DCPI 961/2019

[2022] HKDC 313

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 961 OF 2019  
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BETWEEN

|  |  |
| --- | --- |
| FAISAL | Plaintiff |
| and |  |
| OCEAN PARK CORPORATION | Defendant |

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| --- | --- |
| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing:  Date of Closing Submission: | 18-21 January 2022  8 February 2022 |
| Date of Assessment of Damages: | 7 July 2022 |

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ASSESSMENT OF DAMAGES

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1. The plaintiff claimed to have a slip and fall accident in the lavatory of Ocean Park with his neck hitting the hard toilet bowl on 15 March 2017 (“the Accident”).
2. Interlocutory judgment on liability has been entered by consent on 12 April 2019 and this is the hearing for assessment of damages.

*Pain, suffering and loss of amenities*

1. The plaintiff claimed to have slipped and fell backwards hitting the back of his neck on a toilet bowl. He said that there was no loss of consciousness but he could not move after the fall. He was helped to get up by ambulance personnel who took him to the A&E of Ruttonjee and Tang Shiu Kin Hospitals.
2. According to the A&E medical report (Trial Bundle page 104), the plaintiff was found to have *“diffuse tenderness at posterior neck associated with decreased range of movement of cervical spine”*. CT scan was performed which found *“no vertebra collapse and no dislocation”*. He was given various painkillers and discharged with 3 days of sick leave given (until 18 March 2017).
3. On 18 March 2017, he sought private medical treatment from orthopaedics surgeon Dr. David Ip (“Dr. Ip”) for *“persistent pain and stiffness”* (Dr. Ip’s medical report, Trial Bundle page 105).
4. An X-ray was performed and the report (Trial Bundle page 102) showed an *“exaggeration of cervical lordosis”*, *“mild anterior wedging of C3 to C6 vertebral bodies”* and *“mild degenerative changes”* etc.. There was no report of any findings of fracture, vertebra collapse or dislocation.
5. The plaintiff was treated by Dr. Ip with medications, neck collar and physiotherapy until 21 November 2017 (according to Dr. Ip’s medical report, Trial Bundle page 105)
6. The plaintiff then returned to Pakistan for 2-3 months and claimed to have received further treatment there. There was a sick leave certificate dated 14 February 2018 from *“DIV HQ Hospital Mirpur AJK”* (Trial Bundle page 103).
7. On 29 June 2017, after he returned to Hong Kong, the plaintiff started consulting another private orthopaedic surgeon, Dr. Chan Sai Keung (“Dr. S.K. Chan”). He complained of persistent neck pain with tenderness of the back of his neck and trapezius muscle and limited active range of movement of his neck. He underwent a few sessions of physiotherapy and last saw Dr. S.K. Chan on 28 June 2018 (Dr. S.K. Chan’s medical report, Trial Bundle page 107).
8. The parties’ orthopaedics experts produced 3 joint reports. The plaintiff was examined on 12 June 2018. According to the Joint Medical Report dated 30 August 2018 (the “1st JMR”, Trial Bundle page 129-140), the plaintiff still complains of constant pain in the middle and both sides of the neck of severity of 6/10 in the Visual Analog Scale (“VAS”). Pain was less when he wore a collar and took medicine, but sometimes pain could be 10/10 on the VAS. Pain also increased at night and he had difficulty in sleeping etc. (Trial Bundle, page 133). However, there was no objective findings of any neurological deficit. X-rays and MRI scans were performed and there was no finding of significant abnormality.
9. Dr. Lee Po Chin, the expert for the defendant (“Dr. Lee”), gave his opinion in paragraphs 1 to 10, Trial Bundle page 136-138) which can be summarised as follows:
   1. the X-rays and CT taken on 15 March 2017 (i.e. those taken at A&E on the day of the accident) showed *“no fracture of (or) dislocation”* and that the degenerative changes were pre-exiting, and
   2. the X-rays taken on 18 March 2017 (as ordered by Dr. Ip) showing *“minimal displacement between the C3/4 and C/4/5”* and *“mild anterior wedging of the C3 to C6 vertical bodies”* were likely *“normal variation”*.
   3. There was clearly a typo on this paragraph in this sentence: it goes on to read: *“and there was fracture shown in the CT scan on 15 March 2017, which should be a sensitive tool to detect fracture.”* Taking the meaning of the sentence and the paragraph as a whole, Dr. Lee must have meant that there was no fracture shown in the CT scan.
   4. MRI done by the experts shows *“no significant abnormality”*.
   5. As such, the objective findings are not consistent to one having significant residual neck pain. He also questioned that *“constant neck pain is not a characteristic of mechanical neck pain after a neck injury”*. Further, there was no neurological deficit, reflecting that neither the nerve roots nor the cervical cord were involved. There was no pathological change in MRI to support his complaint of pain. With absence of paraspinal muscle spasm, the residual pain should be mild or absent.”
10. Dr. Chan King Pan, the expert for the plaintiff (“Dr. K.P. Chan”), appeared to give a completely different opinion (Trial Bundle page 138 to 139). His opinion can be summarised as follows:
    1. The plaintiff has sustained an injury which damaged the *“cervical spine complex – the intervertebral disc, the vertebral bodies, the apophyseal joints, the muscles, ligaments and the neurovascular supply”*.
    2. The severity and extent are *“rather difficult to assess”* but *“to give benefit of doubt, and with the history of this severe flexion injury, the clinical features of severe pain and spasm / stiffness and X-ray features of change of lordosis curve (meaning protective muscle spasm) and anterolisthesis (meaning forward movement), it could very well be the evidence of mild compression fractures of these vertebrae”*.
    3. The clinical features of pain, stiffness etc. are *“all highly suggestive of the complications of chronic pain syndrome and post traumatic stress disorder.”*
11. In the Supplemental Expert Report dated 30 September 2019 (the “2nd JMR”), Dr. K.P. Chan even went further and opined that:

