## DCPI 2425/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2425 OF 2014

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##### BETWEEN

LEUNG LEE JASMINE（梁莉） Plaintiff

### and

GO FRESH (HONG KONG) COMPANY Defendant

LIMITED

綠健食品（香港）有限公司

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 8, 9 and 12 September 2016

Date of handing down Assessment of Damages: 28 October 2016

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ASSESSMENT OF DAMAGES

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*INTRODUCTION*

1. This is an assessment of damages of a personal injuries claim brought by Madam Leung Lee Jasmine (“the plaintiff”) against the defendant for the injuries sustained in an accident on 18 July 2013 when the chair she was sitting on in the defendant's restaurant suddenly broke without warning.
2. Liability has been admitted by the defendant in February 2016 by consent leaving damages to be assessed. Hence, the only issue that the court is dealing with at the hearing is the amount of damages which the plaintiff is entitled to recover resulting from the accident.

*BACKGROUND*

*The Injuries*

1. Immediately after the accident, the plaintiff was sent to the A&E of the Caritas Medical Centre (“CMC”). She was found to have back and sacral pain after the fall. The diagnosis made by the doctors at the A&E was back contusion with suspected coccygeal fracture. X-ray taken on the day showed posterior displacement of coccyx and fracture line at coccyx. The plaintiff was hospitalized and was discharged the next day.
2. MRI done on 10 October 2013 showed desiccated L4/5 disc with associated annulus tear over the right foraminal and extraforaminal level. The plaintiff received physiotherapy but continued to suffer from residual recurrent back pain and residual on and off bilateral numbness of her lower limbs.

*Expert Evidence*

1. The plaintiff was examined by Dr Wong See Hoi (“Dr Wong”) for the plaintiff and Dr Danny Tsoi (“Dr Tsoi”) for the defendant jointly in July 2015, which was 2 years after the accident. In their joint medical report dated 18 August 2015 (“the Joint medical Repoart”), both experts were able to agree that the plaintiff sustained a fracture of "coccyx with mild posterior displacement". They both agreed that the condition was directly caused by the accident.
2. However, they were unable to agree on the cause of a prolapse disc at L4/5 which was revealed in a MRI investigation requested by her treating orthopaedic specialist in October 2013, some 3 months after the accident. Dr Wong opined that the prolapse disc leading to an annular tear was compatible with the injury, while Dr Tsoi on the other hand opined that the disc desiccation was pre-existing. Dr Tsoi was further of the view that the annular tear is commonly associated with the degenerative disc and most are unrelated to accidents.
3. Both experts agreed that the MRI feature revealed early stage of degeneration at L4/5 level which is caused by “chronic wear and tear process” and “not caused by accident”. They also agreed that the early sign and symptom after the accident is compatible with “refer pain or nerve root irritation”, either at the exit foramen or irritation of the sciatic nerve.
4. Dr Wong further opined that the prognosis is fair and she is expected to have on and off attacks of low back pain. Dr Tsoi, on the other hand, opined that the residual discomfort should be of a mild degree but accepted that she should sit on a soft chair with intermittent standing.
5. On the issue of sick leave, Dr Wong opined that the sick leave granted by the treating doctors at the private sector of 18 months was appropriate. Dr Tsoi on the other hand opined that an appropriate sick leave in this case should be at 3 to 4 months only.

*DISCUSSION*

*Issues in Dispute*

1. At the end of the evidence, it has become clear that the following are the issues which require the court's determination:-
2. was the annular tear the L4/5 lumbar disc caused by the accident or was it a pre-existing condition, not those as a result of trauma but was hereditarily related;
3. what is the appropriate amount of damages for the claim of pain, suffering and loss of amenities (“PSLA”);
4. whether the plaintiff is entitled to claim a loss of annual leave which was taken to attend physiotherapy treatment, valued at HK$11,855.84;
5. whether the plaintiff is entitled to an award for loss of earning capacity, if so, what is the appropriate amount;
6. whether an award for loss of society should be granted for the plaintiff husband’s loss of society, if so, what is the appropriate amount;
7. what is the appropriate award for the claim of special damages; and
8. whether there should be an award for the cost of future physiotherapy treatment.
9. I shall deal with the above issues individually below.

