## DCPI 102/2018

[2022] HKDC 674

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 102 OF 2018

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BETWEEN

YEUNG SIU LING Plaintiff

and

HOSPITAL AUTHORITY Defendant

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Before: Master Louise Chan in Court

Date of Hearing: 22, 26 and 29 November 2021

Date of Assessment of Damages: 6 July 2022

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ASSESSMENT OF DAMAGES

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1. This is an assessment of the Plaintiff's damages in a personal injury case.
2. On 12 December 2018, the Plaintiff commenced the present proceedings against the Defendant for damages for personal injuries, loss and other damages suffered as a result of an accident at work. She claimed that the Accident was caused by negligence, breach of common duty of care, breach of statutory duty and/or breach of employment contract on the part of the Defendant, their servants and/or agents.
3. By a Consent Order filed on 23 November 2018, which was signed by the respective solicitors for the Plaintiff and the Defendant, the parties agreed that interlocutory judgment on liability be entered in favour of the Plaintiff against the Defendant with damages to be assessed.
4. At the trial for this Assessment of Damages, the Plaintiff was represented by counsel, Ms Jolie Chao, while the Defendant was represented by counsel, Ms Ann Lui. In the Opening of the Assessment of Damages, Ms Chao made an oral application to introduce two sets of supplemental witness statements from the Plaintiff and her husband respectively, which allow them to further explain the latest physical condition of the Plaintiff. Ms Lui raised no objection to have these new evidence be adduced except a particular paragraph in the Plaintiff’s Second Supplemental Witness Statement in relation to her post trial medical treatments should be deleted. Ms Lui argued that no particulars as to the Plaintiff’s future medical treatment was pleaded in the Revised Statement of Damages and neither the Plaintiff’s Supplemental Witness Statement, which was prepared in April 2021, raised any details as to future medical treatments.
5. The Court in exercising the discretion whether to accept new evidence is to take into account the prejudicial effect that may cause upon the Defendant. In this action, it is noted that a Supplemental Witness Statement was filed in April 2021, which explained the Plaintiff’s physical condition after her lower back operation. No medical evidence was provided showing the need for future medical expenses and the Plaintiff raised no allegations that there had been any changes in circumstances since she filed the last Supplemental Witness Statement. The Court also borne in mind that Master Matthew Leung on 26 May 2021 ordered that no further witness statements shall be adduced without the leaves from court. In this action, the Plaintiff has all along been represented by the same firm when all her witness statements were prepared and filed, and when the case was ready for set down. Ample opportunities had been given to the Plaintiff to adduce evidence in relation to her future medical expenses.
6. In light of the above and subject to the Defendant’s consent in accepting the supplemental witness statements of the Plaintiff and her husband, I allowed to have these two new sets of witness statements be adduced in this assessment of damages, but to have the paragraph in relation to the Plaintiff’s needs of future medical treatment be expunged. I also made a costs order against the Plaintiff in respect of this late application and ordered the Plaintiff to pay the Defendant costs for the time spent in dealing with these two sets of witness statements at the assessment hearing.

*Background*

1. The Plaintiff was employed by the Defendant as a Patient Care Assistant II since February 2004. On 26 December 2015, the Plaintiff slipped on a puddle of water while she was working n a ward in the Yan Chai Hospital (**“the YCH”**). She fell and landed on her buttocks (**“the Accident”**) thereby sustaining injuries allegedly over her back, hip, neck and leg.
2. It was the Plaintiff’s contention that the accident was caused by the negligence and breach of the contract of employment / statutory duty on the part of the Defendant.