*“Both the clinical features (history of the accident and treatment progress), and X-rays supported the diagnosis of compression fracture of the C3-6 vertebrae – in addition to damages to the other components of the cervical spinal complex.”*

1. I have a serious problem with Dr. K.P. Chan’s opinion.
2. Firstly, an expert should be instructed that he owed his duty to the court and should give an independent opinion, so giving his instructing party *“the benefit of doubt”* is not the duty of an expert.
3. Secondly, the expert should properly be instructed to give an opinion on the diagnosis *on the balance of probability* based on available evidence, so opining that something *“could very well be evidence”* supporting a diagnosis is neither here nor there and not helpful to the court.
4. Thirdly, it appeared that Dr. K.P. Chan’s diagnosis of *“compression fracture of the C3-6 vertebrae with damages to the other components of the cervical spinal complex”* was based upon the subjective history given by the plaintiff, plus certain features on the X-ray which may be considered “objective”.
5. However, Dr. K.P. Chan only selectively mentioned the X-ray features of lordosis, displacement (reported as “minimal”) and wedging (reported as “mild”) of vertebral bodies as his evidence that it could *very well be* a compression fracture.
6. It is of note that none of the treating specialists, that is, radiologists Dr. Chan Hing Sing Eddie (who reported on the X-rays) and Dr. Sung Han Tung (who reported on the CT scan), A&E Associate Consultant Dr. Wan Kuang An, and orthopaedic surgeons Dr. Ip and Dr. S.K. Chan, ever diagnosed any fracture, let alone a compression fracture of 4 vertebrae (C3, C4, C5 and C6).
7. More alarmingly, Dr. K.P. Chan only mentioned the X-rays and failed to mention the other radiological investigations e.g. the CT and MRI scans which revealed no fracture or other abnormalities.
8. By contrast, Dr. Lee addressed all the radiological investigations and opined that CT scan is a sensitive tool to defect fracture and that the MRI showed *“no significant abnormality”* and *“no disc hernia or degenerative changes in the cervical spine, no significant stenosis.”*
9. It is surprising that, given this big dispute in the diagnosis, Dr. K.P. Chan did not raise any objections to Dr. Lee’s opinion. He also failed to explain why such extensive compression fractures and damages to *“the intervertebral disc, the vertebral bodies, the apophyseal joints, the muscles, ligaments and the neurovascular supply”* etc. were either not shown on any of the radiological investigations, or if any such were shown, were completely missed by all the treating specialist doctors.
10. Not only that Dr. K.P. Chan is granting *“the benefit of doubt”* to the party instructing him, he has clearly demonstrated that he has cherry-picked the evidence (certain X-rays findings) that *“very well be”* supportive whilst ignoring the evidence that are not supportive (the CT and MRI findings) to the party instructing him.
11. Therefore, Dr. K.P. Chan has completely failed to fulfil his duty as an independent expert to the court and I would not rely on his opinion.
12. As for the “subjective” evidence given by the plaintiff of severe and constant pain and stiffness etc., I also have some serious doubt.
13. Of course, the court is not to re-open the issue of liability, but it needs to examine how the alleged Accident happened in order to ascertain the actual severity of the neck injury that it might have caused.
14. According to the plaintiff’s evidence in court, this was how the Accident happened. He entered the cubicle facing the direction of the toilet bowl and, failing to see the wet floor, he was turning around to close the cubicle door behind him. Halfway through that turn he slipped. He fell and hit the back of his neck against the side of the toilet bowl and he continued to slide so the back of his head then hit the floor. After the fall, he could not get up and he confirmed that the photographs in Trial Bundle pages 88 to 99 showed the end position of his body after the fall.
15. I have serious doubt that this was how the Accident actually happened.
16. First of all, the photographs (e.g. Trial Bundle page 95) showed that the cubicle door swung inwards so if the plaintiff was turning around to close the door, he would have been standing quite a way inside the cubicle otherwise his body would be blocking the closing of the door. In other words, his feet must have been positioned very near the toilet bowl at the beginning of his slip.
17. If we look at the plaintiff’s final position after his fall (e.g. photograph on Trial Bundle page 91), one would notice that his feet were all the way outside the cubicle. For the plaintiff to hit the back of his neck on the edge of the toilet bowl and then his head on the ground, and to end up in the final position he was lying on the ground, his feet would need to slide from the starting position very near the toilet bowl all the way to where his feet were lying outside the cubicle as in the photograph on Trial Bundle page 91, that would have been a distance of perhaps 4-5 feet just by looking at the photograph.