*Witnesses’ credibility*

1. Before doing so, I would like to comment generally on the plaintiff's and her husband’s credibility. They were the only witnesses called by the parties in this case.
2. First, I find the plaintiff to be in an honest and credible witness who, despite having been cross-examined extensively and skillfully by the defendant’s counsel, her evidence in my view remained composed, intact and unscathed. Further, besides being sincere and articulated, I find she has given her evidence in an objective and fair manner, not prone to exaggeration or embellishment. In my judgment, she was trying her very best to give her evidence in an honest and truthful manner. This included the very long witness statements she has prepared which were adopted as evidence-in-chief during the hearing. Despite her evidence not being perfect and in some areas there are clear confusions, I accept her claims on both her injuries and losses are truthful. I do not think that she has exaggerated her injuries or evidence in any material way. Therefore, unless otherwise stated below, I would accept her evidence.
3. I also find her husband to be a truthful witness. He was called to give evidence on the loss of society claim which the defendant disputes. Mr Cheng is a very well qualified engineer and has a very respectable job. Besides being put in an very embarrassing position by the defendant to have to relate to the court some of the very personal and intimate matters in their marriage, he was also being tested on the genuineness of some of the plaintiff’s claims regarding her pain and disabilities. I consider Mr Cheng has dealt with the matters in what I would describe as a most dignified and understated manner. I accept his evidence in its entirety. Further, I consider that his evidence in fact corroborates with the plaintiff’s evidence in some material ways, particularly on her claims of disabilities and limitations in her daily activities.
4. As in any other civil cases, I reminded myself that I have to check if the witnesses’ evidence is consistent with any of their previous statements made, the contemporaneous medical records and reports (especially those made by the treating medical professionals who had been looking after her over a long period of time) and the history of the case. Most importantly, whether their evidence fit in the overall picture of the plaintiff’s injuries and complaints.
5. *Was the annular tear at L4/5 caused by the accident?*
6. One of the main disputes in this case is whether the annular tear of the L4/5 lumbar disc, which is a separate injury from the coccygeal fracture that is not disputed by the experts, was caused by the accident or was it a pre-existing condition, ie not as a result of trauma but was hereditarily related.
7. The opinion that the disc desiccation was a pre-existing and the premature generation is hereditarily related came from one single paragraph in the joint medical report given by Dr Tsoi. He stated that a fall would not cause disc desiccation, ie drying out of the disc, as shown in the MRI report written 3 months after the accident. He further stated that the annular tear is commonly associated with degenerative disc and most are unrelated to accident.
8. The problem I find with the above opinion of the Dr Tsoi is that it was not supported by any further explanation than what had been stated in the Joint Medical Report. It was, with respect, no more than a bare assertion of the expert which is not consistent with the objective evidence and the history of the plaintiff's injuries as revealed in this case.
9. On this issue, as on other issues in relation to her injuries, I would prefer the opinion of Dr Wong. I accept Dr Wong’s opinion that the disc prolapse was likely to be related to the accident based on the following reasons:-
10. the plaintiff was 36 years old at the time of the accident and it is most unusual to find disc desiccation detected on the MRI was purely due to degeneration changes rather than injury induced;
11. there was only single disc involvement rather than at multiple levels as one would expect to find in the case of degeneration;
12. The mechanism of the injury is compatible with that given by the plaintiff;
13. MRI was taken on the advice of the private orthopaedic doctor (upon the gradual onset of the lower limbs numbness) some 3 months after the accident and the result is compatible with the development of the disc problem leading to the annular tear at L4/5 which can gradually increase the disc prolapse with time; and
14. there was no previous back injury complaints or any symptoms displayed by the plaintiff prior to the accident.
15. In my judgment, the above opinion expressed by Dr Wong is not only sound but is consistent with the plaintiff’s complaints and the history of her injury. I therefore would prefer Dr Wong’s opinion than that of Dr Tsoi’s on this issue.
16. *What is the appropriate award for PSLA?*