The Plaintiff’s injuries and treatments

1. After the Accident, the Plaintiff was sent to the A&E Department of Yan Chai Hospital for treatment and the diagnosis was “back contusion”. The A&E Report dated 4 January 2017 showed *“no tenderness, deformity or swelling over her back; her lower limb power was normal. However reduced leg raising was found over her right side.”* X-ray also showed grade 1 spondylolistheses of L4 over L5. The Plaintiff was admitted to the orthopaedic ward of the YCH for a night and was discharged on 28 December 2015.
2. The Plaintiff had a private MRI performed in March 2016 with result showing mild degenerative spondylolisthesis on L4/5, posterior disc prolapse on L4/5, L5/S1 and L3/4, thickening of the ligamentum flava and facet joint degenerative changes on L4/5 and mild narrowing was shown on the L4/5 and L5/S1 discs. There was also a mild lumbar scoliosis with convexity showing on the left side, but no nerve impingement nor significant spinal stenosis or focal bony lesion was noted in the lumbar spine.
3. The Plaintiff was referred to the Tseung Kwan O Hospital (“TKOH”) for a course of physiotherapy from 15 January 2016 and was discharged on 14 March 2016. Physiotherapy report showed that the Plaintiff complained of back pain radiating to right leg at her first treatment but claimed that her overall condition was improved for about 60% on the day of discharge.
4. The Plaintiff started receiving occupational therapy for work rehabilitation on 17 February 2016 with main complaints of *“lower back pain, numbness over right lower limbs, residual medial right knee pain, right hand numbness”*. She attended a total of 29 sessions and was discharged on 12 July 2016 with no significant improvement. Not all assessment reports were documented in the Medical Report bundle but three of them indicated that the Plaintiff showed positive Waddell’s signs (4 out of 5) and the therapist concluded on the last session that *“no assessment could be made in relation to the Plaintiff’s actual work capacity due to self-limiting performance”.*
5. The Plaintiff alleged that the last session of occupational therapy on 12 July 2016 was too strenuous and left her with unbearable pain so much so that she needed to attend the A&E Department of TKOH on the following day for increased lower back pain. Diagnosis from the treating doctor was “low back pain” with “lumbar spine x-ray: degenerative change”. She was admitted for one night and medical report shows that the Plaintiff back pain improved shortly after the admission.
6. During the period when the Plaintiff was receiving her occupational therapy, she also received six private treatments with chiropractor from 5 May to 1 June 2016. The medical report from Dr. Benjamin Yip revealed that her main complaint was low back pain radiating down to left thigh.
7. After being discharged from the physiotherapy treatments at the TKOH, the Plaintiff went to the Occupational Medicine Care Services in Princess Margaret Hospital on 13 May 2016 and obtained a referral letter for further physiotherapy treatments (no medical notes but only a referral note was exhibited). She therefore started her *second* course of physiotherapy treatments at the TKOH from 13 June 2016 for back pain management.
8. The Plaintiff was seen at the Orthopaedic Department of YCH on 9 September 2016 with improved back pain. Despite her improved back pain and the on-going physiotherapy treatments with the TKOH, the Plaintiff started receiving a course of musculoskeletal therapy from a private clinic in October 2016. The medical report prepared by her treating therapist Dr. Keith Chan stated that the Plaintiff complained of pain on her lower back and her right lower limb pain, and a relapse of her left buttock pain despite showing a full left hip motion range. Dr. Keith Chan said the Plaintiff reported that she felt “a lot better” after the treatment on 30 October 2016.
9. Shortly after her visits with Dr. Keith Chan for her musculoskeletal therapy, the Plaintiff attended the Department of Staff Clinic at the Queens Elizabeth Hospital **(“the QEH”)** on 3 November 2016 complaining about her back and neck pain. The relevant medical notes showed that the Plaintiff said the neck pain had persisted for a few days with stiffness but the treating doctor opined such pain was mechanical with no association with upper limbs numbness nor weaknesses. She was given a referral letter to receive further physiotherapy treatments at the TKOH and a follow-up consultation in late December 2016. It is noteworthy that this was the first time on record that the Plaintiff complained about her neck since the Accident.
10. And just few days after her visit to the QEH, she went to the Tseung Kwan O (Po Ning Road) General Out-patient Clinic (“TKO (PNR) GOPC”) on 9 November 2016 for her lower back pain. Relevant medical notes showed that the Plaintiff made a few visits between November and December 2016 but there was no mention about her neck or leg pain. And while being seen by the TKO (PNR) GOPC, the Plaintiff also started making her visits to the Tseung Kwan O (Jockey Club) General Out-patient Clinic (“TKO (JC) GOPC”) from the 22 November 2016 for her lower back pain. The diagnosis from all treating doctors were “muscle spasm with limited movement”. Her visits to both these GOPC ended by December 2016.
11. The Plaintiff then underwent a surgery for her right carpal tunnel syndrome on 14 February 2017 at the Orthopaedic Department of the TKOH. There were no records showing that the Plaintiff made any further visits to any government/private hospitals and/or clinics regarding her pain in the lower back/ neck/ legs until 27 July 2017 for a follow-up appointment at the TKOH (transferred from the YCH). She explained to the treating doctor that there was pain around her lower back region but had improved. A MRI of lumbar spine that was requested when she was still under the care of YCH was taken place on 21 August 2017 with the following results:-
12. Dessicated disc at L3/4, L4/5 and L5/S1
13. Loss of disc height at L4/5 and L5/S1
14. Left paracentral disc protrusion at L4/5
15. Spinal stenosis at L4/5 due to prolapse intervertebral disc
16. The diagnosis was lumbar spinal stenosis with L4/5 spondylolisthesis, and the option of surgical intervention was discussed with the Plaintiff. She expressed her wish for conservative treatment and during her follow-up consultations between October 2017 and April 2018, her main complaint was some on and off lower back pain.
17. The Plaintiff went to the Central Kowloon Health Centre on 27 March 2018 for her sleep problem. She told the treating doctor at her second visit on 17 May 2018 about her neck pain and an X ray of cervical spine was performed on 15 July 2018. Result showing a narrowing of C5/6 and C6/7 disc spaces, left of C5/6 and bilateral C6/7 intervertebral foramina. She was referred for physiotherapy.
18. At the consultation on 12 September 2018, the Plaintiff told the doctor that her back pain and left side numbness had “significantly affected her activities of daily living”. She expressed her wish for an operation and subsequently on 8 May 2019, the Plaintiff underwent Posterior Decompression, Instrumented Posterior Spinal Fusion and lumbar interbody fusion for L4/5 (**“the Operation”**). The Operation went smoothly and the Plaintiff continued with her physiotherapy from 27 May 2019 to 5 August 2019.
19. In the Plaintiff’s written statement dated 14 February 2019 admitted in evidence, she said that she was still troubled by the back injury and had the following symptoms:-
20. Persistent low back pain;
21. Lower limbs numbness, worse on left side;
22. Neck pain;
23. Walking tolerance around 5 minutes;
24. Difficulty in going up and down stairs, prolonged sitting and walking;
25. Difficulty and restriction in bending and squatting;
26. Unable to lift anything heavy;
27. Trouble sleeping; and
28. Low mood and feeling anxious.

