheless, there is no ruling out that the plaintiff’s report was self serving. Hence, I have not attached weight to these medical notes, particularly in light of the plaintiff’s willingness to produce even false documents on liability. Anyway, the plaintiff has not relied on these reports on the employment issue.
4. In the evidence, both parties said they did not consider wearing electricity proof gloves a must or necessary. The defendant as the owner of an air conditioning contractor business did not see gloves as necessary. In other words, it was true that he could not have provided any employee with gloves. In the same vein, the plaintiff also said provision of gloves made no difference as he did not wear at all. In other words, it is true that he took upon himself risk. Had employment relationship existed, this evidence is relevant to the issues of breach and contributory negligence. Nevertheless, there was no evidence emerging at trial or any documentary evidence as to the effectiveness of electricity proof gloves, and the practicality of wearing gloves at work.
5. In respect of the only other complaint and alleged breach, ie that the defendant confirmed to the plaintiff that the defendant had switched off electricity already, I accept the argument of Mr Ng at closing that this must be inherent implausible as that would mean that the defendant intentionally want to cause injury to the plaintiff. Intentional causing of injury was not the plaintiff’s case.

In light of my observations in (3) and (4) above, therefore even if there is an employment relationship, I still cannot make a finding in favour of the plaintiff on the two alleged breaches. The action has to be dismissed in any event.

1. The plaintiff’s witness statement contains a table setting out what he suggested as the particulars of his work for the defendant from March to September 2014. He adduced also his own desktop calendar with his handwritten markings signifying events taken place on a given date. There was a lot of cross examining by Mr Ng on the calendar as the calendar was adduced as evidence to support that he worked for the defendant as shown in the table. I have not placed weight on the calendar as evidence to establish the employment relationship and history of the plaintiff’s work. The reason is that the calendar and the table both owe their provenance from the plaintiff. In my view, that the calendar is consistent with the table did not add more credibility to the work history claimed, and that they are inconsistent is not inexcusable as the calendar is one of a workman. One cannot expect perfection from a household desktop calendar of anyone, not to mention that the plaintiff was only a workman, and one cannot criticize a calendar for not being exhaustive and precise enough. I see little probative value in the calendar, and in the evidence coming out of the cross examining on it.
2. For completeness sake, I also mention that there is a plead to *res ipsa loquitur* in the Statement of Claim (paragraph 7). Yet, the relevance of this principle to the decision seems questionable because there was no difficulty of the plaintiff to pin down how the claimed circumstances happened and caused the injury; there is no unexplained feature on the asserted accident causation that requires the application of this principle.

*G. Observations on quantum*

1. I also set out my observation on quantum, for sake of completeness. At closing, the parties’ positions are as follows:-

|  |  |  |  |
| --- | --- | --- | --- |
| Item | plaintiff’s primary case  HK$ | plaintiff’s alternative case  HK$ | defendant’s case  HK$ |
| PSLA | 170,000 | 170,000 | 80,000 |
| Pre-trial loss of earnings | 381,920 | 295,680 | 129,860 |
| Future loss of earnings | 368,838 | 285,552 | Nil |
| Special damages | 7,567 | 7,567 | 7,567 |
| Total | 928,325 | 758,799 | 217,427 |