17. The plaintiff past and current complaints are mainly contained in §§6-15 of her main witness statement dated 30 April 2015. They can also be found in 3 further supplemental witness statements filed by the plaintiff. Having had the benefit of observing her in giving evidence as well as checking her complaints against the contents of the reports of her treating orthopaedic surgeon and physiotherapist (which covered over a 2 year period as contrast to the one-day stay of the plaintiff at CMC), I prefer to accept her evidence than what have been recorded in the CMC’s records.
18. I do not accept the defendant’s counsel, Mr Ashok Sakhrani’s submission that the plaintiff and her husband’s evidence are inconsistent with the contemporaneous medical records/reports and expert evidence for several reasons.
19. First, it is clear from the plaintiff’s evidence that her claim of severe pain was not believed by the orthopaedic specialist on the ward in CMC at the initial stage of her injury. She was discharged after only one day of hospitalization when she was told by the orthopaedic specialist that she had only suffered from a “normal injury” and was “all right” when she clearly was not. This was very different from what she had been told by the doctor at the A&E of CMC where she was told that she had fractured her coccyx. Understandably, she had not returned to the public hospital for further treatment (save for one single occasion when she received physiotherapy treatment on 2 February 2015). Instead, at her own expense, the plaintiff sought treatment from Dr Richard Wong Kar-Fai (“Dr Richard Wong”), a specialist in orthopaedics and traumatology in private practice. She consulted him on no less than 11 occasions, initially over a period of 4 months from July to December 2013 and then on one single occasion in November 2014 when she had a “relapse”. She later was under the care of another orthopaedic surgeon and a bone setter, again for a long period of time. She also had taken time off from work and received physiotherapy treatments at the private sector on no less than 68 occasions. All these treatments were paid by her. This covered a period of over 2 years from August 2013 to September 2015.
20. In my view, no normal person, unless he is a malingerer (of whom I do not find the plaintiff to be one), would be prepared to subject himself to such prolonged and intensive treatments if he does not suffer from genuine pain and a serious condition. In this regard, not only the plaintiff had to give up her annual paid leave in order to attend such treatments, she had no certainty to recover any of those expenses from the defendant at the time when she underwent those treatments. I therefore believe that the severe pain and great discomfort described by her in her witness statements were genuine and were directly resulted from the accident.
21. Third, the defendant’s counsel tried to discredit the plaintiff by putting to her that in the Discharge Summary of CMC upon her discharge on 19 July 2013, she was able to “walk unaided” and it was also mentioned that the “pain improved”. However, I accept the plaintiff’s explanation that in fact she had told the orthopaedic specialist on the ward at CMC that she still felt very painful and unwell but the doctor insisted that she was “all right” and that she was fit enough to be discharged the next day. This clearly was not the case as she took her brother’s recommendation and went to see Dr Richard Wong on the very same day of her discharge and continued to be under his care regularly until December 2013 and on one further occasion in November 2014.
22. Fourth, the defendant’s counsel also tried to cast doubts on the plaintiff’s claims of severe pain and discomforts at the initial stage of her recovery by relying on the notes taken by the admission nurse and the physiotherapist who had briefly saw her during her one day stay at CMC. She had reportedly told the nurse that the pain in her lower back was of "moderate" in severity. In my judgment, besides being nit-picking, all the records taken on the first day of her admission in hospital must be looked at in the right perspective. First, they were brief questions and answers given by the plaintiff on admission to the hospital when the true extent of her injuries was far from clear. Second, they must look at through the prism of what actual treatments the plaintiff had received after her discharge from the public hospital on 19 July 2013. It is clear that she had received prolonged treatments from both Dr Richard Wong, the orthopaedic specialist and physiotherapist, Mr Mervyn Chan (“Mr Chan”), in private practice. In my judgment, had she not suffered from the some severe and genuine pain and discomforts, she would hardly need to go through such prolonged and intensive treatments. Thus, seen in such light, the records kept by the CMC in my view are of very limited value only.
23. Fifth, despite not having been mentioned in the very brief reports of Dr Richard Wong and her treating physiotherapist Mr Chan, I have no reason to doubt that the plaintiff in fact had lied in bed for most of the time in the first 4 weeks after the accident. In my judgment, the fact that it was not mentioned in those brief reports does not mean that the plaintiff had not suffered from such serious condition. After all, I do not expect that the plaintiff would have told her treating orthopaedic specialist and physiotherapist everything about what had happened during her recovery. Nor would I expect those medical personnel would ask such detailed questions or, even if asked, would record them in their very brief reports.
