

DCPI 4215/2019

[2021] HKDC 708

**IN THE DISTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
PERSONAL INJURIES ACTION NO 4215 OF 2019**

BETWEEN

KHAN MURAD

Plaintiff

and

CHAN YUK MING

Defendant

Before: Deputy District Judge Zabrina Lau in Court (Open to Public)

Dates of Hearing: 11 May 2021

Date of Judgment: 15 June 2021

**JUDGMENT**

***INTRODUCTION***

1. At around 2025 hours on 10 February 2019, the plaintiff and his friend were passengers of a taxi driven by the defendant and travelling along Kam Tin Road, Yuen Long, New Territories.

2. According to the plaintiff, he was seated behind the defendant in the back row of the taxi with a seat belt fastened.

3. When the taxi was driven near Kam Tin Mun Yeung Public School, the defendant steered towards the left and the front of the taxi hit the metal railings on the pavement in front of the taxi (the “**accident**”).

4. The plaintiff lurched forward from his seat and sustained personal injuries. He had transient loss of consciousness and regained consciousness while still inside the taxi. He was assisted by others to walk to an ambulance and was sent to the Accident and Emergency Department (“**AED**”) of Pok Oi Hospital (“**POH**”).

5. On 17 July 2019, the defendant was convicted of one count of careless driving and was fined a sum of \$2,500.

6. By a statement of claim dated 7 December 2009, the plaintiff brought this claim against the defendant for damages.

7. The defendant admitted liability and interlocutory judgment was entered by consent on 14 April 2020, leaving damages to be assessed. This is the trial of the assessment of damages.

8. The plaintiff was the only witness testifying at trial. The defendant elected not to call any witness.

9. The reports of the public and/or private hospitals and/or clinics as to the treatment and care of the plaintiff were adduced as agreed evidence without calling the makers thereof.

10. The medical expert evidence was limited to one orthopaedic expert for each party, namely Dr Wong Chin Hong (“**Dr CH Wong**”) for the plaintiff and Dr Wong Kwok Shing Patrick (“**Dr P Wong**”) for the defendant, who conducted a joint examination of the plaintiff on 24 July 2020. Their findings are detailed in their joint report dated 10 August 2020 (“**Joint Report**”), which was adduced as evidence without calling the two doctors.

#### *INJURIES AND TREATMENT*

11. The plaintiff was born on 1 June 1989. He was 29 years old at the time of the accident.

12. According to the medical report from AED of POH, the plaintiff was seen at 2102 hours on 10 February 2019 and the following was recorded:-

(1) The plaintiff was alert with normal blood pressure and pulse.

(2) Both knees had tenderness and abrasions.

(3) Right hip was tender.

(4) Left shoulder was tender.

(5) Left elbow was tender with abrasion.

(6) X-ray of left shoulder, left knee, right hip and pelvis did not show any fracture or dislocation.

13. The plaintiff's abrasions were treated and he was discharged on the same day. The AED of POH granted the plaintiff 8 days of sick leave.

14. The plaintiff then consulted Dr Kwok Chun Yip ("**Dr Kwok**") of Kin Lam Medical Centre in Kwai Chung on 16, 21 and 26 February 2019. X-ray of the chest was ordered on 21 February 2019 and the radiologist's report revealed no lung lesion and no rib fracture. On each of the 3 occasions, the plaintiff was granted 3 days of sick leave.

15. The plaintiff then ceased to consult Dr Kwok and he switched to see Dr Chan Sai Keung ("**Dr Chan**"), an orthopaedic surgeon whose clinic was and still is located in Jordan, Kowloon. According to Dr Chan's medical records, the plaintiff first saw him on 1 March 2019 and physical examination performed on that day showed healed scar over left knee and left elbow. There was also right lower chest tenderness.

16. It was recorded by Dr Chan that he had suggested ultrasound of the right chest (sometimes with x-ray of the lower spine) during those consultations between March 2019 and October 2019 but none was ordered. It was only on 22 November 2019 that Dr Chan performed an ultrasound

of the plaintiff's right chest and noted that there was no evidence of fracture, and the right lower rib cage showed increased signal of soft issue, indicating possibility of post-contusion soft tissue scarring.

17. Since November 2019, Dr Chan only advised massage of the lower right rib cage but was noted to be not useful. Dr Chan had never prescribed any medicine, physiotherapy treatment or surgical treatment in any of the consultations.

18. Notwithstanding, the plaintiff continued to have monthly follow-up consultations with Dr Chan from March 2019 to January 2020. On 30 June 2020, the plaintiff went to see Dr Chan again. On each occasion, Dr Chan granted the plaintiff 28 to 30 days of sick leave.

### *THE JOINT REPORT*

#### *The plaintiff's complaints on his physical condition*

19. The plaintiff's complaints at the joint examination were recorded in paragraphs 32 to 37 of the Joint Report:-

- “32. It is now 1.5 years after the accident. Mr Khan has right anterior lower chest pain all the time. It increased with leaning forward, reduced by sitting more erect and increased with travelling on a bus, walking fast and going up stairs. Pain severity is grade 5/10 to 10/10.
33. He has left low back pain from lower thoracic to buttock all the time, increasing with sitting. Pain severity is 7/10.
34. He has left elbow pain only with movement and lifting. Pain severity is 5/10.

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35. He has right and left knee swelling, pain and noise all the time. Pain severity is from 5/10 to 10/10. It increased with walking on stairs, lifting and during cold weather.
36. He can walk 10 mins maximally, climb stairs up to the first floor. He can stand 10 mins at most and needs to keep moving round [*sic*] a bit.
37. He can manage activities of daily living self-care but with pain. He can do some housework such as change of bedding. He can utilise public transport.”

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20. Dr CH Wong observed that the extent of the plaintiff’s injuries was consistent with the history and mechanism of the accident. Although there was a lack of AED documentation of his chest and lower back condition, it was probable that the plaintiff could have also sustained soft tissue contusion/sprain injuries to his right chest wall and low back during the impact of the accident.