1. In her Supplemental Witness Statement that was prepared almost two years after her Operation, the Plaintiff said she is still suffering from most of the symptoms listed above but with improved lower back pain and lower limbs numbness.
2. Due to the above symptoms, the Plaintiff did not return to work since the Accident and is currently unemployed.

*Joint Expert Report*

1. A Joint Medical Examination (**“the JME**”**)** was held on 11 May 2018 by the Plaintiff’s expert Dr. Tio Man Kwun Peter (**“Dr. Tio”**) and the Defendant’s expert Dr. Ko Put Shui Peter (**“Dr. Ko”**). Parties agreed that the Joint Orthopaedic Expert Report dated 26 September 2019 (“**the Joint Report**”) and the Supplemental Expert Report dated 6 January 2020 (**“the Supplemental Report”**) be adduced without oral evidence at the trial of this action.
2. Both experts agreed that the injury sustained by the Plaintiff was consistent and compatible with contusion injury to her low back region and she suffered from pre-existing degenerative changes to her lumbar spine L4/5 prior to the Accident. In relation to the Plaintiff’s lower limb numbness, both experts also agreed that all medical reports showed no genuine sign of neurological deficit and full lower limb power in both left and right sides were documented in most examinations.
3. The major difference between the experts turned on to the necessity of undergoing the Operation and the apportionment of the Plaintiff’s current disability as resulting from her pre-existing condition. In the Joint Report, Dr. Ko opined there was *“no indication for any surgical intervention on the Plaintiff’s condition”* and *“there should be contraindication because of inconsistent clinical signs at this joint assessment on 11 May 2018”*. The inconsistency Dr. Ko referred to is the fact that the Plaintiff made no complaint about her left lower limb but only right lateral lower limb numbness at the examination, which contradicted to other available medical reports documented. He further explained that the Plaintiff’s overall complaint as to lower limb numbness is inconsistent to the findings of her physical examination as she showed no lower limb neurological deficit and both lower limbs sensation was normal.
4. Since the Plaintiff had eventually undergone the Operation *after* the JME, Dr. Ko furnished the Supplemental Report which he further explained that *“this surgical intervention was purely and solely for the management of her degenerative lumber spine disease which had already been pre-existing before the alleged accident and couldn’t possibly have been caused by any injury that she sustained on 26 Dec 2015 which was essentially and practically a contusion injury to the low back region that occurred on the alleged accident on 26 Dec 2015.”*
5. Dr. Ko opined that the Plaintiff should have reached maximal medical improvement and static condition by around 6-8 months for her contusion injury to the low back region after the Accident, and could resume her usual activities of daily living and her pre-accident job as a care assistant without any significant impairment of her work efficiency and effectiveness.
6. On the question of residual impairment, Dr. Ko considered the muscle contusion suffered by the Plaintiff would only attract 1% whole person impairment and apportioned 50% of the Plaintiff’s current disability as resulting from her pre-existing changes. He referred to 3 possible future scenarios: (1) going through life unaffected by symptoms; (2) strong possibility of current symptoms occurring through some life event or progression of the back condition; and (3) certainty of current symptoms manifesting in any event.  He considered that, but for the accident, the Plaintiff’s condition should be categorized under the scenario (2).
7. Dr. Tio on the other hand, opined no apportionment would be necessary since the Plaintiff showed no history of back symptoms or signs prior to the accident. Although he agreed that there was pre-existing degeneration, it would fall between scenario (1) and (2) and the Accident had advanced the onset of her symptoms over her lower back by roughly 10 years. He further assessed a 7-8% of whole person impairment and loss of earning capacity.
8. As to the Operation, Dr. Tio expressed that *“She had been adequately treated for a prolonged period of time before proceeding to a major operation for her lower lumbar spine… It would be likely that the treating doctors should be of the opinions that her symptoms should be severe/disabling enough for such an operation and the operation should be done in favour of the recovery of her back condition after exhausting possible conservative treatments… The operation should be considered to be done mainly with the symptoms for the captioned injury rather than for the pre-existing condition.”*
9. As to prognosis, Dr. Tio considered the Plaintiff would suffer from residual back pain, stiffness, weakness and loss of endurance and may require up to 9-12 months of rehabilitation after the Operation. He considered the Plaintiff be capable in carrying out most of her activities with some inconvenience due to her limitation in handling heavy work as well as her sitting and walking tolerance. Dr. Tio nonetheless opined that the Plaintiff could resume her pre-accident duty as a care assistant but with reduced efficiency and capacity. He recommended it would be more appropriate for her to consider job relocation to other lighter duties to avoid heavy manual work or prolonged walking and standing etc.
10. In light of the above, the first question this Court needs to consider is that how much the symptoms the Plaintiff is suffering are caused and/or aggravated by the Accident, and thus the question of apportionment. The Court would also consider whether the Operation is an appropriate treatment in respond to the injuries sustained in the Accident itself.
11. It is common ground that X-ray imaging was taken immediately after the Accident showing that the Plaintiff suffered from Grade 1 spondylolisthesis of L4 over L5.