1. The plaintiff was 54 years old at the time of the incident. He sustained electrical shock injury, and there were blisters to his left middle and ring fingers. He lost consciousness immediately. He did not seek treatment until the next day. He attended A&E, and was then admitted to in-patient care for hospitalization for 7 days. He suffered elevated muscle enzyme. He was referred to the Orthopaedic Out-patient clinic of Tseung Kwun O Hospital. He has neurosis over the pulp of his left middle finger and ring finger. There was no fracture, no infection, nor injury to the nerves. He however suffered muscle injury. The burnt left middle and ring fingers were treated conservatively with dressing and the wound eventually dried up. He was later referred to out-patient physiotherapy and occupational therapy. He had out-patient physiotherapy from 2 December 2014 until 30 December 2014. By the time of discharge, there was residual stiffness of both fingers with weakened hand grip. He had 4 sessions of occupational therapy from 4 December 2014 until 19 December 2014. He was granted sick leave of 15 months and 3 days until 16 December 2015.
2. The burn injury was with the pulp of the left middle and ring fingers. It was generalized muscle damage only without damage to bone and nerves. He complained at the time of Dr Danny Tsoi’s examination, the single medical expert, on 3 November 2017 that there was muscle pain and bone pain to the whole body and also painful and hypersensitive pulp over the two burnt fingers.
3. I am prepared to accept the above injuries and conditions, as reported by the single joint expert in his report dated 14 November 2017.
4. On PSLA, I am grateful for Ms Lin’s comprehensive survey of left hand finger injury decisions[[7]](#footnote-7). There are cases with fractures, injury to the nerves and reduction to movement awarding HK$120,000 to HK$180,000. This case is less serious than those cases. As Mr Ng rightly submitted, the plaintiff sought medical treatment only one day after the injury. In this case, there is no reduction of movement, no fracture and injury to the nerve. Taking into account of the fact that he was indeed hospitalized for 7 days, and that there was subconsciousness, as well as inflation, HK$120,000 is appropriate.
5. On loss of earnings, Ms Lin argued at closing that as there was no cross examination by Mr Ng on quantum, the defendant should be precluded from challenging the plaintiff’s loss of pre-trial earnings, future loss of earnings, and the claimed daily wage of HK$800. Ms Lin relied on *Brown v Dunn* (1894) 6 R 67 (HL). However, heads of losses are not evidence. Heads of claims are not inherently a matter for cross examining. Cross examination should concern evidence, and the way it was conducted should not affect entitlement of a party in pursuing a claim or contesting one. Ms Lin’s argument relying on *Brown v Dunn* is a red-herring.
6. Ms Lin also argued that *Brown v Dunn* also prevents a challenge of the claimed daily wage of HK$800 as a mechanic. On the claimed daily wage of HK$800, Mr Ng has already cross examined the plaintiff on his qualification and competence as an air conditioner mechanic. I have no doubt that the defendant is entitled to challenge the daily wage. There was already evidence to challenge his claim that he was a mechanic, and hence also challenging his claim for HK$800 daily wage.
7. As to whether he could return to work at all, there is no plead in the Revised Statement of Damages that he was prevented to work at all. In paragraph 18 of the plaintiff’s witness statement, he himself said he could return to casual worker position to earn HK$500 a day. There is no doubt to me that before the accident, he could not have been an air conditioner mechanic. He was a labourer for 2000 to 2010. There is no evidence how he had scaled up himself to become a mechanic in the few years after, at his fifties. After the accident, he is able to return to this kind of job, as a labourer/casual worker. There is therefore no loss of income after sick leave. There is also no plead asking for time to look for job.
8. On pre-trial loss of earning, I accept only the loss occurred during sick leave (15 months and 3 days). I do not think that there is any basis to doubt the full sick leave period. As I have concluded above, the plaintiff did not know air conditioning work. Between 2000 and 2010, for ten years, he worked as a labourer only. He was then 40 to 50 years old. Thereafter, he did not have stable work for 3 years, and there was no evidence that he has improved his skills at this period. There was no evidence that in early fifties, he scaled himself up to become a mechanic, to earn HK$800 a day. It is well accepted that as labourer, the day rate is HK$500. As to the days in a month the plaintiff works, because the parties’ difference is just 1 day, I am prepared to accept the plaintiff’s more favourable position of 12 days[[8]](#footnote-8) a month. Hence, for the loss during the sick leave, I am minded to accept HK$500 x 12 days x 15 months (3 days rounded down) = HK$90,000.
9. I cannot find any basis at all why the plaintiff cannot return to being a labourer/casual work earning HK$500 a day. Ms Lin did not assert any reason. The plaintiff’s evidence said he could return to be a casual worker, and the opinion of Dr Tsoi also confirmed that he could do casual worker, and messenger jobs. Ms Lin advanced no argument in substance actually to support the legitimacy of the plaintiff’s not going back to work at all since end of sick leave. She relied only on *Brown v Dunn* to preclude the defendant’s challenge. As discussed above, Brown cannot assist her. Dr Tsoi also opined that the plaintiff can return to work but with a reduced capacity as in not being able to heavy lift for long time. The “reduced capacity” view was already specifically qualified and there is no scope to argue that the “reduction” will mean not being able to return to work. Anyway, Mr Ng helpfully drew my attention to *Chan Sze Yuen v Tin Wo Engineering Co. Ltd & Ors*, HCPI 407 of 2008, dated 2 May 2016 wherein Master Leong observed that people did not go to work when 100% fit and efficient, and reduction of capacity should not be translated into loss of income (paragraphs 16-19). I think that this observation is relevant here.
10. The special damages are agreed at HK$7,567.
11. Credit should be given to EC payment of HK$150,000 made on without prejudice basis.
12. For interest, there ought to be interest on pre-trial loss of earnings and special damages at half of judgment rate from date of the accident (ie 12 September 2014) to the date of judgment, and at judgment rate from date of judgment to payment; and interest on general damages (including PSLA) from the date of service of the writ to the date of the EC payment at 2% per annum.
13. A summary of my observation on the award is as follows:-