24. Sixth, the medical experts, after viewing the surveillance footage conducted by the private investigators ordered by the defendant’s solicitors, written a supplemental joint medical report which was dated 8 June 2016 (“Supplemental Joint Report”). In the report, both experts agreed that the plaintiff was able to perform her daily activities well and that there is no major difference from the findings make by them during the joint medical examination in July 2015. They commented that this was quite a contrast to the physiotherapy report prepared by Mr Chan, the plaintiff’s treating physiotherapist, on 17 March 2016 where it was stated that "Miss Leung is unable to sit or stand and walk for more than 15-30 minutes; cannot help her kids in bathing, carrying schoolbags".
25. My own view of the surveillance footage is that it did not contradict her allegations that she was not able to sit for long time (there was no footage showing her sitting down for more than 15 to 30 minutes); or stand for a long time (there was no footage showing that she was standing in the same position for any lengthy period of time); and walking for a long time (there was no prolonged periods of walking shown in the footage where she was not able to take a break in between, eg like when taking public transport). The only few occasions when she was helping with her daughter in “carrying” the schoolbag was in fact with a trolley type of schoolbag which require pulling on wheels on the ground rather than carrying on the back.
26. I accept Dr Wong’s opinion that the coccyx fracture, together with the disc injury, would result in residual pain particularly on exertion like the prolonged sitting for more than 1-2 hours, and sitting on hard object: (see §5 of the Supplemental Joint Report). I also agree with Dr Wong that for a disc injury, prolonged and repeated heavy lifting and carrying of object (for more than one hour) may exaggerate her pain and cause her discomfort. I further accept Dr Wong’s reservations that the complaints/symptoms stated in the plaintiff’s statements "*more than we expected* from a coccyx fracture and disc injury." [emphasis added]
27. In my view, "more than expected" does not mean it was not genuine. We all know that pain is a subjective matter and each person’s level of tolerance of pain is different. It is clear to me that from her detailed descriptions of her pain and disabilities in her witness statements, particularly during the initial months after the accident, she has a rather low tolerance of pain which took a long time to resolve.
28. While I accept Dr Tsoi’s opinion stated in the Supplemental Joint Report that her persistent pain and apparently deterioration of symptoms as stated by the physiotherapist was probably "caused by the pre-existing degenerative discs (as shown in the MRI taken on 25 October 2013)" and "has nothing to do with her coccygeal injury": (See §7 of the Supplemental Joint Report), as found in §§16-20 above, I prefer Dr Wong’s opinion that the desiccated disc was in fact caused by the accident.
29. When compared with her very carefully prepared witness statements describing, amongst other things, her pain and discomforts (particularly during the initial period of recovery and treatment) with the relatively brief physiotherapy reports (the 1st report was only 1 page long and the 2nd report was only 1½ page long in substance), I would much prefer her own descriptions than those brief reports prepared by Mr Chan.
30. Seventh, the defendant’ counsel also tried to undermine the plaintiff’s credibility by putting to her that she had never informed her treating physiotherapist Mr Chan that she had lied in bed for almost 4 weeks before she first consulted him as it was not recorded in his 1st report dated 14 December 2014. With respect, I cannot agree with such an approach. First, I do not think it is the role of a treating physiotherapy to ask or to take down such detailed history. Second, even if he did ask, I do not think it will necessary find its way to the one page 1st report which simply recorded the history as “(S)he complained low back pain noted after prolong (sic) standing and sitting. Bilateral numbness also found after sitting for 15 minutes.” As the plaintiff stated in evidence, of which I accept, she was referred to the physiotherapist for treatment by Dr Richard Wong when her pain was not resolved after one month. Her first treatment with Mr Chan was on 21 August 2013. This, in my view, is consistent with the fact that she was bedbound at home for most of the time for the initial 4 weeks after the accident.
31. In my view, what is important to note in this case is that the contemporaneous records of the treating physiotherapist as well as the orthopaedic specialist actually go to support the plaintiff’s case in a significant way rather than discrediting it.
32. This is what Mr Chan said regarding the initial assessment in his 1st report dated 14 December 2014:-