12. The respective MRI imaging that were taken 3 months and 20 months after the Accident were both submitted for the experts’ considerations. Both experts in the Joint Report agreed that the first MRI images showed pre-existing long standing degenerative spondylolisthesis at L4/5 and degenerative changes in multiple levels in the lumbar spine region. And when comparing with the ones taken in 2017, both experts agreed, quite contrary to the Plaintiff’s case, that *“similar findings on MRI examination on 21 August 2017 at CMC was reported and found”*.
13. With reference to the medical report by Dr. Ivan Tsui from Apex MRI Centre dated 9 March 2016, *“the degenerative changes in multiple levels in the lumbar spine region”* referred by the experts were actually some mild narrowing of the L4/5 and L5/S1 discs and posterior disc prolapse of L4/5 and L5/S1 along with other degenerative changes. The Medical Report dated 13 August 2018 by neurosurgeon Dr. Clarence Leung of Pedder Clinic, who reviewed the Plaintiff’s both MRI images commented that the 2017 MRI images showed *more* disc prolapse at L4/5 especially on the left side compromising the traversing L5 nerve root, but spondylolisthesis remains the same. Further, a Medical Report dated 15 August 2019 by Dr. Eric Ho Po Yan, who was the Plaintiff’s treating doctor at the Orthopaedic Department of the TKOH also commented that the 2017 MRI images showed that *“spinal stenosis at L4/5 due to prolapse intervertebral disc”* and her case was treated as lumbar spinal stenosis.
14. In light of the above, I disagree with the experts’ views that the findings between the 2016 and 2017 MRI reports were similar. I am satisfied that the Plaintiff’s prolapsed discs got worsen between March 2016 and August 2017.
15. Notwithstanding these objective medical findings, Dr. Ko viewed that such aggravation on the Plaintiff’s pre-existing lumbar degenerative diseases could not be caused by the uncomplicated soft tissue contusion on her lower back injury, and thus the Operation itself has nothing to do with the injuries the Plaintiff suffered.
16. Dr. Tio did not explain how far the Accident could aggravate the Plaintiff’s pre-existing condition, but he agreed that all the treatments the Plaintiff received subsequent to the Accident were standard and appropriate. The Operation was offered and done as a result of the failed conservative treatment to resolve the symptoms that sustained by the Plaintiff.
17. In light of the above, I came to the following conclusions that:-
18. The Plaintiff suffered from pre-existing spondylolisthesis and prolapsed disc at L4/5 at the time of the Accident;
19. The Plaintiff took two days’ sick leaves in March 2015 for pain in her right hip and thigh. While the defence suggested that the Plaintiff was suffering from sciatica as early as that stage, it is more conservative to say that the Plaintiff suffered some pain symptoms that would allow the treating doctor to suspect sciatica.
20. I considered the work nature of the Plaintiff and found that it would be difficult for her to perform her daily duty if she suffered from some severe posterior prolapse or spondylolisthesis. I therefore accept the evidence of the Plaintiff that she did not suffer from any severe back symptoms before the Accident;
21. The Operation was done in view of the Plaintiff’s general degenerating intervertebral disc that has caused her pain and numbness (degree of such will be discussed hereinafter) since the Accident;
22. It is common knowledge that degenerative changes take a long time to form. The Court bears in mind that the Plaintiff was almost completely pain free in her lower back prior to the Accident but started showing some rapid deterioration within 2 years after her muscle contusion. I therefore consider it is more probable than not that such injury has caused aggravation on her pre-existing lower problems.
23. As such, I accept the Plaintiff’s counsel submission that the Accident is a substantially contributing cause of the Plaintiff’s injury and the Defendant cannot escape liability for the loss caused by the aggravated pre-existing condition. Since the Operation was presented as a viable option for the Plaintiff to solve the symptoms of her degenerative spine diseases which were aggravated by the Accident, the “thin skull” rule applies and the Defendant must take his victim as he finds him.
24. On the question of apportionment, medical records show that the Plaintiff started to complain about her neck pain in November 2016 and raised it again when she visited the Central Kowloon Health Centre in August 2018. X-rays showed that there were narrowing of her C5/6 and C6/7 disc spaces. No medical evidence suggested that the Accident has caused her any injuries to the neck as such I am of the view that the Plaintiff has also developed some degenerative problem on her cervical spine.
25. Together with the fact that the Plaintiff’s treating doctor suspected sciatica just 6 months before the Accident, I am more inclined to view that the Plaintiff’s whole spine has started degenerating before the Accident but they were mostly asymptomatic and mild in nature. Considering the nature of the Plaintiff’s pre-accident job, I agree with Dr. Ko that there is a strong possibility that there are some other events, or the natural progression of the Plaintiff’s pre-existing conditions would have brought about her present state, but for the Accident.
26. Taking into account of the Plaintiff’s age and the onset of the Plaintiff’s degenerative vertebral spine which kicked in around November 2016, I disagree with Dr. Tio that the current Accident had advanced the onset of her degenerative lumbar disc disease by 10 years. I incline to view 5 years as a more reasonable figure.
27. Taking into account of both the experts’ views, the apportionment exercise cannot be performed scientifically but is a matter of judgment and impression. I find that the accident was responsible for about 80% of the Plaintiff’s condition from the time of the accident up to the present.

