

HONG KONG / JUDGMENT

CB v. APTHORP, BRIAN DREW

[2025] HKDC 208

COURT

District Court

DECIDED

14 February 2025

CASE / FILE NUMBER

DCPI357/2021

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DCPI 357/2021

[2025] HKDC 208

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 357 OF 2021

BETWEEN

CB

Plaintiff

and

APTHORP, BRIAN DREW

Defendant

Coram: Deputy District Judge David Chan in Chambers (Paper Disposal)

Date of the Plaintiff's written submissions: 23 October 2024

Date of the Defendant's written submissions: 14 November 2024

Date of the Plaintiff's written submissions in reply: 21 November 2024

Date of Decision: 14 February 2025

DECISION

INTRODUCTION

This is the plaintiff’s application for leave to appeal against my Judgment, specifically my judgment on the issue of liability, handed down on 23 July 2024.

In the Judgment, I have dismissed the plaintiff’s claim as I have ruled against her on the issue of liability. Dissatisfied with the findings I have made, the plaintiff filed a summons on 20 August 2024 seeking leave to appeal against the Judgment. The summons was subsequently amended and re-filed on 10 October 2024 (the “Amended Summons”). In gist, the plaintiff seeks to set aside and reverse the Judgment on liability, and to enter judgment for her for the damages as assessed in the quantum part of the Judgment.

In this Decision, in order to achieve consistency and clarity, the same abbreviations and definitions used in the Judgment will be adopted.

For this application, the plaintiff and the defendant are represented by the same teams of counsel who respectively represented them at the trial of this action.

LEGAL PRINCIPLES FOR LEAVE TO APPEAL

Mr Shum for the plaintiff and Mr Choy SC have no quarrel on the legal principles applicable to the present application.

Under section 63A(2) of the District Court Ordinance, Cap. 336, leave to appeal shall not be granted unless the judge, master or the Court of Appeal hearing the application is satisfied that: (1) the appeal has a reasonable prospect of success; or (2) there is some other reason in the interests of justice why the appeal should be heard.

Reasonable prospect of success means an appeal with prospects more than ‘fanciful’, but do not need to be shown to be ‘probable’. ‘Merely arguable’ and ‘not fanciful’ are said to be insufficient for the Court to be satisfied that the appeal has a reasonable prospect of success.

GROUND OF APPEAL

As per the Amended Draft Grounds of Appeal attached to the Amended Summons, the plaintiff relies on 3 broad grounds in support of this application.

Ground 1

It is said that I have erred in failing to identify issues and apply the correct burden of proof. These must be discerned from the parties' pleadings including admissions. Pausing here, I am highlighting the word 'admissions' here as it seems to me this is the main theme and foundation of the plaintiff's present application, as will be illustrated below.

Under this ground, the plaintiff says that, although she bears the legal burden of proof of her claims in relation to the Sexual Abuses, 3 out of the 4 Sexual Abuses incidents were formally admitted by the defendant in his Defence, subject only to the positive defences pleaded by him in relation to each of the Sexual Abuses incidents. And I have erred in ignoring the said admissions of the defendant in his pleading and that the Sexual Abuses admittedly happened.

In the premises, the evidential burden regarding the Sexual Abuses falls on the defendant to satisfy the Court on balance of probabilities that these positive defences are proved and accepted by the Court. Hence, I have failed to consider and make any finding as to whether the defendant's positive defences pleaded were proved.

Ground 2

Under this head, the plaintiff says that I have erred in failing to state the exact matters she has failed to prove. In addition, I have failed to make the following crucial findings.

First, I erred in failing to find that the Sexual Abuses pleaded by the plaintiff were admitted or proved.

Second, I have failed to make clear in the Judgment which aspects of the plaintiff's case relating to the Sexual Assaults were not proved on balance of probabilities.

Third, if the matters I found the plaintiff having failed to prove relate to the positive defences of the defendant, since the burden is on the defendant to prove, the doubt and reservation on credibility of the plaintiff is insufficient, and it is premature for me to dismiss the plaintiff's claim without considering whether the defendant has discharged his burden of proof having due regard to his evidence.

