## DCPI 2391/2017

[2021] HKDC 1189

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURY ACTION NO 2391 OF 2017

BETWEEN

BILAL MUHAMMAD Plaintiff

and

LAW KIM WAH 1st Defendant

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD 2nd Defendant

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Before: Deputy District Judge Jonathan Wong in Court

Date of Hearing: 31 August & 1 September 2021

Date of Judgment: 29 September 2021

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JUDGMENT

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*INTRODUCTION*

1. On 2 December 2014, the plaintiff (“P”) sustained injuries in an accident at work (“Accident”). P commenced these proceedings to claim damages against the 1st defendant (“D1”).
2. Previously, P had commenced DCEC 802 of 2016 against D1 to recover compensation pursuant to the Employees’ Compensation Ordinance Cap 282 (“DCEC Proceedings”). In those proceedings, D1 contested liability on the basis that P was not his employee. Deputy District Judge S.H. Lee found for P, and assessed compensation in the sum of HK$116,021. D1 was ordered to pay the assessed compensation and interest thereon with costs to P.[[1]](#footnote-1)
3. Apart from filing a homemade defence dated 1 March 2018, D1 has not participated in these proceedings. By an order dated 4 October 2019, D2 (“ECAB”) was granted leave to be joined as an additional defendant, but only for the purpose of contesting the assessment of damages.
4. The original trial of these proceedings took place before Deputy District Judge Charles Wong on 16 June 2021. On P’s application, the trial was adjourned for P to amend his Statement of Claim and to file a supplemental witness statement to provide a clearer picture as to how the Accident happened. The amended pleading and supplemental statement were filed in compliance with the court’s order.
5. The adjourned trial came before me. As on the occasion before Deputy District Judge Charles Wong, D1 did not attend and Ms Patrice Lo and Ms Phillis Loh appeared for P and D2 respectively. I was satisfied, on the evidence, that proper service of the relevant documents, including Deputy District Judge Charles Wong’s order,[[2]](#footnote-2) was effected on D1. I therefore decided to proceed in the absence of D1.
6. P and D2 were able to reach a settlement on the first day of the trial. What remain in issue are (1) whether P is able to establish liability against D1, and if so, what is the *quantum* of his entitlement and (2) what is the proper costs order to be made as between D1 and D2. Although P and D2 had reached a settlement, ECAB in closing offered its observations on the *quantum* of P’s claims.
7. P called one factual witness, namely P himself. By reason of the settlement reached, P was not cross-examined by Ms Loh.

*THE AMENDED STATEMENT OF CLAIM AND P’s SUPPLEMENTAL WITNESS STATEMENT (“P’s SWS”)*

1. The details of the Accident were only set out for the first time in the Amended Statement of Claim and P’s SWS. The details are not entirely consistent with the evidence contained in P’s first statement.
2. At P’s first statement §13, P suggested that the Accident might have been caused by an equipment malfunctioning. P’s SWS put forward a different account, as set out in the section immediately below.
3. In P’s SWS, an explanation was offered as to why the details of the Accident were only set out therein. It is P’s evidence that at the time of the preparation of P’s first statement, he was told by a clerk of his former solicitors that there was no need to provide any information in detail. However, P said that he had given the same instructions as those canvassed in P’s SWS to his former solicitors.
4. P was born in Pakistan on 7 May 1995 and completed Form 3 secondary education in Hong Kong. He did not come across to be a very sophisticated person. He explained that throughout the instruction-taking process, no Urdu interpreter was arranged by the former solicitors although one was arranged to read P’s first statement to him before he was asked to sign it. P’s first statement contains a declaration of translation.
5. There is a ring of truth in P’s explanation. P’s first statement was filed on 10 July 2018 by his former solicitors. The trial of the DCEC Proceedings took place on 15 and 16 January 2019. At §29 of the written judgement of the DCEC Proceedings, there is, in essence, a verbatim recitation of P’s first statement §13. It appears that, at the time of the preparation of P’s first statement, a decision was made by P’s former solicitors to essentially adopt in these proceedings the relevant parts of the evidence filed for the purpose of the DCEC Proceedings.[[3]](#footnote-3) The details of how the Accident happened are of course less crucial in the DCEC Proceedings, as the main issue there was whether P suffered injuries by an accident arising out of and in the course of employment by D1. In the DCEC Proceedings, the court was not required to consider issues such as negligence and breach of duty.
6. The Amended Statement of Claim and P’s SWS were served on D1. D1 has not come forward to challenge P’s evidence.
7. In the absence of any evidence to the contrary, I accept P’s explanation.