“In the initial assessment, increased lumbar lordosis and obvious muscles spasm over bilateral paraspinal muscles noted. Limited lumbar movement especially forward flexion and extension noted. *Localized tenderness over L4/5 & L5/S1 region* as well as coccyx area were found and neurological tests were positive for her (numbness provoked by the test). From the findings, possible physical diagnosis were concluded as *prolapsed L4/5 & L5/S1 disc with irritation of nerve* and fracture coccyx injury.” [emphasis added]

1. On the treatments given, Mr Chan recorded the following in the same report:-

“Treatment plans were pain relief and muscle relaxation. In the beginning of the treatment period, Miss Leung obtained a satisfactory improvement for the pain intensity and pain-free standing and sitting duration as well as the range of lumbar movement. However, the condition of *bilateral lower limbs numbness* *while sitting was unchanged*. Therefore, MRI test was recommended…..”[emphasis added]

1. The above again in my view accords with the complaints made by the plaintiff in her witness statements which are supplemented by her oral evidence.
2. At the end of her physiotherapy treatments which lasted for more than 1 year, it has been reported by Mr Chan in his 1st report that there was 70% improvement achieved for her “back pain, range of movement as well as functional ability.” However, it is important to note also his comment that, “(F)or their *bilateral lower limbs numbness*, no improvement obtained (sic).” [emphasis added]
3. Mr Chan has written a 2nd report some 15 months later which charted the plaintiff’s progress during that time. The report was dated 17 March 2016. It has been reported in the 2nd report that her "overall improvement was only 70% and ceiling effect reached by active physiotherapy treatment." Significantly, Mr Chan also reported that there was "recurrent back pain and *increased bilateral lower limbs numbness* noted for 3-4 times every year within these few years." [emphasis added] At the time of writing the 2nd report, the plaintiff was unable to sit or stand and walk for more than 15 to 30 minutes. After bending activities or physical exercises, the current back pain was also noted. It was noted by the physiotherapist that for her "social role at home, as a mother and wife, she cannot help the kids in *bathing*, *caring schoolbags* and cannot have *a normal sexual life*." [emphasis added] Apart from these activities, she was also advised that prolonged standing, walking, bending activities and any kind of activities that may increase the loading of the disc at number spine should be avoided.
4. It has also been noted in the same report that the outcome of the traditional Chinese medicine, massages and treatment from the Chinese bonesetter were not as satisfactory as those provided by physiotherapy. It was accepted by the treating physiotherapist that the plaintiff may not have a full recovery from the injury and therefore the aim of the treatment was to minimise her functional limitations caused by the accident and to prevent any further deterioration in her condition.
5. I consider all the above contemporaneous records made by her treating physiotherapist in fact go to show that the plaintiff's complaints have been persistent and genuine rather than contradictory to her claims as submitted by the defendant’s counsel.
6. Eighth, another reason why I find the plaintiff's complaints to be genuine is based on the observation I made on her throughout the almost 1½ day while she was giving evidence in the witness box. She was clearly displaying signs of discomforts which required her to stand up often and for long periods of time while giving evidence (with permission from the court). I also noticed that, while sitting, she was sitting on the edge of the chair most of the time, ie not leaning or placing her weight towards the back of the chair (and hence putting pressure on the coccyx) like how most of us would sit. I do not find that plaintiff had deliberately tried to feign such acts nor do I find her to have in any way exaggerated her discomforts while giving evidence. She certainly looked more comfortable when she was giving her evidence while standing up rather than sitting down.
7. Ninth, Mr Sakhrani in his final submissions stated that the plaintiff had simply taken on a “sick role”. With respect, I disagree as there is simply no medical evidence to support such serious and unfounded allegation, whether from the defendant's own medical expert Dr Danny Tsoi or any other doctors. It was not pleaded nor canvassed in evidence and was only raised for the first time in the defendant’s written closing submission.
8. For the above reasons, I reject the defendant’s submissions that the plaintiff’s symptoms and disabilities are wholly built upon her and her husband’s oral evidence and are not supported by the report of CMC, the findings of a treating orthopaedic surgeon and physiotherapist, the views of the orthopaedic experts and surveillance. They are also the reasons why I consider her evidence on her complaints and disabilities should be accepted.