21. Dr P Wong on the other hand observed that there was substantial inconsistency between the plaintiff’s complaints and the documented evidence. For example, the left side lower back pain with left leg numbness was only first recorded by Dr Chan on 1 March 2019. Considering he was thrown forward with the front of his body hitting the driver’s seat and there was no injury to his lower back documented by the AED, Dr P Wong thought that the plaintiff’s left side low back pain with left leg numbness was very unlikely to be related to the traffic accident. Moreover, despite such complaints being recorded as persistent, no x-ray or MRI of the lumbar spine was taken and no specific treatment (not even physiotherapy) was given despite multiple consultations with Dr Chan. In the circumstances, Dr P Wong was doubtful as to how genuine or serious those symptoms were.

22. Dr CH Wong observed that the plaintiff's injuries had been treated conservatively. He opined that all treatments rendered to the plaintiff for his injuries were appropriate.

*The experts' comments on the plaintiff's current condition*

23. The two experts' physical examination of the plaintiff showed that the plaintiff's general condition was satisfactory. He could sit for 50 minutes for the interview without problem, with intermittent standing up. He could stand and walk normally, and he could stand on a single leg and walk on heels. He could walk on tiptoes but he was unstable and almost stumble due to left knee pain.

24. For the lower right chest and left knee, the two principal areas that the plaintiff complains of having residual pain from the accident, the two experts had the following to say:-

**"Chest**

48. Inspection shows no deformity or swelling, no scar.

49. There is tenderness over right costal margin.

50. Chest expansion is from 99cm to 105cm. there is no pain with deep breath.

51. Auscultation is normal.

...

**Lower limbs**

57. Measurement of muscle bulks:

	Right side	Left side
Thigh diameter at 10cm above patella	48 cm	47 cm
Maximum calf diameter	36.5 cm	36.5 cm

58. Inspection shows no swelling, effusion or tenderness. There are multiple abrasions scars but are well-healed.

59. His right knee is non-tender.

60. There is tenderness over anterior/medial/lateral/posterior of his left knee.

61. Range of motion of knees – both sides 0-140 degrees. He complains of pain with movement but no crepitus.

62. There is no ligament laxity.

63. McMurray test is negative.

64. Sensation and power are normal.

65. PF joint grinding is negative.

66. Power of knees: RS – 5/5, LS – 4/5 with pain

67. He can sit up from supine position during the assessment a few times normally.”

25. X-rays of the chest taken on the day of joint examination showed no rib fracture. X-rays of both knees taken on the same day showed no bony lesion and alignment was normal. Joint spaces were normal.

26. Both experts shared the view that the plaintiff showed normal general ambulatory ability. Examination of all his injured body parts did not show any objective abnormality to substantiate his claim for such



persistent pain and disability. There were only subjective signs such as local tenderness and inadequate voluntary effort during power test.

27. It was further recorded that x-rays of his chest, left elbow, lumbar spine and knees showed no abnormality.

28. Dr P Wong considered that the mild soft tissue injuries he sustained during the accident should have recovered well long time ago. Dr CH Wong also took the view that the plaintiff has recovered satisfactorily.

29. Both experts agreed that the plaintiff had attained maximal medical improvement for his soft tissue injuries sustained in the accident, and he does not require any further medical or surgical intervention. There was also no indication for the plaintiff to be further examined by other medical specialist for the injuries caused by the accident.

*THE PLAINTIFF'S 2<sup>ND</sup> SUPPLEMENTAL LIST OF DOCUMENTS*

30. Shortly before the commencement of the trial, by way of a 2<sup>nd</sup> supplemental list of documents, the plaintiff sought to adduce, *inter alia*, a recent MRI report dated 17 April 2021 and a letter from Dr Chan dated 21 April 2021. At the beginning of the trial, Mr John Wright, counsel for the plaintiff, explained that it was he himself who advised the plaintiff to further follow up with Dr Chan with a view to possible further investigation of his left knee.

31. Mr Wright urged the court to take such latest evidence into account when assessing the plaintiff's injuries and current condition and he made the following submissions:-

(1) Since there was no observable pathology evidence regarding the alleged consistent pain in the plaintiff's left knee, it should be the court's priority to do justice to take the latest MRI findings into account.

(2) The MRI report is objective evidence of the injury of his left knee.

(3) Dr Chan's letter stated that the MRI revealed "flipped lateral meniscus which is likely resulted from the above traffic accident. Operative treatment is recommended." A flipped meniscus is a tear in the C-shaped fibrous cartilage in the knee. The only reasonable conclusion to be drawn from the MRI is that the plaintiff's complaints of persistent left knee pain are genuine and have prevented him from returning to strenuous manual work.

32. In support of his submissions, Mr Wright asked for leave of the court (which I granted) to allow the plaintiff to demonstrate to the court and the defendant's legal representatives his crepitus when extending his left leg.

33. Ms Margaret Chan, counsel for the defendant, did not object to the plaintiff's filing of the 2<sup>nd</sup> supplemental list of documents, but asked the court not to give any or any significant weight to such belated evidence. Ms Chan submitted that whilst the MRI report might reveal the current condition of the plaintiff's left knee, it did not take the plaintiff's case further since the plaintiff cannot establish any causal link between the MRI findings and the accident. More significantly, it was submitted that notwithstanding the plaintiff's complaints of left knee pain since March 2019 to January 2020, Dr Chan had never advised any treatment or medical scanning of his left knee. It was only upon the advice of the plaintiff's legal team for further investigation that he referred the plaintiff for an MRI in April 2021. The recent findings were also inconsistent with Dr Chan's own diagnosis in the past.

34. I think Ms Chan's observations are fair and correct, and I accept her submissions. The findings in the MRI report can only indicate the plaintiff's left knee condition as of 17 April 2021. It has been more than two years since the accident and some 9 months since the joint examination. One simply cannot rule out the possibility that the flipped meniscus as observed in the MRI report occurred after the accident or, even more likely, after the joint examination.