*THE ACCIDENT*

1. At the material time, D1 was in the business of collecting used oil from restaurants for redistribution to factories for industrial use. D1 was the registered owner of a light goods vehicle bearing registration mark JP5916 (“LGV”).
2. The LGV had a separate driving cabin (with a seating capacity of 2 persons excluding the driver) and an enclosed box behind it for storage of goods (“Storage Compartment Box”).[[4]](#footnote-4) At the rear of the Storage Compartment Box was a tailboard, which could be raised up and down for the purpose of loading and unloading goods (“Tailboard”). There was no door at the rear of the LGV.
3. The Tailboard could be operated by two separate lever controls. One level control was fixed outside the LGV below the tail lights on the left (“External Lever Control”). The other lever control was located inside the Storage Compartment Box (“Internal Lever Control”). The Internal Lever Control was not fixed in one location but was connected to an electric cable of around 75cm in length.
4. The Lever Controls had three round buttons each. The Tailboard could be raised or lowered by pressing respectively the top or bottom round button. Other combinations of the three buttons served to open or close the Tailboard. The Lever Controls were not protected by any cover.
5. The used oil was contained in rectangular tin cans. D1 would drive the LGV to various locations and P would then collect the tin cans from the restaurants and emptied the contents into one of the five round tin barrels in the Storage Compartment Box. Each of the five round tin barrels measured around five feet in height and one metre in diameter. According to P, the Storage Compartment Box was extremely congested and disorganized. In addition to the five tin barrels, there were also many empty rectangular tin cans, various metal tools and hand trollies. These items were scattered around and loosely stacked on top of each other.
6. On the day of the Accident, by 11:30 am, D1 and P had already visited a number of restaurants. After another round of collection from a restaurant, P returned to the LGV which was then parked near Yan Ping Industrial and Commercial Association Lee Lam Ming College, 1 Ming Kum Road, Shan King Estate, Tuen Mun, New Territories. D1 was waiting in the LGV for fear of getting a parking ticket. P and D1 together emptied the used oil in the rectangular tin cans into the large tin barrels.
7. Afterwards, D1 instructed P to close the Tailboard. They returned to the driving cabin before the Tailboard had closed completely.
8. However, D1 noticed from the CCTV device installed near the driver’s seat that the Tailboard could not close properly because a hand trolley was wedged between the Tailboard and the rear of the LGV.
9. Inside the driving cabin, D1 instructed P to “push up” the hand trolley to enable the Tailboard to close properly. P and D1 then proceeded to the rear of the LGV.
10. P then lowered the Tailboard slightly by using the External Lever Control. The Tailboard lowered to a “V-angle” with enough space for P to insert his left hand between the Tailboard and the rear of the LGV. P then pushed the hand trolley deeper into the Storage Compartment Box so that the hand trolley would not obstruct the closing of the Tailboard.
11. Unfortunately, whilst P’s left hand was still in the “V-angle”, the Tailboard started to rise (or close). P’s left hand was caught by the rising Tailboard and he was injured as a result.
12. It is P’s evidence that whilst he was pushing the hand trolley into the Storage Compartment Box with his left hand, some items got displaced and something must have hit one of the buttons of the Internal Lever Control such that the Tailboard started to close. Although P did not see what hit the buttons of the Internal Lever Control, he was sure that he did not touch the External Lever Control.[[5]](#footnote-5)
13. In the absence of contradictory evidence, I accept P’s evidence as to how the Accident happened.

*LIABILITY*

1. Although a number of allegations are advanced in the Amended Statement of Claim, Ms Lo has summarized P’s case at P’s Closing Submissions §21. Ms Lo submits that D1 had failed to provide a safe system and/or safe place of work.
2. P started to work for D1 in around June 2014, which was around 6 months before the Accident. As I understand P’s evidence, the Storage Compartment Box had always been congested and disorganized. D1 had never instructed P to tidy up the Storage Compartment Box, and even when P himself suggested it, D1 told P that he should not waste any time to do so. Specifically, on the day of the Accident, P was again told by D1 that he should not waste any time to clean up the Storage Compartment Box. I accept P’s evidence.
3. Ms Lo submits the D1 ought to have put in place the following preventive measures. First, D1 ought to have ensured that the Storage Compartment Box was better organized such that loose items would not accidentally come into contact with and trigger the Internal Lever Control. Secondly, it was reasonably practicable to install a cover for the Lever Controls such that it would not be triggered unintentionally. Thirdly, the Internal Level Control ought to be fixed at a safe position inside the Storage Compartment Box. I agree with Ms Lo that these are reasonable and practicable precautionary measures.
4. Further, it seems to me that the manner in which P was instructed or condoned to “push up” the hand trolley through a partially lowered Tailboard was unsafe. It was obvious that the safer way to proceed would have been to take the time to lower the Tailboard properly and for P (and D1) to tidy up the Storage Compartment Box, before seeking to close the Tailgate again.
5. I find that P has proved negligence and breach of duty of care as employer on the part of D1. D1’s pleaded defence is one of denial that the Accident happened. There are no issues such as contributory negligence which ought to be taken into consideration.