Ground 3

Finally, I am said to have erred in failing to dismiss the defendant's positive defences. In this regard, the plaintiff asserts that, given the adverse findings I have made in the Judgment against the defendant on his case and credibility, the overwhelming evidence that his testimony is generally discredited, and the inherent improbability of his positive defences, the positive defences should be rejected. In the circumstances, I should have dismissed the defendant's positive defences.

By reasons of the above errors, the plaintiff suggests that I am entitled to, and should, re-assess the defendant's positive defences and conclude that his positive defences should be dismissed.

DISCUSSIONS

Overview

As one could see in the above grounds of appeal, and from Mr Shum's submissions, the plaintiff's application relies heavily, if not entirely, on the defendant's alleged admissions of the incidents. Thus, the evidential burden shifted to him to prove his positive defences, and that because of my criticisms of his evidence in the Judgment, the defendant has failed to discharge such burden.

In support of this, Mr Shum in his written submissions first relied on a case to show that I was wrong in my approach when dealing with the issue of liability. He cited the case of *Martnok Thanradee v Commissioner of Police & Anor*, in particular, parts of what DHCJ M. Ng (as Her Ladyship then was) said in §§34-35 of her judgment. I prefer to set out those paragraphs (and §36) in full for the proper understanding of the same:-

“34.

Mr Leung relied on Halsbury's Laws of England which suggests “[the] burden of proof, in the sense of the burden of adducing evidence is not stationary; when the plaintiff has given such evidence as, if not answered, will entitle him to a verdict, the burden of proof is shifted to the defendant”.^[55] This is nothing more than saying the claimant (on whom the legal burden lies) has an evidential burden to adduce sufficient evidence to raise an issue as to the existence or otherwise of a fact in question whereupon the spotlight switches to the defendant to discharge his evidential burden of raising a *prima facie* innocent explanation, and if that is satisfied the claimant has to establish on proper standard of proof the defendant's *prima facie* innocent explanation is to be rejected.

35.

If the defendant chooses to adduce some countervailing evidence such that the 2 sides' versions are contradictory and mutually exclusive, the burden of proof is practically an assessment of the parties' relative credibility and cogency of evidence/inferences. As said in *Clerk & Lindsell on Torts*, “[the] issue of whether the defendant had reasonable and probable cause to institute a prosecution will normally depend on resolving a conflict of evidence between the claimant and defendant”.^[56] Mr Leung cited *Amstrad Consumer Electronics Plc v The British Phonographic Industry Limited* where Whitford J said as follows:^[57]

“The probative burden was on [the plaintiffs] to satisfy the court that they were entitled to the relief for which they were asking. Evidence was called by both parties. The trial judge had to assess the evidence and draw such inferences from it as he thought right, remembering that, during the course of a trial, the evidential burden, as distinct from the probative burden, might shift.”

36.

But where the defendant chooses to leave the claimant's prima facie case unanswered by not adducing any evidence at all, the court can (if there is reasonable basis) draw inferences from a party's failure to rebut it.[58] But these observations are predicated upon evidence tending to establish the claimant's claim having been advanced in the first place, and the absence of any countervailing evidence adduced by the defence. Further, the authorities do not say a court must, as opposed to may, convert such evidence into proof of the claimant's case in the absence of evidence adduced by the defendant on a particular issue.[59] But here, Ds called the identified police officers impugned by P to give evidence, and their evidence contradicted P's case." (emphasis added by me)

Mr Shum follows this with the criticism that I have, in §264 of the Judgment, came to the conclusion that the plaintiff has failed to discharge her burden, after analysing her evidence without any reference to the defendant's evidence. Mr Shum submits that it is pre-mature and wrong for me in arriving at such conclusion, which ended the analysis for the issue of liability. He says that my analysis of the defendant's evidence only came after I have dismissed the plaintiff's claim.

Mr Shum adds that, when I analyse the defendant's evidence, I have described it as my 'observation', denoting that I have treated it as a matter of obiter dictum, as though it is not necessary to refer to the defendant's evidence for resolution of the issue of liability.