*The Plaintiff’s Credibility*

1. The Plaintiff averred that she could not resume her duty as a Personal Care Assistant due to the pain and numbness around her lower back and lower limbs, and her inability to handle heavy manual labour. The Defence submitted that the level of pain and sufferings alleged by the Plaintiff is questionable based on mainly the following reasons:-
2. The Plaintiff’s complaints about her lower limbs’ numbness and pain were inconsistent. She switched between right and left leg at different consultations with various doctors;
3. Three positive Waddell’s tests results (with Waddell’s inappropriate signs recorded at 4 out of 5) in the Occupational Therapy Assessment;
4. Made frequent visits to various clinics, private and public, for extension of sick leaves even when condition became stable.
5. On the question of her inconsistent pain switching between right and left lower limbs, the Court bears in mind that the Plaintiff suffered from osteoarthritis on her right knee and had an operation of arthoroscopy in around March 2014. From the available medical records, the Plaintiff was still attending regular follow-ups at the QEH in early 2016. I found it possible that the pain the Plaintiff referred to on her right limb could be the residual pain from her knee’s condition. And as can be seen from the admission notes of the A&E of the YCH, the Plaintiff did complain about right paraspinal tenderness. Without medical explanation elaborated by either experts, I accept the injury the Plaintiff suffered at the time of the Accident involved the right side of her lumbar region and it is probable to have caused her some residual pain on her right lower limb.
6. On the other hand, while Dr. Ko suggested that there were inconsistent clinical signs as the Plaintiff did not mention her left lower limb pain, he provided no medical evidence suggesting that the degenerative spinal disease could only radiate pain to one side of the lower body. I accept that such lower limb pain/numbness can be switched from one side to another from time to time.
7. I have already recited in details the medical treatments the Plaintiff has received since the Accident in paragraphs 9-23 and I shall not repeat here. The Court accepts that the severity of the pain, either objectively or subjectively suffered by the Plaintiff, would be more intense when she started receiving her treatments.
8. The Court also accepts the Plaintiff’s counsel argument that the exhibition of “Waddell signs” can only be taken to indicate that there may be a non-organic cause to her perception of pain and the Court should be slow in coming to the conclusion of malingering or exaggeration from the Plaintiff.
9. However, when looking into the chronology of the Plaintiff’s medical treatments in 2016, it is apparent that she frequented hospitals and clinics *extensively* with complaints of her back pain around those 6 – 8 months when she was waiting for her Employees’ Compensation Assessment & Review, which was held on 6 October 2016 and 5 January 2017. Yet when reading into the detailed consultation notes from all her treating doctors at the Orthopaedic Department with YCH, her physical examination in terms of motion and limbs power were all within appropriate range with no nerve impingement and her condition was described as ‘static’.
10. It is also noted that the Plaintiff self-assessed her overall condition was improved for about 60% before she was discharged from her first course of physiotherapy at the TKOH on 14 March 2016. The Consultation Summary from her treating doctor at the Orthopaedic Department of TKOH dated 15 July 2016 read as follows:-

*Occu: progress plateau*

*… reminded the patient that SL (“sick leaves”) may not be continued in next appt because no active PT/OT (“physiotherapy/ occupational therapy”) treatment at the moment*