18. Further, the plaintiff confirmed that he was simply standing and turning his body and was not walking or running forward when he slipped. One would not need to be a scientific expert to question how a rotational motion could turn into a linear motion.
19. Common sense (or maybe a rudimentary knowledge of Newton’s Laws of Motion) suggests that if someone slips whilst turning his body, the slip would be more of a rotational motion, much like an ice-skater performing a spin.
20. Conversely, if someone slips whilst walking or running with a linear (and not a spinning) motion, the slip would carry the body forward, much like a car trying to brake on ice without antilock braking system and skidding forward with wheels locked. Thus, unless the plaintiff was walking or running forward when he slipped, it was hard to imagine how there would be a linear motion which would carry both his feet some 4-5 feet outside the cubicle. This was clearly not a short distance to slip from a linearly stationary (but rotating) position.
21. Another big question was that if the plaintiff was slipping while he was only halfway turning his body, he would be facing one of the side walls of the cubicle, with one of his shoulders facing the direction of the toilet bowl. So if he fell in that position, his shoulder would likely hit the edge of the toilet bowl. For the back of his neck to come into contact with the toilet bowl, his body would need to complete a full turn so that he would now face the exit of the cubicle. So the plaintiff’s body needed to do another half turn whilst he was slipping.
22. Further, the plaintiff’s feet could have slipped in any of the 360 degrees of direction. However, if his feet were to slip in any other directions, he would have only slipped a very short distance before coming into contact with, say, the side walls of the cubicle which would have likely broken his fall. For the accident to occur as the plaintiff claimed, he must have slipped, by pure chance out of 360 degrees, exactly at 180 degrees (taking the direction of facing the toilet bowl is 0 degrees) towards the exit of the cubicle, completing a precise half turn from facing the toilet bowl and in the direction where it just happened that he could slip for the longest distance possible. I would wonder how probable that would be.
23. Common sense also tells us that when we fall, we tend to reach out with our arms and hands to try to break our falls. We would also bend our bodies and our knees to assume more like a sitting position so that our bottoms tend to hit the ground first.
24. That is the reason why for violent or heavy falls, there may be signs like abrasions and bruises to the hands, palms, elbows and the bottom, and even wrist fractures and contusion injuries to the lower spine and the coccyx (our “tailbone”). It is, again, common sense, that the more violent the force is, the more likely that there will be signs of injuries to the “contact” spots.
25. There was no report of such injuries in the A&E medical report. Of course, the absence of such signs may not indicate anything, but the presence of such signs may support a more violent or heavy fall.
26. Furthermore, if the plaintiff was slipping inside the narrow confined space of the cubicle (as evident from the photographs e.g. on Trial Bundle page 89), one would question why he could not break the fall by simply reaching out with his arms and hands.
27. For the plaintiff to hit the back of his neck with the toilet bowl in the manner described by him, he evidently did not reach out his arms and hands to attempt to break the fall nor attempt to bend to assume a sitting position. Instead, one could reasonably deduce that he would need to be holding his body in a rather straight and rigid manner falling backwards, much like a falling tree after being cut down.
28. In summary, the Accident described by the plaintiff required him to have slipped from his initial position standing near the toilet bowl inside the cubicle, with his body halfway through a turn, towards the exact direction of the exit of the cubicle, ending up with his feet some 4-5 feet way outside the cubicle. Whilst slipping, his body performed a pirouette in mid-air so that he now faced outwards with his back to the toilet bowl. From this position, he fell straight backwards with his body held rigid like a falling tree without any effective attempt to sit down on his bottom or to reach out with his arms and hands to break the fall. And after his neck hit the edge of the bowl, there was somehow still momentum in the linear slipping motion, so he still failed to stop and his neck slid off the side of the bowl, and his head continued to fall to hit the ground.
29. This scenario simply does not make any sense. We are not disputing liability here, but it is likely that however the Accident and injury might have happened, it was unlikely that it had happened this way. There is clearly a big question concerning the credibility of the plaintiff.
30. Further questions on the plaintiff’s credibility can be gleamed from the medical reports.
31. The plaintiff apparently had a previous slip and fall accident (causing back injury etc.) in 11 October 2015 (the “2015 Accident”). He had consulted Queen Mary Hospital regarding the 2015 Accident. A medical report dated 16 September 2019 from Queen Mary Hospital reported the findings at a follow-up consultation on 2 June 2017:

*“On his last follow-up on 2 June 2017, his symptoms have improved. However, there is still chronic back pain and left lower limb pain. He requires a stick for walking. There is mild weakness (Medical Research Council grading 4/5) over the left L5 and S1 myotomes of the left lower limb, other lower limb power is full.”*

1. Significantly, this follow-up consultation for the 2015 Accident took place about 3 months after the Accident (15 March 2017).
2. If the plaintiff had required a stick for walking at that time of the consultation on 2 June 2017, one would question why he was not carrying one 3 months earlier when he visited the Ocean Park, as shown in the photograph of him posing outside the Ocean Park gate in Trial Bundle page 87. In fact, no walking stick was seen in in any of the photographs that the plaintiff has produced.
3. Further, the plaintiff never mentioned the need for or his use of a walking stick in all his evidence regarding how the Accident happened.
4. Dr. Ip’s medical report (Trial Bundle page 105) concerning the presentation of the plaintiff on 18 March 2017 stated:

*“Premorbid, Mr. Faisal enjoyed good health with no neck problem.”*

1. Clearly, the plaintiff did not mention to Dr. Ip his *“chronic back pain and left lower limb pain”* and his need for *“a stick for walking”*.
2. It is also reasonable to assume that he did not attend Dr. Ip with a walking stick or display any walking problems otherwise one would assume that Dr. Ip would not have stated *“Mr. Faisal enjoyed good health”*.
3. However, it appeared that all these symptoms and the requirement for walking stick suddenly returned 3 months later on 2 June 2017 when the plaintiff attended the Queen Mary Hospital consultation for the 2015 Accident.
4. And then, only 27 days after this consultation, the plaintiff attended Dr. S.K. Chan (on 29 June 2017) for the Accident.
5. Dr. S.K. Chan’s medical report (Trial Bundle page 107) concerning the physical examination did not mention any *“chronic back pain”*, *“left lower limb pain”*, or that the plaintiff *“required a stick for walking”*.
6. It appeared that all such “chronic” complaints of the plaintiff since the 2015 Accident mysteriously disappeared once again.
7. The plaintiff was clearly inconsistent in reporting his symptoms to his doctors. Indeed, if it was really true that the plaintiff suffered from such chronic disabilities, one wonders why he would attend Ocean Park without a walking stick. Anyone who has attended Ocean Park is aware of the amount of walking (including slopes) that is required.
8. Given the above discussion, it is reasonable to deduce that the plaintiff has been exaggerating both the extent of his accident and his symptoms and injuries to various doctors.
9. As such, the plaintiff is evidently an unreliable and dishonest witness. I would put very little weight on any subjective evidence from the plaintiff, including what he told various doctors and experts.
10. In summary, I find that Dr. K.P. Chan’s opinion was based upon the plaintiff’s subjective evidence (which was unreliable) and selective cherry-picking of objective evidence. I would therefore reject Dr. K.P. Chan’s diagnosis of compression fracture with damages to the cervical spinal complex / chronic pain syndrome / post traumatic stress disorder.
11. I would therefore agree with Dr. Lee’s opinion that the plaintiff suffered from mild pre-existing degeneration in the cervical spine with no fracture or significant abnormalities, and that *“natural progression of degeneration”* would mean that he would develop similar pain in 10 years even without the accident. In the current accident, the plaintiff only had *“soft tissue injury to the neck”* and *“the objective findings are not consistent to one having significant residual neck pain”* which should be *“mild or absent”*. And that *“sick leave for about 3-4 months should be more than adequate”* (Trial Bundle page 137-138).
12. The opinion of Dr. Lee is also in line with my analysis of the Accident above which shows that, however that might have happened, it was unlikely to be a heavy or violent fall.
13. It is of note that Dr. Lee, having reviewed medical documents regarding the plaintiff’s previous injuries, including the 2015 Accident, also question the reliability of the plaintiff’s complaints (2nd Supplemental Joint Medical report dated 24 August 2020. Trial Bundle page 150):