Mr Shum reiterates that it is the defendant who bears the evidential burden to prove his positive defences. The Court should therefore assess his evidence and decide if his evidence is credible, before even reviewing the evidence of the plaintiff. He even goes as far as to suggest that, even if the plaintiff did not give evidence at the trial, the defendant would still have to discharge his burden to substantiate his positive defences. In the event that the Court does not accept the defendant's defences on his evidence, that will be the end of the matter and the plaintiff's claim would be established.

Leaving aside the question of "admissions" for the moment, I am unable to accept Mr Shum's submissions above.

First, Her Ladyship has made it abundantly clear in the quoted passages of the Martnok Thanradee case that the claimant, apart from the legal burden of proof, also bears the evidential burden to adduce sufficient evidence to raise an issue as to the existence or otherwise of a fact in question. It is after this is satisfied that the respondent will then have to discharge his evidential burden of raising a prima facie innocent explanation. I do not see how these principles support Mr Shum's submissions that the Court should first assess defendant's evidence and decide if his evidence is credible, before even reviewing the evidence of the plaintiff.

Second, where the respondent chooses to adduce some countervailing evidence such that the parties' versions are contradictory and mutually exclusive, the burden of proof is practically an assessment of the parties' relative credibility and cogency of evidence/inferences. This is what happened in our case.

Third, even in the case where the respondent chooses to leave a claimant's prima facie case unanswered by not adducing any evidence, the Court can, if there is reasonable basis, draw inferences from a party's failure to rebut it. Her Ladyship added that these observations, however, are predicated upon evidence tending to establish the claimant's claim having been advanced in the first place, and the absence of any countervailing evidence adduced by the defence. Again, these principles reiterated the need for the Court to consider whether the evidence adduced by a claimant could establish his claim in the first place.

Fourth, simply applying these principles to the present case, I do not see how I have erred in considering the plaintiff's evidence to see whether there are sufficient evidence to raise an issue as to the existence of the Sexual Abuses. In this regard, I have devoted 47 paragraphs in the Judgment dissecting and analysing her evidence (i.e., from §218 to §264 of the Judgment), before coming to an initial view that they are insufficient to support the existence of the Sexual Abuses.

It should be noted that neither the plaintiff in her grounds of appeal, nor Mr Shum in his submissions, has criticised me for any errors committed in the analysis and assessment of her evidence.

Fifth, I do not agree that, by what I have said in §264 of the Judgment, i.e., "For the reasons above, I am not persuaded that the Sexual Abuses happened as alleged by the plaintiff, based solely on her evidences", I have already dismissed her claim. In fact, I have in §265 expressed that I would continue to consider the evidence of the defendant, in order to find support for the plaintiff's case. This I did from §§266 to 284 of the Judgment. It was only after I have considered evidence from both sides that I gave my conclusion on the issue of liability at §285.

I will add that, before discussions of their evidence, I have considered and set out at length their pleaded case, their evidence contained in the witness statements, and their testimonies at trial, highlighting (by italicising) along the way the discrepancies I find in their respective narratives (see §§6 to 216 of the Judgment). This led to a trailer of my analysis at §217.

Sixth, Mr Shum criticised that, when I analyse the defendant's evidence, I described it as my 'observations', suggesting that I was treating it as a matter of obiter dictum, and as though it is not necessary to refer to the defendant's evidence for resolution of the issue of liability. That cannot be farther from the truth. One can see that the term was used as sub-headings under the broad heading of 'analysis on the evidence and discussions on liability'. The same description of 'observation' was adopted as the sub-headings when I was discussing in detail the plaintiff's evidence (see the sub-headings before §218), and oddly, there is no complaint from his side that I treated her evidence as a matter of obiter dictum. Come what may, I elected to use that term because, aside from the evidence, my observations on the parties' performances whilst giving testimony at the trial were also taken into account.

Grounds of appeal and the "admission"

As I have said in §9 above, the grounds of appeal advanced by Mr Shum are primarily founded on the suggestion that the Sexual Abuses were admitted by the defendant in his pleading. If this is true, I agree that the evidential burden would have shifted to the defendant to prove his positive defences.