35. Secondly, both experts inspected the plaintiff's knees in July 2020 but they did not find any abnormality. To the contrary, despite the plaintiff's complaint of noise (ie crepitus) when moving his left knee, they found the plaintiff's knees to have a normal range of motion and there was no crepitus. This suggests that the crepitus now observed in the plaintiff's knee likely occurred sometime after the joint examination.

36. Thirdly, I also note that in his letter of 17 April 2021, Dr Chan said for the first time that the plaintiff had complained of crepitus on movement since his injury on 10 February 2019. But there was no mention of any noise or crepitus in any of his medical notes for the previous consultations.

37. Moreover, Dr Chan in his letter only stated that the flipped lateral meniscus was “likely resulted” from the traffic accident but he did not base his opinion on any objective evidence and he did not give any reason for such a suggestion. In any event, Dr Chan was not an expert appointed for this case to give an expert opinion on the issue.

38. In light of these reasons, I accept Ms Chan’s submissions that even if such lately discovered documents are admissible, no weight should be given to such evidence, as the plaintiff has failed to establish a causal link between the latest MRI findings and the accident.

#### *ASSESSMENT OF THE PLAINTIFF’S CREDIBILITY*

39. For the purpose of assessing a witness’s credibility, the following passage from *Star Glory Investment Ltd v Kai Tuo (HK) Technology Co Ltd & Ors* (unreported, HCA 3523/2002, 13 August 2005) *per* Chung J at §12 is instructive:-

“There are two objective tests for assessing a witness’s credibility regarding a matter to which he has testified:-

- (a) whether that part of his testimony is inherently plausible or implausible;

(b) whether that part of his testimony is, in a material way, contradicted by other evidence which is undisputed or indisputable (an example often given of such evidence is contemporaneous documents).

Further, where it is shown that a witness has been discredited over one or more matters to which he has testified (using the above tests), this fact is relevant to the assessment of his overall credibility. Likewise, regard may be had to a witness's motive for deliberately not giving truthful testimony. For example, telling the truth may prejudice his interest, or a just determination of the litigation may affect his interest."

40. Overall speaking, I did not find the plaintiff's evidence credible or helpful. On many occasions, his answers were inconsistent with contemporaneous documents, implausible or internally contradictory.

41. For example, during cross-examination, Ms Chan noted that Dr Chan kept fairly meticulous records of his consultations with the plaintiff on matters such as diagnosis, complaint, and action plan. For example, he had recorded his recommendation of an ultrasound of the chest but the plaintiff refused because he said he could not afford it or because his wife was giving birth on that day. When the plaintiff was cross-examined on whether Dr Chan had previously suggested any investigation or treatment of his left knee, he insisted that Dr Chan had advised an MRI but he could not afford it. The plaintiff's answers were inconsistent with Dr Chan's medical records, which made no mention of any MRI (or any investigation or treatment of the left knee) until the plaintiff returned to see him in April 2021 at the suggestion of Mr Wright.

42. The plaintiff was asked by the court if Dr Chan had thought that an MRI was necessary for his left knee and if the plaintiff could not afford it, whether Dr Chan had suggested referring the plaintiff to take the

MRI scan at a public hospital, which would be free. The plaintiff said “no”. In my view, this is rather implausible as it is a usual practice of private medical practitioners to refer patients with financial difficulties to public hospitals for investigation and treatment. The plaintiff’s answer certainly casts doubt on his assertions that Dr Chan had advised him to obtain an MRI of his left knee.

43. Despite the plaintiff’s admission that Dr Chan did not prescribe any medication or treatment and his condition did not improve, the plaintiff continued to see Dr Chan. The plaintiff was asked if he was genuinely suffering from such pains as he alleged, and if he was so keen to return to work to support his family, why he did not switch to other doctors or attend government clinics to cure his pains. The plaintiff answered that doctors at government hospitals did not care much and would only prescribe painkillers, he did not know other doctors, and nonetheless he thought Dr Chan was better. But other than his visit to the A&E of POH on the day of the accident, the plaintiff admitted that he had never consulted any doctors at a public hospital for his injuries. It is therefore questionable on what basis he speculated that the public doctors would only give him painkillers. Again, I find the plaintiff’s evidence internally contradictory, and does not tally with common sense.

44. The plaintiff was also cross-examined on certain payments into his bank account which he said were made by his wife as his “pocket money”. One of those payments was made on 27 July 2019. Whilst he admitted that his wife was giving birth to their daughter on that day (which was also recorded in Dr Chan’s record as a reason for his refusal to get an ultrasound of his chest), when it was put to him that he had a very busy day

since he had to see Dr Chan and took the trouble to deposit money into bank, all while his wife was giving birth in hospital, he suddenly backtracked by saying that he could not recall whether the sum was indeed from his wife, albeit soon after he insisted again that only his wife would give him money.

45. Ms Chan then asked about the other deposits into his bank account but the plaintiff readily admitted that he did not keep any record for the alleged deposits from his wife, father-in-law or his wife's friends, yet strangely he was able to identify them in his witness statement. When he was asked why his wife had bothered to deposit the sums into his bank account if he had to withdraw it immediately afterwards, he could not recall why and to whom the sums were withdrawn, even though he could see the transferees' account numbers. All these suggest that the plaintiff was not forthcoming in his testimony.

46. In conclusion, I do not find the plaintiff credible, and he is not a reliable witness. I will treat his evidence with great caution and the quantum of damages will be assessed primarily by reference to contemporaneous documents and the Joint Report.

#### *ASSESSMENT OF THE PLAINTIFF'S CONDITION*

47. The plaintiff's case is that he still suffers serious persistent pain over various parts of his body, with his left knee and lower right chest being the two principal areas of residual pain.

48. The plaintiff in his witness statement contended that due to the accident, he was and still is suffering permanent disabilities including the following:-

(1) Pain on the right chest, left back, both knees, left elbow;

(2) Stiffness on the right chest and left back;

(3) Abrasion on left elbow;

(4) Swelling knees;

(5) Unable to walk for extended period of time;

(6) Unable to sit for extended period of time;

(7) Pain during sleep when lying flat on his bed;

(8) Unable to turn on the back during his sleep;

(9) Unable to run;

(10) Difficulty in walking up and down the stairs;

(11) Unable to continue on pursuing his hobby, ie cricket;

(12) Insomnia;



(13) Feeling hopeless and useless; and

(14) Unhappiness and emotional distress.