*“However, the information from the medical reports covering these (previous) injuries showed that Mr. Faisal’s complaint of pain is usually severe. For the more recent alleged back injury on 11 October 2015, there was complaint of persistent pain but there was presence of non-organic signs and inconsistency in the course of his illness. His back pain persisted and medical report from…QMH showed that he was still complaining of pain at lower back and left lower limb with left lower limb weakness. If Mr. Faisal had genuine back pain, this would have impaired his ability to work as a mobile phone delivery worker that had to lift regularly 35-40 kg.”*

1. Regarding to his previous claimed back injury, in the Statement of Damages of DCPI 2154/2018 regarding the 2015 Accident (Trial Bundle E, page 309), the plaintiff has already claimed damages for much pain due to his back injury and loss of amenities like no being able to run, jump or climb which involved movement of his back, nor playing cricket or any sporting activities. It is inappropriate for the plaintiff to be claiming similar losses again in the current case (Paragraph 4 of the Revised Statement of Damages, Trial Bundle page 38)
2. The plaintiff claims HK$450,000 under this head of claim. I am of the view that this is vastly inflated and the plaintiff’s injury is a soft-tissue injury, at most, comparable to a simple and uncomplicated whiplash injury with “mild or absent” residual pain and no psychological or psychiatric consequences.
3. Mr. Dennis Law, counsel for the defendant, has referred the court to a number of cases including *Au Suk Man v. Chan Chi Wai* DCPI 1213/2013, *Leung Hiu Yan Hilda v. Lam Kam Hung* DCPI 220/2012 and *Lai Ka Yin v. Chan Yiu Kei* DCPI 453/2008 in his closing submission which I do not intend to repeat here.
4. The usual award in similar injuries would be between HK$50,000 to HK$80,000. On balance, I think the likely extent of the injury would be at the lower end because there were no other associated injuries like back injuries, there was no admission to hospital, and however uncertain circumstances that the Accident might have happened, it was likely to be less violent that a road traffic accident. Further, having considered that the plaintiff has already been awarded damages for a similar claim in loss of amenities for the 2015 Accident, I am of the view that the award should be further reduced by 50%. So the appropriate award under this head of claim should be HK$25,000.