1. Notwithstanding such reminder made by his treating doctor, the Plaintiff was granted a further 27-day sick leaves on her subsequent appointment in early September 2016 as she obtained a referral letter for a second session of physiotherapy from the Occupational Medicine Care Services in PMH. And on the date when this sick leaves period expired, (which is also the date of her EC Assessment), she started a course of musculoskeletal therapy with Dr. Keith Chan with sick leaves granted until 3 November 2016, after which the Plaintiff went to the Staff Clinic at the QEH for consultation with more sick leaves granted. A similar pattern occurred thereafter that the Plaintiff would frequent various outpatient clinics complaining lower back pain with occasional lower limb numbness and had her sick leaves extended.
2. The EC (review) assessment was made on 5 January 2017 and she was given 117 days of sick leaves by the attending doctor at her last visit with the Orthopaedic Clinic at the YCH on 9 January 2017. Interestingly, all these frequent complaints of pain and suffering came to an abrupt stop and there were no further medical records showing the Plaintiff’s emergency needs of medication or medical attention for her lower back pain. She was also discharged from the second physiotherapy session on 19 January 2017 with a subjective overall improvement of 60% for her back pain and 70% for her neck pain.
3. The Plaintiff did not attend any hospitals/clinics for her back pain problem until July 2017 at a follow-up consultation when she told the doctor that her back pain was better after seeing bonesetter/chiropractor. She made similar complaints of back pain and occasional left leg pain and numbness in the next few consultations and in May 2018 at the JME, she told the experts that she had no problem in managing her activities in daily living. Her condition however deteriorated quickly thereafter, so much that she requested for an operation at a consultation in August 2018 as she felt the pain and her left side numbness has significantly affected her daily living.
4. The Plaintiff has called her husband to give evidence in order to explain, inter alia, how her daily activities been affected. I find that his evidence cannot advance the Plaintiff’s case as all he said was simply to reaffirm his wife’s evidence as to the pain and suffering.
5. Having considered all the medical reports and consultation summaries in details, I consider that the Plaintiff had genuine pain and symptoms in the lower back and the lower limbs but that the degree might not be as severe as the Plaintiff claimed. I accepted some weight should be placed on the three positive Waddell’s tests assessed by professionally trained therapist. I found that the back pain she suffered sometimes between 2016 and 2017 was actually *less* severe than what she suffered in 2018 due to the more significant stenosis. Evidence suggested that the Plaintiff made very frequent complaints about her back pain in 2015 *before* her EC assessments (both first and review assessment) and I have reasons to believe that she was ‘shopping around’ for doctors who would extend her sick leaves. This belief is supported by the fact that all her pain complaints and frequent visits to various out-patient clinic came to a stop when she was given a 117-day sick leaves and she did not even feel the need to extend her physiotherapy.
6. I borne in mind that the Plaintiff gave evidence in her witness statement that she received some treatments from bonesetter in 2017, but no receipts were provided and it is unknown to the court how often she received those treatments. I would not put so much weight on this averment.
7. On the other hand, I accept the Plaintiff’s counsel argument that it would be unrealistic to suggest that the Plaintiff’s doctors would allow her to receive such invasive treatments unless her problem is genuine. I also accept that it is quite improbable for the Plaintiff to exaggerate her pain at the expense of subjecting herself to all the risks associated with an operation.
8. I therefore find that the pain and sufferings were moderate in 2016 but started worsening and became severe by August 2018. However, I do accept that her current back condition will continue to have an impact on her and curtail her activities with a lower tolerance level of prolonged sitting and standing. As to her residual impairment, I am satisfied that she now only suffers from mild symptoms and there is no reason why she would not be able to walk without a stick. Taking into account of both experts’ views, I consider the Plaintiff should suffer no more than 4% impairment of the whole person and earning capacity.  As I have just found, the accident was responsible for about 80% of her present condition.

*PAIN, SUFFERING AND LOSS OF AMENITIES (“PSLA”)*

1. The Defence submitted that the award for PSLA should not be more than $100,000 take taking into account of Dr. Ko’s view that her injury should only be a simple muscle contusion. Ms Lui submitted that should the Court decides on any award above $100,000, then a discount of 50% on ground of the pre-existing degeneration of the spine should be taken into account.
2. As I have already decided that the Defendant should be liable for all the Plaintiff’s symptoms including those degenerative spine diseases which were aggravated by the Accident, I would not need to consider the authorities submitted by the Defence, save that a 20% discount will apply to reflect her pre-existing condition.
3. I am therefore left with the 5 authorities submitted by Ms Chao. She has fairly considered that the Plaintiff’s condition should fall below the lower end of the “serious injury” category and the Court should make an award in the region of $500,000.
4. Guided by the authorities cited to me, I view that *Chan Yuet Keung v Harmony (International) Knitting Factory Ltd* [2010] 5 HKLRD 599 and *Wong Man Kin v Golden Wheel (C&HK) Transportation Company Limited* (unrep, HCPI 913/2011) are both good comparable as the plaintiffs involved in similar kind of accidents, sustained similar kind of injuries and suffered from similar pre-existing conditions. I bear in mind that the $300,000 PSLA awarded in *Chan Yuet Keung* was made in 2010 and the amount reflected a 10% apportionment due to pre-existing conditions. I would say the injury in that case was less serious than the present case as the plaintiff in *Chan Yuet Keung* was not presented with the option to undergo any spinal operation. I am also aware of the PSLA awarded in *Wong Man Kin* was in 2015, which had also taken into account of his psychiatric injuries. I consider the extent of injuries and pain sustained by *Wong Man Kin* would be slightly more serious than the Plaintiff as he presented with more physical symptoms of impairment (such as muscle wasting on his calf and a general reduction of power on his left leg). I nonetheless regard it because both the experts in that case consider the degenerative changes in his low back warrant an option of spinal operation. Last but not last, the final award of $500,000 has already reflected the 10-20% discount of pre-existing conditions.
5. Based on the above analysis and taking into account of inflation since those awards were made, I agree an award in the region of $500,000 before apportionment is appropriate. After taking into account the discount on ground of the pre-existing degeneration of the spine, the award will be **$400,000**.