49. However, the plaintiff's complaints of such persistent pains seem to be contradicted by the experts' observations in the Joint Report.

(1) First and foremost, both Dr P Wong and Dr CH Wong observed that examination of all his injured body parts did not show any objective abnormality to substantiate his claim for such persistent pain and disability. There were only subjective signs such as local tenderness and inadequate voluntary effort during power test.

(2) Further, both experts considered that the plaintiff was able to manage activities of daily living. His enjoyment of life and social activities would only be minimally affected by his injuries sustained in the accident.

(3) It was stated that physical examination showed normal general ambulatory ability and examination of all his injured body parts did not show any objective abnormality.

(4) Even the plaintiff's expert opined that the plaintiff had recovered satisfactorily in August 2020 and no further medical or surgical intervention was recommended.

(5) It was also agreed by the experts that there was no indication for the plaintiff to be further examined by other medical specialist.

50. In passing, I note that the plaintiff did not provide any medical records of his consultation with Dr Kwok, who only saw fit to give the plaintiff intermittent sick leaves of 3 days.

51. Moreover, there is evidence suggesting that the plaintiff may have exaggerated his condition:-

(1) He claimed to have taken painkillers since the accident but there was no record in Dr Chan's notes that he had prescribed any medication. It was only clarified during cross-examination that he obtained the painkillers from Dr Kwok and subsequently from a pharmacy. However, the plaintiff did not provide any documentary evidence or receipt for the purchase of any painkiller.

(2) The plaintiff's complaint of right chest and knee pains does not sit well with the fact that Dr Chan did not find it necessary to prescribe any medication, treatment or physiotherapy for pain relief despite the plaintiff's complaints. All he advised was massage of the plaintiff's lower rib cage though it was said to be not useful.

(3) The plaintiff stopped seeking consultation from Dr Chan from mid-January 2020 but only sought once in June 2020 and lately, after the case was put under the warned list in April 2021. When he was asked about the reason, he repeated his answer of having financial difficulty. But as mentioned above, he did not try to seek further treatment from a public hospital and he did not have a good reason for it.

(4) The plaintiff had managed to travel frequently to Pakistan, China and Cambodia starting about two months after the accident:-

(a) 16 to 24 April 2019 (Pakistan)

(b) 2 to 25 September 2019 (Pakistan)

(c) 11 November 2011 (day trip to Shenzhen)

(d) 15 to 18 November 2019 (Beijing)

(e) 19 to 20 November 2019 (Shenzhen)

(f) 12 December 2019 (day trip to Shenzhen)

(g) 23 to 25 December 2019 (Phnom Penh)

(h) 7 to 10 February 2020 (Pakistan)

(i) 14 to 18 February 2020 (Pakistan)

(j) 6 to 18 March 2020 (Pakistan)

(5) It appears that the plaintiff had kept changing his areas of pain. For example, his alleged pain in the neck, teeth and head were not mentioned in the medical records, yet he did not provide any explanation and insisted that he had felt pain in those areas.

(6) On 11 May 2021 (ie the first day of trial), the plaintiff was able to sit throughout his testimony from 9:45 am to 1pm with a short morning break, without any sign of discomfort at all.

(7) Significantly, it appears that even the plaintiff's expert had reservation on the plaintiff's alleged severity of his alleged pain, as Dr CH Wong observed in the Joint Report that there was "*certain degree of over expression of symptoms and signs*".

52. As discussed above, I do not find the plaintiff to be a reliable witness and I treat his evidence with great caution. Despite his complaints of pain over various parts of his body and how the injuries from the accident had caused great difficulties to his daily life, in light of the overwhelming evidence from the experts and the objective circumstances, it seems to me that the plaintiff's evidence on the extent and severity of his

alleged pain and disabilities is to a very large extent exaggerated. I accept the experts' opinion that the plaintiff has achieved maximal medical improvement and his enjoyment of life and social activities would only be minimally affected by his injuries sustained in the accident.

*PAIN, SUFFERING AND LOSS OF AMENITIES ("PSLA")*

53. In his Revised Statement of Damages, the plaintiff claimed \$400,000 for PSLA. This was later adjusted to a sum of not less than HK\$250,000. The defendant said an award of \$80,000 is reasonable.

54. Mr Wright cited the following cases in support of the plaintiff's claimed amount of not less than \$250,000:-

(1) *Frances Christine Keeling v The Hebe Haven Yacht Club Ltd* (CACV 43/2005, 2 November 2005): the plaintiff tore the ligaments in her right knee and aggravated the injuries by subsequent falls. She received extensive physiotherapy and used a walking frame then crutches for 6 to 8 months. PSLA was increased on appeal from \$160,000 to \$250,000.

(2) *Lee Kam Lin v Full Wise Limited* (DCPI 2354/2014, 27 November 2015): on 6 February 2012 the plaintiff hit her right knee on the handle of an electric food mixer. Although she felt pain on her right knee, she continued to work. An MRI scan in July 2014 revealed a grade 3

tear of posterior horn of medial meniscus. PSLA was of \$180,000 was awarded for the knee injury.

(3) *Rukhsar Begum v Native English Centre Limited* (DCPI 2243/2015, 3 April 2017), the plaintiff slipped and fell at work. Her right ring finger and knee were tender and swollen with reduced range of movement. She was treated and discharged with knee brace and walking stick on the same day. A subsequent MRI of the right knee indicated a possible tear of posterior horn of medial meniscus. PSLA was awarded at \$180,000.