*QUANTUM*

1. In closing, Ms Lo only pursues 3 heads of damages, namely (1) pain, suffering and loss of amenities, (2) pre-trial loss of earnings and (3) special damages occasioned by medical expenses, travelling and tonic food.

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

1. Immediately after the Accident on 2 December 2014, P attended the Accident & Emergency Department of Tuen Mun Hospital. P’s chief complaint was left hand pain and swelling. Medical examination revealed tender swelling over his left hand dorsum with superficial abrasions. X-ray of P’s left hand showed fracture of 2nd to 4th metacarpal shaft with displacement. He was admitted to the orthopedic ward on the same day.
2. P was transferred to Pok Oi Hospital (“POH”). He had an operation on 5 December and was discharged on 6 December 2014.
3. After the operation, P was referred to physiotherapy and occupational therapy for rehabilitation. He attended physiotherapy treatment at POH for a total of 15 sessions from 22 December 2014 to 8 May 2015. Upon the last treatment on 8 May 2015, there was 80% improvement for his left-hand condition.
4. On 20 January 2020, P was jointly examined by Dr Wong Chin Hong (instructed by P’s solicitors) and Dr Danny Tsoi Chi Wah (instructed by ECAB’s solicitors) (“Joint Assessment”).
5. During the Joint Assessment, P complained of intermittent pain over the dorsum of his left hand and his fingers. P also complained about increased pain when grasping and gripping objects and on making a fist. He also suffered from left hand stiffness and tightness with reduced pronation and supination limited by pain radiating up to forearm.
6. Physical examination conducted by the experts revealed no discoloration, deformity or muscle wasting. There was a 4 cm longitudinal surgical scar on dorsum of 2nd interosseus space and a 5 cm longitudinal scar on dorsum of 4th interosseus space. The scars were found to be well healed with no hypertrophy.
7. In relation to range of movement of left fingers, P was able to perform an active grip, make near full fist and fully extend all of his fingers. He was however unable to fully adduct his middle finger and ring finger. The sensation over left hand was normal, being no different from the right hand.
8. Further, X-rays taken at the time of Joint Assessment showed that the plates and screws were in their original position and the fractures had united in normal alignment.
9. In relation to P’s diagnosis, the two experts agreed that P’s injury was appropriately treated by surgical means and that P had reached the state of maximal medical improvement as at the date of Joint Assessment. There was no need for further medical or surgical intervention and no assessment by other specialist is necessary and the 217 days of sick leave given to P[[6]](#footnote-6) were justifiable and reasonable.
10. Ms Lo submits that an award of HK$400,000 should be made for P’s PSLA. Ms Loh on the other hand says that an appropriate award should be no more than HK$300,000. Both parties have in their written material referred to a number of comparable cases and I have considered them. Ms Lo in particular relies on *Wong Shek Mui v Mammoth Holdings Ltd*, HCAP 1291 of 2003, 16 February 2007 in which an award of HK$500,000 was made in a case where the plaintiff, as here, suffered a crushed hand injury.
11. It seems to me that the injuries suffered by Madam Wong were more serious than the plaintiff’s. First, Madam Wong’s injuries, unlike the plaintiff, were to her dominant hand. She was hospitalized for a far lengthier duration than the plaintiff (18 days compared to 5 days in the present case). Importantly, Madam Wong suffered from adjustment disorder with depressed mood which P fortunately did not.
12. Ms Loh placed emphasis on the fact that at P’s last physiotherapy session on 8 May 2015, his Numeric Pain Rating Scale was assessed at 0 and satisfactory progress was noted.
13. Given that P’s injuries were much less serious than those of Madam Wong, I am of the view that an award of HK$300,000 for PSLA is appropriate. P’s injuries fell below the “serious injury” category.

*Pre-trial loss of earnings and MPF*

1. Ms Lo seeks an assessment in the sum of HK$157,500. Ms Lo says that P’s pre-accident earnings were already established in the DCEC Proceedings at HK$15,000 per month and this is a finding which ought not be reopened. As there is no evidence to the contrary, I accept P’s pre-accident earnings to be HK$15,000 per month.
2. Ms Lo says that P is entitled to pre-trial loss of earning in respect of 10 months, 7 for which sick leave was granted and 3 as a reasonable period of job seeking. I have no difficulty with the former but the difficulty with the latter is that no evidence has been adduced by P that he had tried to look for a job but failed. P’s case in his Revised Statement of Damages is that although P was unable to secure any jobs after his sick leave until 30 October 2018 (a period of about 40 months), his claim was quantified on the basis that he could notionally secure a job as a security guard after his sick leave.
3. Ms Lo invites me to following the approach in *Wong Yun San v Cheung Yue Yiu t/a Radio Engineering Co*, DCPI 1909 of 2007, Deputy District Judge Richard Khaw, 21 July 2008 in which the learned Judge allowed a period of 3 months following the expiry of the sick leave period as a reasonable time for the plaintiff in that case to find a suitable job.
4. In my view, where, by his last physiotherapy session on 8 May 2015, P had already made very substantial recovery, it seems to me that an allowance of 3 additional months from July 2015 for P to look for a suitable job is excessive. In the present case, according to P’s first statement, P was able to find a job within 2 days of an introduction by a friend.
5. In the circumstances, I am of the view that an allowance of only 1 month is appropriate. Together with his sick leave period of 7 months, I will assess P’s pre-trial loss of earnings (and MPF) at 8 months, ie HK$15,000 per month x 8 months x 1.05 = HK$126,000.