PSLA HK$120,000

Pre-trial loss of earnings HK$90,000

Future loss of earning Nil

Special damages HK$7,567

Sub-total HK$217,567

Less EC payment (HK$150,000)

Total: HK$67,567

*Conclusion*

1. This claim has to be dismissed. Whilst costs should normally follow event, I consider that the costs order should mark my disapproval of the serious nature of falsehood that the two parties had generated. There be a costs order nisi that there be no order as to costs of this action (including costs which was reserved). The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
2. I am concerned with the apparent use of false instruments in this action, which evidence joint efforts in the creation of the instruments. Parties should be warned that use of false instruments in any circumstances can lead to serious consequences and should not be pursued by parties at all.
3. It remains for me to thank Ms Lin and Mr Ng for their assistance to the court.

( Kate Li )

Deputy District Judge

Ms Chantel Lin, instructed by Cheung, Chan & Chung, assigned by the Director of Legal Aid, for the plaintiff

Mr Eddie Ng, instructed by Hon & Co, for the defendant

1. Ms Lin, for the plaintiff, confirmed the plaintiff’s case as such at opening. The Statement of Claim pleaded no other basis from which duty arose. There was no plead as to duty of care on other kind of relationship whether as co-workers undertaking the same work or otherwise by reason of standalone positive acts which the defendant has allegedly done that caused the incident. [↑](#footnote-ref-1)
2. ECC proceedings were commenced and on a non-admission of liability basis, the matter was settled out of court with the defendant’s payment to the plaintiff. [↑](#footnote-ref-2)
3. as stated in his witness statement [↑](#footnote-ref-3)
4. *Phipson on Evidence*, 19th ed, para 6-07. [↑](#footnote-ref-4)
5. It is noteworthy that Ms Lin for the plaintiff has not argued on shifting of burden of proof as such. She clearly took up employment as an issue for the plaintiff to prove. Hence, my alternative analysis is set out for fuller exposition of potential issues only. [↑](#footnote-ref-5)
6. Medical notes of the Department of O&T in Tseung Kwan O Hospital dated 23 December 2014, 12 June 2015, and of A&E of Tseung Kwan O Hospital dated 22 March 2016. [↑](#footnote-ref-6)
7. *Yeung Tze Man v Everbest Port Services Limited (in liq)* [2018] HKDC 1054, *Wong Yan San v Cheung Yue Yiu t/a Radio Engineering Co,* DCPI 1909 of 2007, dated 21 July 2008, *Chan Ming Yat v Youth Eng Lai Michael t/a Prime Industrial Company (Hong Kong),* DCPI 201 of 2003, dated 5 June 2004*, Yiu Pau Yau v Co-Ray Design & Construction Limited*, DCPI 864 of 2006, dated 3 May 2007, *Mohammed Sayeed v Leighton Road Hotel Management Services Limited*, DCPI 2072 of 2012 dated 21 October 2014, *Khan Zubair v Hung Kee Cleaning Environment Recycle Limited,* DCPI 1514 of 2008, dated 1 April 2009, and *Shah Junaid Ali v Yau Lee Galvanizers (Hot-Dip) Company Limited,* DCPI 517 of 2008 dated 14 April 2009. [↑](#footnote-ref-7)
8. Based on the plaintiff’s own account of his working history with the defendant adopted for the sake of quantum discussion. [↑](#footnote-ref-8)