(4) *Chan Kwok Kuen v Actionsports International Limited* (DCPI 1985/2013, 30 April 2019), the plaintiff suffered injuries to his left knee. MRI showed complex tear of anterior horn, body and posterior horn of the medial meniscus and a complete tear of the anterior cruciate ligament (ACL) close to the femoral insertion. The plaintiff underwent surgery, hospitalised for 5 days and discharged with crutches. He had 31 physiotherapy sessions and 25 follow-up appointments. PSLA was awarded at \$250,000.

55. On the other hand, Ms Chan cited the following cases in support of her contention that the claimed amount of \$250,000 is grossly excessive:-

- (1) *Ma Kwan Tung v Wong Wing Kwong* (DCPI 673/2012, 16 September 2013): a PSLA of \$50,000 was awarded for the plaintiff suffering from contusion of face, left clavicle and left leg in a traffic accident but without adducing any medical evidence.
- (2) *Mohammed Ashaq v Royal Honour Industrial Limited* (DCPI 586/2007, 27 November 2007): the plaintiff worked as a forklift driver and was injured when the gas cylinder of the forklift car broke loose and hit the back of the driver's seat, which in turn hit his back, causing him to fall onto the ground. Doctors found tenderness over the posterior aspect of the left shoulder and low back. He was treated with analgesic and physiotherapy, and discharged from hospital after 4 days. He continued with physiotherapy treatments in the next four to five months. *Ma Kwan Tung (supra)* was considered and PSLA was awarded at \$50,000.
- (3) *Khan Sabz Ali v Ko Kim Development Ltd* (DCPI 1254/2014, 5 February 2016): the court awarded a sum of \$140,000 under PSLA for a construction site general labourer suffering from contusion of right leg and lower back with a grant of 438 days of sick leave.

56. The defendant submitted that the plaintiff's injuries sustained in the accident were more in line with those in *Mohammed Ashaq* and much

less serious than those in *Khan Sabz Ali*. Since *Mohammed Ashaq* was decided more than 13 years ago, it was submitted that an award of \$80,000 would be a fair amount under this head.

57. Mr Wright, on the other hand, criticised the cases cited by Ms Chan on the basis that they did not involve knee injuries. I note that the authorities cited by Mr Wright all involved injuries to the knee which are appropriate for comparison. However, it seems to me that the injuries sustained in those cases were significantly more serious than those suffered by the plaintiff in this case. For example, the plaintiffs in those cases had received extensive physiotherapy (*Frances Christine Keeling*) and even surgery (*Chan Kwok Kuen*). Here, other than some minor treatments given by the AED of POH, the plaintiff did not receive any medical treatment or physiotherapy for his condition. In *Lee Kam Lin*, the plaintiff suffered not only bodily injuries but also psychiatric injuries for which she received treatment. In this case, other than the plaintiff's bare assertions in his witness statement, there is no evidence of any psychiatric condition that arose as a result of the accident. In *Rukhsar Begum*, the plaintiff's fracture of finger and meniscal tear were found to have been caused by the accident. But here, as discussed above, the plaintiff has failed to establish any causal link between the flipped meniscus observed in the MRI on 17 April 2021 and the accident.

58. In considering the severity of the plaintiff's injuries, I also note Dr CH Wong's opinion in the Joint Report, where he said that "all treatments rendered to Mr Khan for his injuries were appropriate". Given neither Dr Kwok nor Dr Chan rendered any medical treatment to the plaintiff and the plaintiff (on his own case but without proof) only took



painkillers purchased from a pharmacy, it seems to me that Dr CH Wong's opinion can be viewed as an indication that he did not consider the plaintiff's injuries to be severe enough to require any particular medical treatment.

59. Having considered the authorities and the totality of the evidence, I take the view that the appropriate award for PSLA should be \$100,000.

#### *PRE-TRIAL LOSS OF EARNINGS*

60. Under this head, the plaintiff claims a sum of \$325,000 plus MPF of \$16,250 on the basis of a monthly salary of \$25,000 and 13 months of sick leave.

#### *Monthly income at time of accident*

61. According to the plaintiff, at the time of accident, he was working as a full-time general labourer at a garage earning an average monthly salary of around \$25,000.

62. The only evidence adduced by the plaintiff on his pre-accident income was a letter from his then employer and a self-serving declaration on TAVA form. There was no other corroborative documentary evidence such as MPF, payroll record or tax returns.

63. It is also noteworthy that despite the court's order for the disclosure of his bank statements from November 2018 to November 2019,

his bank statements for the period from 7 January 2019 to 7 March 2019 (which covers the period in which the plaintiff was allegedly employed by the garage) were omitted. By a letter to the defendant's solicitors dated 24 September 2020, the plaintiff's solicitors explained that they had obtained the plaintiff's bank statements from Hang Seng Bank and found that there was no transaction from 7 January 2019 to 28 June 2019.

64. During cross-examination, the plaintiff told the court that he received a sum from his employer as his salary for January 2019 in cash. He gave part of that sum to his wife and he deposited the rest into his account with Hang Seng Bank ("**HS account**"). The plaintiff told the court that the HS account was his only bank account. One could see from the records that he had extensively used the account before and after the accident.

65. However, when Ms Chan showed him the missing bank records during the relevant period, the plaintiff backtracked and claimed that he forgot whether he had in fact deposited any of the sum into the HS account. More tellingly, it is noted that the closing balance on 7 January 2019 (\$741.54) was different from the opening balance on 7 March 2019 (\$41.5). This suggests that at least some transaction took place during that period and what was said in the letter of the plaintiff's solicitors dated 24 September 2020 might be incorrect. However, the plaintiff had offered no explanation for this discrepancy.

66. In the circumstances, Ms Chan urges, and I agree, that the court is entitled to infer from the inexplicable omission of his bank

statements from January 2019 to March 2019 that the plaintiff's pre-accident income was in fact less than his claimed amount of \$25,000.

67. During cross-examination, the plaintiff agreed that he was not working as a garage mechanics but a general labourer. According to a survey of the Hong Kong Census and Statistics Department, the average daily wage for general workers and labourers engaged in public sector construction projects was \$980.5. Ms Chan submitted that this rate, which was on the generous side, might be adopted for the purpose of calculating pre-trial loss of earnings. I accept Ms Chan's submission as fair and sensible.