*Loss of earning*

1. The plaintiff was 25 years old at the time of the accident and claimed to be a hard working manual worker.
2. The plaintiff claimed in the Revised Statement of Damages that he had been working as a delivery worker and odd construction labourer earning the wages of HK$15,500 and HK$7,083 respectively with the total monthly income of HK$22,583 at the time of the Accident (Trial Bundle page 38).
3. During the trial, the plaintiff claimed that he earned about HK$24,000 for 5 months from October 2016 to February 2017 as a full time general labourer with Himali Engineering Construction Limited (“Himali”). He then changed to become a part-time labour with Himali in March 2017 when he could work more flexible time, usually from 7 p.m. to 9:30 p.m..
4. Around that time (8 March 2017), he secured a full time job as a delivery worker with “I TECH” for HK$15,500 per month. For this job, he claimed that he had to move, lift and carry heavy good and cartons weighing about 35 to 40 kg.
5. A week later (15 March 2017), he had the Accident so he stopped working (due to his chronic neck pain etc.) thus he is claiming pre-trial loss of earnings up to the nominal trial date (according to the Revised Statement of Damages, Trial Bundle page 39).
6. However, on Day 1 of the trial, the plaintiff gave evidence that he had, in fact, worked as a security guard for 2 months (with salary of about HK$14,500 per month) in around 2019.
7. There was no documentary support for such work. Further, the Revised Statement of Damages dated 24 February 2020 made no mention of this.
8. On re-examination on Day 3, the plaintiff then explained that the 2 months of work should be after the signing of Revised Statement of Damages.
9. I have serious doubt even with that explanation: the plaintiff’s opening submission dated 21 September 2021 did not mention this work at all but instead maintain the claim for pre-trial loss of earnings up to the trial date.
10. It is clear that the plaintiff simply made up his evidence as he went along and this served as another example of his dishonesty. I find that, on balance, the plaintiff did not work as a security guard during the pre-trial period.
11. As for his claimed employment by “I TECH”, the plaintiff has produced a contract of employment dated 8 March 2017 with a company chop stating “I TECH Circle” (Trial Bundle page 158-161). He has also produced a Pay Slip for payment of HK$15,500 with a date stated as “- - March 2017” (Trial Bundle page 162).
12. The plaintiff claimed that his monthly salary from “I TECH” was HK$15,500. If this is true, then one must question why, as it appeared from this purported Pay Slip, that he was paid a full month’s salary for March 2017 when he could only have worked from 8th to 14th March (or at most the morning of 15th after which he met with the Accident).
13. The purported employment contract is also questionable. The working hours stated was 9 a.m. to 9 p.m., which would have made it rather difficult for the plaintiff to work for in his alleged part-time job at Himali.
14. A further problem is that a BR search (Trial Bundle page 187) showed that “I TECH Circle” only commenced business on 12 September 2017, which was 6 months after the alleged contract date. The plaintiff explained that “I TECH” and “I TECH Circle” were “sister companies”, but no BR documents of “I TECH” was ever disclosed to show whether it was in business at the contract date.
15. As for the alleged employment by Himali, the plaintiff did not disclose any employment contract. There were two letters from Himali which appeared to acknowledged the employment and the salaries as claimed (Trial Bundle page 165 and 166). The plaintiff claimed that he has been paid in cash but no signed receipt was disclosed.
16. Despite such claimed employment and salaries, the IRD letter (Trial Bundle page 163 to 164) states that there is no income information of the plaintiff from 2012/13 to 2017/18.
17. Further problem with the plaintiff’s claim is (as mentioned above in paragraph 44) that the plaintiff attended Queen Mary Hospital on 2 June 2017, some 3 months after the Accident, and still complained of chronic back pain, left lower limb pain and weakness which required a stick for walking.
18. I agree with the opinion of Dr. Lee: I cannot see how the plaintiff could have worked as a general labourer or a delivery worker that required him to *“move, lift and carry heavy good and cartons weighing about 35 to 40 kg”* if he has such disabilities. The plaintiff would need to use one hand to hold the walking stick for walking. As such, he must have been using his other free hand to power-lift those 40 kg (or almost 90 pounds) cartons! That would have been a very impressive strength worthy of an elite power lifter, and would have been impossible for a person with a chronic back pain and leg weakness.
19. A final “nail in the coffin” for the plaintiff’s claim is the “without prejudice” letter dated 16 July 2020 from the plaintiff’s solicitors to the defendants in the claim regarding the 2015 Accident, that is DCPI 2154/2018 (Trial Bundle page 351-353).
20. Despite the letter being marked “without prejudice”, there appeared to be no objection from the plaintiff as it was in the Trial Bundle.
21. In this letter, the plaintiff was offering to accept a sum for settlement which included (Trial Bundle p.352 paragraph 2(b)), a full loss of earnings from 11 October 2015 (the date of the 2015 Accident) to 15 March 2017 (the date of the Accident). There was no mention of any gainful employment that the plaintiff has put forward in the current claim.
22. This shows that the plaintiff was simply lying regarding his alleged gainful employment and raises serious doubt as to the authenticity of the documents allegedly from “I TECH / I TECH Circle” and Himali.
23. I note, of course, that the plaintiff has signed a “Statement of Truth” for the Revised Statement of Damages (Trial Bundle page 42).
24. This also raise an even more serious concern: this “without prejudice” letter concerning DCPI 2154/2018 is from the same law firm acting for the plaintiff in the current claim, Choy Yung & Co. Solicitors. The “contact” solicitors are “Mike Nanwani / Amber Ho” in DCPI 2154/2018 and the internal reference number is “MK18030202DY-MN-HL-PI”.
25. In the current claim, the “contact” solicitors are “Mike Nanwani / Suki Yip” and the internal reference number is “MK18030202DY-MN-SY-PI” (see for example, letter from the plaintiff’s solicitors dated 7 July 2021, Trial Bundle page 349).
26. It is quite clear at least one solicitor, Mr. Mike Nanwani, is involved in handling both claims, and yet Mr. Nanwani appears to be pursuing a claim of full loss of earnings for the 2015 Accident in DCPI 2154/2018 but, at the same time, pleads that his client has been working during that same period in the current claim.
27. The court views this very seriously: unless there are some reasonable explanations, I am concerned not only that the plaintiff may be committing perjury, but that his solicitors (or at least Mr. Nanwani of Choy Yung & Co. Solicitors), being an officer of the court, may be supporting this conduct and blatantly attempting to mislead the court.
28. In conclusion, the plaintiff is clearly a very dishonest person who would lie to whoever at whatever time for his own gains and advantage. When one does that too often, he would get caught out by all the inconsistencies, as in this case. As such, I am not convinced that the plaintiff has any gainful employment prior to the Accident. According to Dr. Lee, sick leave for about 3-4 months should be more than adequate for the recovery from the injury caused by the Accident. This would take us to around the time of the consultation at Queen Mary Hospital. If the plaintiff has not worked after this time, it was not caused by the Accident.
29. As such, I would not allow any award under this head of claim.