*Special damages*

1. I am satisfied that P is entitled to HK$3,670 (comprising of medical expenses (HK$1,670), travelling (HK$1,000) and tonic food (HK$1,000)).
2. In summary, P’s claims are assessed at:-

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| --- | --- |
| PSLA | HK$300,000 |
| Pre-trial loss of earnings and MPF | HK126,000 |
| Special Damages | HK$3,670 |
| Less ECC Compensation | (HK$116,021) |
| Total | HK$313,649 |

1. I also order that (1) interest at 2% is awarded for PSLA from the date of the writ to the date of judgment and thereafter at judgment rate and (2) interest at half judgment rate is awarded on special damages from the date of the Accident to the date of judgment and thereafter at judgment rate.

*COSTS*

1. As between ECAB and D1, Ms Loh submits that D1 should pay the ECAB’s costs of the Action. She relies on, *inter alia*, *Cheng Ka Piu v 黃明光 & Anor*, DCEC 516 of 2016. The employer in that case, like D1 in the present case, did not participate in those proceedings.
2. At §§113, Deputy District Judge Philips Wong said:-

“*113. Ribeiro PJ further stated (at §§46-47) that the general starting point should be no order as to costs between the applicant and the board, irrespective of whether the board sought to test the case as to liability, quantum or both. A different costs order might be warranted on particular facts. For example when the board’s conduct is unreasonable or misconceived or unjustifiably antagonistic, unnecessarily prolonging the intervention, or otherwise untoward, the court may order the board to pay the applicant’s costs.*

*114. In the present case, I find the Board’s intervention to be necessary. This is particularly so given that Wong has been absent all along. The Board has a duty to ensure that the plaintiff would not exaggerate his claims and that the public funds would not be used for improper purposes. I am also of the view that the Board has assisted the court in testing the plaintiff’s case on both liability and quantum. I find that there is nothing in this case which warrants the departure from the general position.*

*115. Accordingly, I make an order that there be no order as to costs as between the plaintiff and the Board.*

*116. Mr Yip has sought costs against Wong. As one of the reasons for the Board’s intervention was Wong’s refusal to take part in the present proceedings, I am of the view that it is fair that Wong should also be responsible to pay the costs of the Board in these actions, with certificate for counsel, to be taxed if not agreed*.” (emphasis added)

1. Given the similar factual position, I am unable to see why my discretion should be exercised differently from *Cheng Ka Piu*.
2. As between P and D1, costs should follow the event.
3. I understand that P and ECAB have agreed that no order is required as between them.
4. I therefore make an order *nisi* that P and ECAB are to be paid their costs of the action by D1 (including any reserved costs) to be taxed if not agreed, with a certificate for counsel. P’s own costs, in respect of the period when he was on Legal Aid, shall be taxed in accordance with the Legal Aid Regulations.
5. I thank both counsel for their helpful assistance.

( Jonathan Wong )

Deputy District Judge

Miss Lo Shuk Ching Patrice, instructed by C M Chow & Company, for the plaintiff

The 1st defendant acting in person, being absent

Ms Phillis Loh, instructed by P C Woo & Co, for the 2nd defendant

1. [2019] HKDC 178 [↑](#footnote-ref-1)
2. Which expressly makes provision for the date of the adjourned trial [↑](#footnote-ref-2)
3. P’s statement(s) in the DCEC Proceedings are not in the hearing bundle. [↑](#footnote-ref-3)
4. As stated in the Certificate of Particulars of Vehicle Supplied under Regulation 4(2). The LGV’s type of body is described there in as Pantechnicon (TL). [↑](#footnote-ref-4)
5. The evidence that he did not touch the External Lever Control is inconsistent with the evidence given at P’s first statement §13 where he stated that he was using his right hand to operate a Lever Control to make the Tailboard to descend but it moved upwards and closed. However, as set out at §2.7 above, I accept P’s explanation that P’s first statement did not accurately set out the details of the Accident. [↑](#footnote-ref-5)
6. From 2 December 2014 to 6 July 2015 [↑](#footnote-ref-6)