*PRE-TRIAL LOSS OF EARNINGS AND MPF*

1. It is the Plaintiff’s case that the extent of injuries sustained would not allow her to return to her job as a Patient Care Assistant II. She was 56 at the time of the Accident and 62 at the time of the trial. She was given continuous sick leaves from the date of the Accident. She gave evidence and agreed by the Defendant that there is a mechanism for the Defendant’s staff to apply for employment extension after the mandatory retirement age, which is 60 years old in her case. The Plaintiff avers that she never had any intention to retire by 60 and she would work until 65 but for the Accident. It is the Plaintiff’s case that she would have a good prospective in being hired to work until 65 based on her work experience, good health and insufficient manpower of her position.
2. Ms Shum (“Shum”), who is an Assistant Human Resources Manager of the Defendant was tendered to give evidence. She has made two witness statements; the contents of the first witness statement which was about the Plaintiff’s salary and retirement age are largely undisputed. Shum, in her Supplemental Witness Statement, explained that the Defendant has devised a policy which allows staff members of the Plaintiff’s position to engage only Light Duty Arrangements (“LDA”) for medical reasons.
3. Shum gave evidence that the Plaintiff was put on LDA on 5 different occasions in 2008, 2014 and 2015 due to various medical conditions. It is the Defence case that not only the Plaintiff ought to be fit enough to return to her job after the Accident (with 6 to 8 months of resting as per Dr. Ko’s opinion), she never made consultation with her supervisor in relation to possible LDA after the Accident. I find Shum is an honest and credible witness. I accept all her evidence.
4. It is not disputed that the role of a Patient Care Assistant involves heavy manual work, such as lifting, moving and positioning patients, assisting them in shower etc. During cross-examination, the Plaintiff explained her job also involved lighter duties such as preparing food and drinks for patients, taking vital readings, prepare equipment for other medical officers. The Plaintiff gave evidence that she was not aware of a LDA system and she disagreed that she had been put on LDA on 5 occasions. She agreed that she was given less strenuous tasks after she had operation for her left hand carpal tunnel syndrome.
5. I found it incredible that the Plaintiff was not aware of the LDA system. Even if she did not know the details of such policy *per se*, she ought to know that she had been assigned with lighter duties after her operation done in 2015 (which lasted for 20 weeks) and her operation of arthorosc done in 2014 (which lasted for 8 weeks). In this regard, I am of the view that the Plaintiff was trying to be evasive when being questioned her genuine intention in returning to her job.
6. I accept that there could be light duties be arranged for the Plaintiff if she had asked. While the Plaintiff averred she had every intention in going back to work, evidence shows that she lacked such incentive. She did not accept the recommendation for job changes and with vocational resettlement services offered by her occupational therapist neither did she take an active approach to explore the possibility of lighter duties with her employer at any time since the Accident.
7. As discussed above, I found that the Plaintiff has exaggerated her pain sometimes between 2016 and 2017. Ms Chao submitted to the Court that the Plaintiff’s inability to walk without aid since the Accident demonstrated the impossibility of her returning to her old job, as Shum also gave evidence in Court that they could not have a care assistant working in the ward requiring walking aid. However, when taking into account of all the objective medical findings such as her range of motions and power of both her lumbar spine and lower limbs, as well as the absence of nerve compression on her spine, I am satisfied that such alleged need of walking aid is without medical findings. I consider a 10-months’ sick leaves from the time of the Accident is more appropriate. I do not agree with Dr. Ko that her condition in October 2016 would allow her to perform a range of strenuous tasks, but the Plaintiff would be given lighter tasks (and shorter working hours) which are compatible to her physical condition.
8. I have explained earlier that the Plaintiff did not complain about her back pain since early 2017 until her first appointment with the Orthopaedic Department at TKOH in July the same year. MRI performed in August showing worsening stenosis and although the Plaintiff did not complain her back pain got worsen at this stage, I am convinced that the sick leaves granted by her treating doctors are reasonable based on medical reasons. I therefore allow sick leaves granted to her again from September 2017 until 10 months after she had her Operation.
9. Dr. Tio opined that the Plaintiff would be able to return to her job as a patient care assistant after 8-12 months of rehabilitation from the Operation. He said any strenuous tasks should be avoided as that could aggravate her lower back pain. I accepted his view and adopt 10 months as an appropriate period for the Plaintiff to undergo all necessary rehabilitation before returning to work in around March 2020. I believe the Defendant would be able to make LDA for the Plaintiff if she made the request.
10. As such, I am convinced that the appropriate lengths of sick leaves should be granted to the Plaintiff as follows:-