I have, in the Judgment, set out the extent of his admissions to the plaintiff's pleaded case (see §§34, 39, 40, and 42). Nevertheless, in fear that I might have missed any admissions of the Sexual Abuses in the defence, I have again reviewed the pleadings of the parties for the purpose of this Decision. I find no error in my summaries of the defendant's admissions as contained in his defence. These summaries have also not been challenged by the plaintiff in her grounds of appeal or in Mr Shum's submissions.

For the Body Check Assault, the defendant admits that he had asked the plaintiff to attend the Office, and he then brought her to the Study Room. He did show her the Health Declaration, and asked her questions listed thereon. The plaintiff signed on the Health Declaration; he also signed on the same as a witness. After this, they went to the Master Bedroom. The parties then differed in their accounts on how the body check was conducted and what happened during the same.

Regarding the Sexual Massages, the defendant agrees with the basic procedures adopted for the massages as described by the plaintiff, including that he would be naked throughout the sessions. He also admits that Janice massaged him prior to her departure in November 2018.

As to the Whipping Incidents, he admits that he would be whipped on his back and buttock.

There is no admission at all regarding the Video Watching Incident.

One can see that the extent of admissions in the above do not constitute any admission on the Sexual Abuses that the plaintiff claims to have happened. For examples, how could his complete denial of the Video Watching Incident be taken as an admission? In addition, there is no admission by the defendant that he had made the 1st to 3rd Sexual Demands, and that the alleged acts under these demands were indeed performed on him by the plaintiff, under the head of Sexual Massages. I cannot understand how simply because of his admissions in §35 above would shift the burden on him to disprove the existence of the 1st to 3rd Sexual Demands and the acts allegedly performed by the plaintiff pursuant to them.

Equally, the undisputed fact that the body check did take place is not an admission as to, for examples, the involuntariness of the plaintiff to take part in it, her unawareness that a body check would be conducted on her, how the same was allegedly performed, and the alleged indecent acts that were involved.

Furthermore, the defendant's agreement that he would be whipped on his back and buttock could not be stretched to include admissions that he would have his nipples pinched and penis whipped as well. Nor could this support the plaintiff's pleaded case that she was forced to whip him out of her fear for the defendant.

Finally, the defendant's assertion that the plaintiff had brought to him pornographic videos from the Philippines has no connection with the Video Watching Incident. Never once did he say that he had watched the pornographic videos together with the plaintiff, not to mention that he had forced her into it. In any event, the plaintiff's case is that she was forced to watch a video depicting Janice masturbating the defendant, not any pornographic videos that she had brought back for him.

However, what Mr Shum is now suggesting is that these pleaded "admissions" would have shifted the evidential burden on the defendant to prove his positive defences, i.e., that he has to prove that the Sexual Abuses did not happen. And the plaintiff does not even have to give any evidence at trial before the defendant could prove the Sexual Abuses did not happen. For the reasons provided in the above, I do not agree. I am not persuaded that I have erred in adopting the conventional approach and considered first in the Judgment whether the plaintiff has adduced sufficient evidence in support of her claims.

Mr Shum adds under Ground 2 that I have failed to state the exact factual matters that the plaintiff has failed to prove. He says that I have erred in only making a simplistic finding that the plaintiff has not proved the Sexual Assaults. I think I have made it clear in my analysis from §§218 to 264 of the Judgment the reasons why I did not believe the plaintiff's case and her evidence. I reject this argument.

Lastly, under Ground 3, Mr Shum says that I have failed to make any finding on the purposes of the Body Check Assault, Sexual Massages, the Whipping Incidents, and the Video Watching Incident. To this, I will repeat what I have said in §285 of the Judgment, that I do not find the existence of these Sexual Abuses were established based on the cases and the evidence of both the plaintiff and the defendant. I am in a blank as to how I could ascertain the purposes of events that I have great doubts that they have even existed as described.

Apart from the above, Mr Shum criticises that I did not find that the defendant's evidence in relation to the Sexual Abuses as pleaded as true, and that it is necessary for me to find on balance on probabilities as to whether the Sexual Abuses took place because of the reasons the defendant put forward.