68. Assuming that the plaintiff could work 6 days a week, the average monthly income at the time of accident was about \$23,532 (\$980.5 x 24 days).

*Length of sick leave*

69. The plaintiff was granted intermittent sick leave from 10 February 2019 and 27 July 2020, with a total number of 395 days. Save for the initial 17 days which were granted by POH and Dr Kwok, the remaining 378 days were all granted by Dr Chan each with a period ranging from 28 to 31 days. During the most recent consultation on 16 April 2021, Dr Chan also granted the plaintiff a sick leave of 30 days.

70. Ms Chan urged the court not to readily accept the sick leave granted by Dr Chan as a basis for the calculation of pre-trial loss of earnings. She pointed out that Dr Chan's practice of granting sick leave

contrasted sharply with those by POH (granted 8 days) and Dr Kwok (who granted intermittent sick leaves each of 3 days only). On the other hand, Dr Chan readily granted lengthy sick leaves in each of the consultations, and he did so again on 16 April 2021 even before the plaintiff took the MRI and despite that the plaintiff had not consulted him for almost 10 months. It is also unclear from the medical records what physical examinations or checks Dr Chan had been performed to justify the continuous issuance of sick leaves of 28 or 30 days.

71. On the length of sick leave, it is well established that a judge cannot be bound by the mere issue of sick leave certificates, since the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiff. In *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210 at §18, Le Pichon JA said:-

“Since the plaintiff’s pre-trial loss of earnings is ascertained by reference to the period during which the plaintiff was prevented by injuries sustained from returning to work, what has to be ascertained and identified is the length of that period. In my view, that is an exercise that would not require evidence to suggest or imply that those who had granted sick leave to the plaintiff did so improperly. Logically, if the finding is that the plaintiff could have gone back to work after three months, that is the period that is relevant to the assessment and award of pre-trial loss of earnings and no other. Sick leave certificates are no more than a piece of evidence that has to be evaluated in the light of all the available evidence including medical evidence before the court. As Rogers VP observed in *Choy Wai Chung v Chun Wo Construction & Engineering Co Ltd* (unrep., CACV 172/2004, [2005] HKEC 1077) at para. 9, the judge cannot be bound by the mere issue of sick leave certificates; the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiff.”

72. In *Li Cheuk Lam v Cheung Sun Tai & Others* (HCPI 1102/2015, 13 October 2017), Master Leong made the following observations when considering the lengths of sick leave:-

“11. What is striking from these medical records (a summary is helpfully provided on the schedule of sick leaves) is that, in these 11 attendances, the plaintiff was given variable lengths of sick leaves after each consultation but he always attended for medical treatment the day that the previous sick leave ran out.

12. I would expect that any reasonable patient with a persisting pain and unable to work would be very keen for full recovery and to return to earn a living. So if the patient attended a doctor and was given a certain medication and a period of sick leave, and if pain persisted despite the medication, he is unlikely to wait until the sick leave period expired before seeking further medical treatment. This behavior would be even more unlikely if he has done this repeatedly and each time he has been prescribed with the same type of, if not exactly the same, medication.

13. Instead, I would expect any reasonable patient with persistent pain would return to the doctor very promptly if the treatment did not help. He would likely request stronger medications, further investigations or even referral to a specialist.

14. If a patient chooses to passively take the same medications (despite the obvious failure of such medications to cure the persistent pain) and sit out until the last day of every sick leave period, this rather suggests that the patient is more concerned in obtaining continuous sick leaves than about curing any alleged complaints.

...

18. I note that the plaintiff was given 4 weeks’ sick leave and yet, without any prescription of medicine, he ‘sat out’ these 4 weeks without seeking any ‘interim’ ‘emergency’ medical treatment.

19. This behaviour stood in stark contrast with the previous period when the plaintiff was only given a few days of sick leave at each consultation and he repeatedly attended emergency consultation at AED or day clinics whenever the sick leaves ran out.

20. Again, this rather suggested that the plaintiff was attending doctors more for obtaining sick leaves than for treating any alleged persistent pain.” (emphasis added)

73. As the plaintiff’s medical records and sick leave certificates demonstrate, his pattern of medical consultation was identical to the one in *Li Cheuk Lam (supra)*. *A fortiori*, Dr Chan did not even prescribe any treatment or medication whereas the doctors in *Li Cheuk Lam* had prescribed certain medication. It appears that the plaintiff was attending Dr Chan more for obtaining sick leaves rather than for treating any alleged pain.

74. At any rate, it seems to me that obtaining sick leave certificates was of paramount importance to the plaintiff, as he saw fit to see Dr Chan on 27 July 2019, whilst his wife was giving birth to their daughter on the same day. In Dr Chan’s medical notes dated 27 July 2019, it was recorded “Action: plan: check US Rt chest next FU as his wife have child devivery [sic] now in TMH”. In that consultation, Dr Chan did not record any sudden change or emergency condition of the plaintiff, nor did he prescribe any treatment or medication to justify any physical need of the plaintiff to see Dr Chan on that day. One can only infer from this incident that the plaintiff was very keen to get a new sick leave certificate as his previous one was due to expire on 28 July 2019.

75. In the Joint Report, Dr P Wong observed that other than the 30-day sick leave granted each time, Dr Chan did not do much in any of the monthly consultations. He opined that if a patient had genuine serious orthopaedic conditions, regular multiple symptomatic medications,

physiotherapy and further radiological investments or even surgery would usually be required, not just monthly sick leaves.

76. Dr P Wong was also doubtful if the plaintiff had genuine serious pain as he did not seek second opinion or treatment from any other medical practitioner. Moreover, despite that he sought prolonged sick leaves, he was able to travel to Pakistan just over two months after the accident. Dr P Wong therefore took the view that a maximum of 6 weeks should be adequate for the plaintiff's mild injuries to be recovered.

77. On the other hand, Dr CH Wong took the view that all the sick leaves granted by the attending doctors were "acceptable", but he did not provide any reason to support that view.