27/12/2015 to 26/10/2016

5/9/2016 to 8/3/2020

1. As to the Plaintiff’s retirement age, I mentioned in earlier paragraphs that taking into account of the Plaintiff’s age and the onset of the Plaintiff’s degenerative vertebral spine which kicked in around November 2016, I believe the current Accident had advanced the onset of her degenerative lumbar disc disease by around 5 years. I agree the Plaintiff’s employment contract with the Defendant would likely be extended due to her experience but not so much for her *good health* as submitted by Ms. Chao*.* The Plaintiff underwent 3 different kinds of operations on her knee and both hands, all of degenerative nature between 2014 and 2017. I have grave reservations if her employment contract with the Defendant can be extended for 5 years neither am I convinced that the Plaintiff could secure a job in private sector especially when there would be no ‘light duties’ can be arranged. Shum gave evidence that the re-hiring mechanism allows the employment contract be extended for every 1, 2 or 3 years. I am more inclined to view that the Plaintiff’s degenerating health would have caused her to retire by 62 years old but for the Accident.
2. Based on the above, and by adopting the median figure of Plaintiff’s earnings (excluding MPF) submitted by Ms Chao, the Plaintiff’s pre-trial loss of earnings & MPF would be as follows:-

|  |  |  |
| --- | --- | --- |
| Period | Loss of Earnings & MPF | Amount |
| 27/12/2015 to  26/10/2016 | HK$19,910.50 x 10 mths x 1.05 | $209,060.25 |
| 5/9/2017 to  8/3/2020 | HK$19,910.50 x 30.1 mths x1.05 | $629,271.35 |
|  | **TOTAL** | **$838,331.60** |

*SPECIAL DAMAGES*

1. Special damages reflecting all the medical expenses, travelling expenses and tonic food expenses were agreed by both parties at **$30,000**.

*POST-TRIAL LOSS OF EARNINGS & MPF*

1. As explained above, the Plaintiff should be able to continue with her pre-Accident job until the age of 62. I therefore make no award under this heading.

*LOSS OF EARNING CAPACITY*

1. As the result of the injuries and impairment suffered by the Plaintiff, I agree that the Plaintiff will run a risk of losing any employment she may be able to find in the future and suffers a handicap in the open labour market. Given the age of the Plaintiff and the stability of the job she had prior to the Accident, 2 months of her median salary will be appropriate to cover her loss under this head and such sum is to be apportioned by 20% reflecting her pre-existing condition: ($19,910.50 x 2) x80% = **$31,856.8**.

*POST-TRIAL EXPENSES*

1. The Plaintiff received physiotherapy after her Operation as suggested by Dr. Tio and she could continue receiving further treatments from the Government hospitals. I will not make any awards under this heading as no evidence suggests the needs of any further medical care.

*ECC CLAIM*

1. The Plaintiff shall give credit to a total of $670,273.44 received as employee’s compensation from the Defendant.

*SUMMARY*

1. The Plaintiff’s damages is now assessed as follows:-

|  |  |  |
| --- | --- | --- |
| (a) | PSLA | $400,000.00 |
| (b) | Pre-trial loss of earnings | $838,331.60 |
| (c) | Loss of earning capacity | $31,856.80 |
| (d) | Special damages | $30,000.00 |
|  | **Sub-total** | **$1,300,188.40** |
|  | Less: employees’ compensation | $670,273.44 |
|  | **Total:** | **$629,914.96** |

Interest and costs

1. Interest on general damages in the sum of $431,856.80 will be awarded at 2% per annum from the date of issue of the writ to the date to the 6th July 2022 and thereafter at judgment rate until payment. Interest on other pre-trial loss and special damages will be awarded at half the judgment rate from the date of the accident to the 6th July 2022 and thereafter at judgment rate until payment.
2. Subject to the costs order I made at the hearing of the assessment as mentioned in paragraph 8 hereinabove, I also make a costs order *nisi* against the Defendant in favour of the Plaintiff for the assessment of damages proceedings with Counsel’s Certificate, to be taxed if not agreed.  The above order *nisi* shall become absolute after 14 days from the date hereof unless any party applies to vary them within this 14 days’ period.
3. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
4. It remains for me to thank Ms Chao and Ms Lui for the assistance they have rendered to the court.

( Louise Chan )

Master

Ms Jolie Chao, instructed by Joseph Leung & Associates, for the Plaintiff

Ms Ann Lui, instructed by Deacons, for the Defendant