I think I have made it abundantly clear that I also do not believe in what the defendant has said, in §§266 to 284 of the Judgment. However, neither do I believe in the plaintiff's case and evidence, as I have said in the above, and §285 of the Judgment. As such, as submitted by Mr Choy SC, I have resorted to the only course that was just for me to take, i.e., deciding on the burden of proof. On this point, I will adopt the principles summarised by DHCJ M. Ng (as Her Ladyship then was) in *Chan Chi Ling Elywin v Richfield Realty Ltd*,

"24.

Even though “[no] judge likes to decide cases on burden of proof if he can legitimately avoid having to do so”, “[there] are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.” This is explained by May LJ in *Morris v London Iron and Steel Co Ltd* as follows:

“.....Judges and tribunals of fact should make findings of fact in relation to matters before them if they can. In most cases, although in some cases it may be difficult, they can do just that. Having made them, the tribunal is entitled to draw inferences from the findings of primary fact where appropriate. Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact. But it is in the exceptional case that they may be forced to reach the conclusion that they do not know on which side of the line to reach the conclusion.”

25.

The principles have been summarised by Poon J in *Big Island Construction (HK) Limited v Wu Yi Development Company Limited* as follows:

“19.

If one version is found to be improbable, it does not necessarily lead to the acceptance of the other when, owing to the unsatisfactory state of the evidence, the court is not satisfied that the latter is probable. There are judicial utterances to the effect that in such scenario, the judge would be forced to say “I just do not know” on which side of the line the decision ought to be drawn. However, such judicial utterances should not be understood to mean that the court will or should shy away from making a finding. What the court will do is to resort to deciding the matter on the burden of proof: *The Popi M*, supra, per Lord Brandon at p.956A; see also *Yau Wah Yau v Commissioner of Inland Revenue*, supra, per Tang JA (as he then was) at paras.42 to 46. Applying *In re B (Children)*, supra, the court will treat the matter of which the party carrying the burden of proof but failing to discharge it, as having not taken place.

20.

If neither version is improbable, rejection of one may justifiably lead to the acceptance of the other: *Datec Electronics Holdings Ltd and others v UPS Ltd*, supra, per Thomas LJ at para.6.

21.

Finally, a good dose of common sense is required when the court evaluates the evidence in determining the probability or otherwise of the conflicting versions of events.” (my emphasis)

26.

Hence, where there are two improbable theories, the elimination of one does not automatically lead to the acceptance of the equally improbable theory. The judge or tribunal has open to him a third alternative, ie the party on whom the burden of proof lies in relation to any fact has failed to discharge that burden. The judge must be satisfied on the evidence that a particular fact or state of affairs is more likely to have occurred than not. May LJ in *Morris* said:

“..... In any event, where the ultimate decision can only be between two alternatives the when all the evidence in the case has been called the judge or the tribunal should ask himself or itself whether, on the totality of the evidence, on the balance of probabilities, drawing whatever inferences [may] be thought to be appropriate, the alternative which is necessary for the plaintiff to establish in order to succeed is made out. If it is not, then the operation of the principle of the burden of proof comes into play and the plaintiff fails.” (words bolded and underlined by me for emphasis)

To make it crystal clear about this, I shall repeat that I do not accept that the evidential burden of proof has shifted to the defendant by reason of any “admissions” as relied upon by the plaintiff in this application.

CONCLUSION

For the above reasons, I am not satisfied that the plaintiff has, by the grounds of appeal advanced, and the submissions of Mr Shum, show that the intended appeal has a reasonable prospect of success. There is no submissions from Mr Shum that there is some other reason in the interests of justice that the appeal should be heard. Her application for leave to appeal under the Amended Summons is thus dismissed.

As to the costs of this application, it should follow the events. Hence, I order that costs of the application should be paid by the plaintiff to the defendant, with certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs should be taxed in accordance with the Legal Aid Regulations.

I thank counsel for their assistance.

(David Chan)

Deputy District Judge

Mr Eric Shum and Ms Yvonne Leung (on pro bono basis), instructed by Patricia Ho & Associates, assigned by the Director of Legal Aid, for the plaintiff

Mr Edwin Choy SC and Mr Jacky Ho, instructed by Haldanes, for the defendant

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