*Bank passbook and loan notes*

1. The plaintiff has disclosed his bank passbook which shows occasional substantial cash deposits into his account after the Accident. The plaintiff’s case is that these were loans from his friends, namely Ali Nabeel (“Nabeel”), Hussain Asim (“Asim”) and Maqbool Muhammad (“Muhammad”).
2. Three loan notes, all dated 4 November 2019, have been disclosed from each of the them (Trial Bundle page 225-227). The entries to the loan notes corresponds (generally) to the cash deposits on the bank passbook. These were not unsubstantial sums: Nabeel apparently has loaned a total of HK$104,000 to the plaintiff, Asim has loaned HK$89,748.53 and Muhammad HK$113,525.
3. The defendant has issue subpoena and Nabeel and Asim answered to testify in court about these loan notes. On cross-examination, they admitted that their loan notes were prepared by the plaintiff’s solicitors for them to sign, so it was clear that these were not contemporaneous documents and they were not produced for the purpose for the friends to keep track of how much they have loaned to the plaintiff. Rather, they were produced by the plaintiff’s solicitors for the purpose for this claim.
4. Surprisingly, for such rather substantial loans, the friends kept no contemporaneous records or, indeed, any records. The plaintiff’s claim was that whenever he received a loan, he would deposit the cash into bank account and that would serve as his “records” so he would identify each of these loans from his 3 friends.
5. Presumably, all three friends must have trusted the plaintiff so much that they parted with their cash and not a single one of them bothered to keep any records themselves, even doing something simple like writing on a piece of paper.
6. Further, Nebeel’s loan note showed two loans of HK$20,000 on the same date (8 July 2018) which corresponded to two entries as deposits in the plaintiff’s bank passbook of the same date. When asked why this should not be entered as one loan of HK$40,000 on 8 July 2018, Nabeel started on this story about loaning HK$20,000 in the morning and then the plaintiff asked for more in the afternoon. However, this still would not answer why Nabeel should not simply put the two loans together as one sum of HK$40,000.
7. Similarly, one entry on Asim’s loan note showed a loan of HK$2,348.53. When asked by the court, Asim claimed that this was actually a cash cheque which he gave to the plaintiff, and that he have received the cash cheque from a sub-contractor for his wages as a general labourer. But he then confirmed that his daily wage was HK$800 and was unable to give a reasonable explanation as to how he would be paid the rather odd wage of HK$2,348.53.
8. A further observation is that Asim is a general labourer earning HK$800 a day. If his loan note (Trial Bundle page 226) was correct, he has made 13 loans (all at various sums ranging from HK$1,500 to HIK$27,000) to the plaintiff over a period of some 3 months totally close to HK$90,000, which must be the equivalent of all his income over several months, and yet Asim never bothered to even keep his own personal records of all these loans. Similar questions can be raised regarding the other two friends’ loan notes.
9. All these rather further raised the suspicion that the loan notes were simply prepared by the plaintiff’s solicitors by substantially copying the deposit entries in the plaintiff’s bank passbook and the plaintiff’s 3 friends simply signed them. I am not convinced that they have any idea of the loans and were simply playing along to assist the plaintiff’s case.
10. There are other examples of such inconsistencies and I need not go into details. Suffice to say that I do not accept that the plaintiff’s claim that these deposits into his bank deposits were loans from his 3 friends.
11. The nature of the bank deposits raises serious questions on the credibility of the plaintiff and his witnesses but ultimately the nature of the deposits does not matter: the plaintiff’s case is that he has not worked since the Accident but, as above, I accept Dr. Lee’s opinion that he could return to his work after at most 3-4 months of sick leave.
12. As such, if the plaintiff was actually working and earning during this time, this would support Dr. Lee’s opinion, and if he was not working and these were really loans, the plaintiff has entirely failed to mitigate his loss. In any case, the plaintiff is not claiming for any future loss of earnings which is mystifying given that his case is he has not worked after the Accident.