78. The plaintiff did not mention his trip to Pakistan in April 2019, and it was only in cross-examination that he said for the first time that he had to see his father who had fallen ill. Again, he did not provide any evidence to support this assertion.

79. Indeed, save for his trip to Pakistan in September 2019, the plaintiff did not explain or even mention any of his trips that he made after the accident. This is probably because Dr Chan had recorded in his notes dated 27 September 2019 that the plaintiff's right chest and left knee pain had become more serious after his trip to Pakistan, and hence it was thought necessary to deal with it in the plaintiff's witness statement.

80. It is important to note that all those trips listed in paragraph 51(4) above took place during the claimed sick leave period. In respect of

A  
B the trips to China, the plaintiff said that his wife ran an online business  
C selling T-shirts from China, and he took those trips to help his wife (who  
D had to stay in Hong Kong to take care of their children) to look for suitable  
E clothing for her business. Ms Chan questioned the credibility of his  
F answers as he admittedly did not speak Mandarin and he said he could not  
G find the way to those garment suppliers. Be that as it may, what is clear  
H from his answers is that he was physically fit enough to conduct such  
I frequent business trips, and although there appears to be no formal business  
or employment relationship between the plaintiff and his wife's company,  
it cannot be doubted that he would stand to benefit from any profit  
generated from his wife's business.

J 81. As for his trip to Phnom Penh, he said he was accompanying  
K a friend who was in Cambodia for the first time. When he was further  
L questioned on why he needed to go there, he revealed that it was for holiday.

M 82. During cross-examination, the plaintiff admitted that he did  
N not consult Dr Chan before he went on any of those trips. However, as a  
O matter of common sense, if the plaintiff was indeed suffering from such  
P severe persistent pain, one would have sought the advice from his doctor  
Q before taking such frequent trips. This may suggest that the plaintiff had  
already more or less recovered and was reasonably fit when he started to  
travel in April 2019.

R 83. All in all, all the medical and objective evidence goes to show  
S that the plaintiff's condition was not as severe as he alleged and there was  
T no proper justification for Dr Chan to have granted such prolonged sick  
U leaves.  
V



84. Ms Chan suggested that in light of the fact that the plaintiff was able to fly to Pakistan in April 2019, just over two months after the accident, the date of this trip can be used as a reference for ascertaining the period during which the plaintiff was prevented by the injuries sustained from returning to work. In other words, the appropriate sick leave should have expired by the time the plaintiff flew to Pakistan on 16 April 2019.

85. Having considered all the medical evidence before me, the plaintiff's behaviour and Dr Chan's pattern of granting sick leaves, it seems to me that the plaintiff should have recovered and was reasonably fit when he travelled to Pakistan and I accept Ms Chan's suggestion that the proper period for the calculation under this head should run from the date of the accident to 15 April 2019.

86. It follows that the pre-trial loss of earnings together with MPF should be:-

$$\$23,532 \times 65/30 \times 1.05 = \$53,535$$

*POST-TRIAL LOSS OF EARNINGS*

87. The plaintiff's claim under this head was revised to \$2,166,480 plus MPF of \$108,324.

88. The plaintiff told the court that because he was still suffering from persistent pains in the right chest, left back, both knees, left elbow pain, he can never return to his previous job as a general labourer. He

believed that he would be disadvantaged and discriminated in the labour market as most employers would choose someone who is more able-bodied than him.

89. He said that he had enrolled in a security guard course, and had attended a 2-day training course in September 2020. He hoped he could find a job as a security guard.

90. On the basis of a security guard having a notional monthly salary of \$14,380, the plaintiff was 31 years old at the time of the trial and will retire at the age of 55, Mr Wright submitted that the plaintiff is entitled to  $(\$25,000 - \$14,380) \times 17 \times 12 = \$2,166,480$ .

91. On the other hand, Ms Chan argued that the plaintiff is not entitled to any loss of future earnings and she gave the following reasons:-

(1) Both experts agreed that the plaintiff had achieved maximal medical improvement and there was no objective abnormality to substantiate his claim of such persistent pain and disability.

(2) There is no evidence that the plaintiff had sought further medical treatment after January 2020 save and except once in June 2020 and recently in April 2021 at the suggestion of his counsel.

(3) Other than a bare assertion that he could not return to work after the accident, there was no objective

evidence suggesting that the injuries sustained from the accident had prevented the plaintiff from going back to work.

(4) Contrary to the plaintiff's claim that he was keen to resume working, there is no evidence that he had made any attempt at all. When it was put to him that he had completed the course for security guard, he suddenly claimed that he was still not qualified because he needed two more "cards" (qualifications), but he did not explain why he had not obtained such qualifications yet. When he was asked why he did not try to find other light duty jobs, he kept repeating his complaint of persistent pain that he could not sit or walk for long. But such answers were inconsistent with the fact that he was able to conduct frequent trips overseas and sit through his testimony in court.

(5) There were numerous suspicious deposits in the HS account for which the plaintiff could not give any plausible explanation.

(a) Firstly, he said his wife had to use his bank account to receive deposits from her friends or business associates. However, he admitted that his wife had her own bank account and there is no reason why his wife would need to use his bank account to receive those funds, in particular

where inter-bank transfers were possible. In re-examination, he told the court that he did not know any of his wife's friends who deposited the funds into his HS account.

(b) Secondly, it was observed that on a number of occasions, the money allegedly given by his wife was deposited into his bank account but withdrawn almost immediately afterwards. He tried to explain that he deposited the money for safety reason, but he suddenly needed to use the money right afterwards. Ms Chan submitted that such an explanation did not make any sense, as one would expect his wife to simply pass him the cash for his immediate use.

92. Ms Chan therefore urged the court to scrutinise the plaintiff's claim that he could not resume working and he had no means of income.