*Loss of Earning capacity*

1. As above, I agree with Dr. Lee’s opinion that sick leave for about 3-4 months should be more than adequate to allow the plaintiff should be able to return to work with the nature of the job he had described. Dr. Lee also opined that based on the more objective findings of the joint examination, there was less than 1% impairment of the whole person and less than 1% loss of earning capacity.
2. The plaintiff’s case was that he had not worked since the Accident. Even if that was true, there may be many reasons why: the plaintiff’s alleged pre-existing condition due to the 2015 Accident, or a total failure to mitigate loss (perhaps the plaintiff was simply living off his previous accident claim compensations: besides the 2015 Accident, the plaintiff also had an accident in 2013 (DCEC 1371/2013 and DCPI 788/2014) and an accident in 2014 (HCPI 165/2015). In any case, I accept Dr. Lee’s opinion and find that any “disadvantage in the open labour market” due to the Accident is insignificant and minimal.
3. There should therefore be no award under this head of claim.

*Medical expenses*

1. In view that Dr. Lee opined that a sick leave period of 3-4 months should be more than adequate, I would allow medical expenses for up to 4 months after the Accident.
2. I would accept the defendant’s submission that an appropriate cut-off point should be Dr. Ip’s consultation on 28 June 2017 (Trial Bundle page 228) when 65 days of suck leave was given. This would take it beyond the 4 months’ post-accident period.
3. The plaintiff also claimed HK$14,200 as “other medical expenses” which he claimed was for pain relief cream that he bought from the pharmacy from time to time. Despite, claiming that he was in such pain and had been relying on such medications for years, no invoice was produced and the plaintiff was unable to name what the medication was called or give a satisfactory description of what the packaging looked like. It is not believable: if someone really had suffered severe pain over the years and had been relying on certain medications, one would reasonably expect that he would know a lot more about those medications. I would allow HK$500, which I think is generous for any alleged need for relief of any residual pain which are *“mild or absent”*.
4. As such, the medical expenses should be **HK$8,770**.

*Travelling expenses*

1. The plaintiff claims HK$3,000. I would allow **HK$1,000** since it would only be for travelling for medical consultations for 3-4 months.

*Tonic food*

1. There is no invoice produced. But I will allow **HK$1,000** which again I see as generous.

*Summary*

1. The total award of this claim should therefore be:

|  |  |
| --- | --- |
|  | Amount (HK$) |
| PSLA | 25,000 |
| Pre-trial Loss of Earnings | 0 |
| Loss of Earning Capacity | 0 |
| Special damages | 10,770 |
| Total | **35,770 (plus interest)** |

1. Interest on PSLA be paid at 2% per annum from the date of the writ to date of judgment, and thereafter at judgment rate until payment. Interest on special damages be paid at half judgment rate from the date of the Accident to the date of judgment, and thereafter at judgment rate until payment.

*Costs*

1. There be a cost order nisi for the defendant to pay the plaintiff’s costs of the action to be taxed if not agreed with certificate for Counsel.

*Further comment*

1. In view of the court’s findings and concern raised in paragraphs 84 to 92 above, I would direct that a copy of this Judgment be passed to the Department of Justice and the Law Society of Hong Kong for investigations and, if necessary, appropriate actions.

(Harold Leong)

District Judge

Mr Sadhwani Kamlesh Arjan, instructed by Messrs Choy Yung & Co, for the plaintiff

Mr Dennis Law, instructed by Messrs Mayer Brown, for the defendant