93. The court has repeatedly held that it must take particular care in situations where the plaintiff claimed to suffer from chronic pain beyond the normal recovering time when there was no objective evidence to prove that the plaintiff has continuous injury: *Li Cheuk Lam* (supra) at §39. In the context of the present case where I have found the plaintiff to be unreliable and unbelievable as a witness, I must treat the plaintiff's assertions of persistent pains with grave reservations in particular where there is not a shred of objective evidence to prove the existence of such condition.

94. I also accept Ms Chan's observations and submissions on the plaintiff's HS account. The substantial deposits in the HS account which the plaintiff failed to provide any credible explanation do, in my view, cast doubt on the plaintiff's assertions that he had no means of income. The plaintiff's contention that some of the deposits were made by his wife also cannot withstand scrutiny (see paragraph 44 above). Moreover, the plaintiff's frequent trips to China also suggest the possibility that he was gainfully engaged in a business endeavour (be it his wife's or otherwise).

95. For the purpose of assessing the quantum of damages under this head, I will give no or little weight to the plaintiff's evidence, and will take into account primarily the experts' opinions on his residual impairment and the objective circumstantial evidence on the plaintiff's condition.

96. In relation the plaintiff's residual impairment, the two experts had the following to say:-

"Dr P Wong: The prognosis for Mr Khan's mild soft tissues injuries sustained in the accident are good. He is expected to have only mild residual pain from time to time as a result. He is not expected to have severe or persistent pain over multiple body parts as he claimed. He should not have any functional limitation as he claimed as a result of the accident.

Dr CH Wong: Despite certain degree of over expression of symptoms and signs, it is plausible for him to have residual pain on the exertion and repeated movement due to the sequelae of soft tissues and contusion/sprain injuries. His symptoms and sign would not resolve completely."

97. On the plaintiff's prospects of returning to work:-

“Dr P Wong: Mr Khan should be fully capable of returning to work on any of his pre-accident jobs. Reduction of work efficiency and capacity as a result of the accident should be minimal.

Dr CH Wong: Mr Khan would need to modify his work to accommodate for the residual pain on movement and exertion in his left elbow, left knee and right chest wall should he desire to return to work as a warehouse worker. He would also be suitable for alternative jobs such as process worker, messenger or shop assistant.”

98. Dr P Wong’s opinions on the above two aspects were firm and consistent with the rest of his opinion in the Joint Report. On the other hand, there is clearly a tone of reservation and uncertainty in Dr CH Wong’s opinion, as he said that there was a degree of over expression of symptoms, and it was only “plausible” for the plaintiff to have residual pain. He said that the plaintiff would need to modify his work to accommodate his residual pain but he did not say exactly how. Nonetheless, Dr CH Wong thought that the plaintiff could return to his previous job if he desired to do so.

99. What I gather from the experts’ opinions, therefore, is that whilst the plaintiff might have mild residual pain, the impact of the injuries on his capacity to work should be minimal and he should be able to return to his previous position should he wish to do so.

100. Even on the plaintiff’s case, he would be able to work as a security guard after the accident. Yet the plaintiff has not proffered any credible explanation for not seeking the required qualification or attempting to find any alternative employment. It appears to me that he

either simply sat on the sick leaves granted by Dr Chan or he was not being truthful when he said that he did not resume working.

101. For all of the above reasons, I do not think it is appropriate to award any loss of future earnings, for the plaintiff should be able to return to his pre-accident employment or an equivalent job well before this trial.

*LOSS OF EARNING CAPACITY*

102. The plaintiff claims a sum of not less than \$100,000 under this head, on the basis that he could not return to his pre-accident employment and he would only be fit for lighter jobs such as security guard or shop attendant. It is said that he has a real or substantial risk of unemployment.

103. Ms Chan on the other hand suggested that although the plaintiff had exaggerated the extent of seriousness of his injuries, a sum of not more than \$50,000 may be awarded.

104. I agree that the plaintiff's evidence on his injuries and condition has been grossly exaggerated and he ought to have been able to return to work not long after the accident. Meanwhile, I also note that Dr P Wong estimated the plaintiff to have 0.5% whole person impairment for possible mild residual pain whereas Dr CH Wong estimated a 3% total impairment.

105. Taking a broad-brush approach, I accept the defendant's suggestion and award a sum of \$50,000 under this head.

*SPECIAL DAMAGES*

106. The plaintiff claims \$11,100<sup>1</sup> for medical expenses incurred for his consultations with Dr Chan. The defendant objected to the consultation in June 2020, on the basis that plaintiff had elected to stop seeing Dr Chan in January 2020. The defendant therefore submitted that the sum of \$10,300 might be allowed, deducting the consultation in June 2020.

107. The plaintiff also claims a sum of \$3,500 for tonic food, travelling expenses and repair of his mobile phone. The plaintiff admitted that he did not produce any proof of these expenses. Nonetheless, the defendant agreed to pay the sum of \$3,500.

108. I allow a sum of \$13,800 for special damages.

*SUMMARY*

109. In summary, I am of the view that the plaintiff is entitled to the following amount of damages:-

PSLA	\$100,000
Pre-trial loss of earnings plus MPF	\$53,535
Loss of future earnings plus MPF	\$0
Loss of earning capacity	\$50,000
Special damages	\$13,800
Sub-total (before interest):	<u>\$217,335</u>

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<sup>1</sup> It appears that the plaintiff does not make a claim in respect of the recent consultation and MRI.



110. Interest on general damages shall run at 2% per annum from the date of the writ to the date of this judgment. Interest on special damages shall run at half judgment rate from the date of accident to the date of judgment. Post judgment interest of the assessed sum shall run at judgment rate until payment in full.

111. I make an order *nisi* that costs of this assessment on damages be paid by the defendant to the plaintiff, with certificate for counsel, to be taxed if not agreed. The order *nisi* shall become absolute unless an application to vary is made within 14 days from the date of this decision.

112. I think counsel for their assistance provided to the court.

( Zabrina Lau )  
Deputy District Judge

Mr Wright John, instructed by C M Chow & Company, for the plaintiff

Miss Margaret K M Chan, instructed by Tsang Chan & Woo Solicitors & Notaries, for the defendant