*Bilateral Numbness*

1. The plaintiff's complaint of bilateral lower limbs numbness was recorded by both of her treating orthopaedic specialist as well as physiotherapist.
2. In the report of Dr Richard Wong dated 27 November 2014, it has been reported that at the first examination by him on the plaintiff on 19 July 2013, there was tenderness over the coccygeal region with swelling but there was no lower limit neurology at the time. It was only on subsequent follow up consultations that there was a "gradualonset of *bilateral lower limbs numbness*." [emphasis added] It was also as a result of the persistent pain that the MRI was ordered by Dr Richard Wong when the "L4/5disc annulus tear and the marrow edema of coccyx" were discovered. Dr Richard Wong reported that while the plaintiff's condition slowly improved and when she was last seen by him on 21 November 2014 there was 80% improvement in terms of pain, he also mentioned that “(T)here was residual *on and off lower limbs numbness*” [emphasis added] with “no obvious neurology detected”. It should be remembered that Dr Richard Wong is the orthopaedic specialist who had looked after the plaintiff from July 2013 to November 2014. Thus, what he says about her injuries should in my view carry considerable weight.
3. The radiologist who has written the MRI report Dr Chan Cho Yin, when commenting on the "desiccated L4/5 disc the associated aunlus tear over the right foraminal and extraforaminal level", anticipated that this would give rise to *“localized low back pain symptom”*. And, in my view, that was exactly what happened to the plaintiff after the accident.
4. As stated above, in both of the 1st and 2nd physiotherapy reports, Mr Chan mentioned *“bilateral lower limbs numbness”* suffered by the plaintiff which remained unresolved.
5. Thus, in my judgment, it cannot be said that the “bilateral lower limbs numbness” was something new that the plaintiff has only started to mention for the first time in her witness statements and her evidence. They have been consistently reported by both the treating orthopaedic specialist and physiotherapist. It has also been anticipated by the radiologist who wrote the MRI report.
6. Further, I think the plaintiff was being rather honest when she agreed with the defendant’s counsel at the beginning of the cross-examination that there was much improvement on her “waist pain” (see §§6&7 of the plaintiff’s WS dated 30.4.2015), at least to the extent of 70 to 80% when compared her condition in August 2013 to the time of the hearing in September 2016. But she did not agree with the defendant counsel’s suggestion that there was substantial improvement in the “*numbness in her waist*”. Hence, it is clear that she was still suffering from some forms of numbness even by the time of the hearing.
7. It is unfortunate that when the plaintiff tried to demonstrate the areas where she had been suffered from numbness when giving evidence in court, she had only indicated her lower waist/buttocks areas rather than her "lower limbs". In her witness statements, she mentioned numbness in both lower limbs as well as her waist. I am not sure when she described her numbness to the treating orthopaedic specialist and physiotherapist whether she was referring to the same areas as those demonstrated in court or somewhere else. However, towards the end of her cross-examination, she disagreed with the suggestion put to her that her “persistent complaints of lower limbs numbness” is not correct as there is no medical basis for it. Her reply was that she disagree as “it is a fact (which is still) happening”. Thus, one can say that there might be some confusions in this aspect of her evidence.
8. Be it as it may, what is clear in my view is that, judging from the reports of her treating orthopaedic surgeon and physiotherapist over a period of just over 2 years, she had at least suffered from “bilateral lower limbs numbness” during that time. By the time Dr Richard Wong saw her after what the plaintiff has described as a “relapse” in November 2014, there was still “on and off lower limb numbness” reported.
9. In my judgment, the early signs and symptoms, including the complaint of the bilateral lower limbs numbness, were consistent with the “nerve root irritation, either at the exit foramen or irritation of the sciatic nerve” agreed by the experts in the Joint Medical Report: (See §32 at [I/D/146]). I accept Dr Wong’s view expressed in the Joint Medical Report that her nerve root irritation over bilateral numbness has likely improved with time: See §39 at [I/D/148]. Further, I reject Dr Tsoi’s opinion that the plaintiff’s bilateral lower limb weakness and numbness were not genuine. For one thing, if it was not genuine, it begs the question of why she had persistently made such complaints to the treating doctor and physiotherapist over such a long period of time when it was less than certain that she would able to recover the cost of the treatments from the defendant or anybody.
10. I am prepared to give her the benefit of the doubt that, at least for the periods mentioned in the reports of her treating orthopaedic specialist and physiotherapist, she was suffering from bilateral numbness to her lower limbs which was caused by the nerve root irritation, which in turn related to the prolapse disc at L4/5.
11. As for the bilateral numbness to her waist / lower back claimed by her during evidence, I would not take that into consideration when assessing the PSLA award.

*Surveillance footage*

1. The medical experts, after viewing the surveillance footage conducted by the private investigators ordered by the defendant’s solicitors, written a supplemental joint medical report which was dated 8 June 2016. In the report, both experts agreed that the plaintiff was able to perform her daily activities well and that there is no major difference from the findings make by them during the joint medical examination in July 2015. They commented that this was quite a contrast to the 1st physiotherapy report prepared by Mr Chan, dated 17 March 2016 where it was stated that "Miss Leung is unable to sit or stand and walk for more than 15-30 minutes; cannot help her kids in bathing, carrying schoolbags".
2. My own view of the surveillance footage is that it did not contradict her allegations that she was not able to sit for long time (there was no footage showing her sitting down for more than 15 to 30 minutes); or stand for a long time (there was no footage showing that she was standing for any lengthy period of time); and walking for a long time (there was no prolonged periods of walking shown in the footage). The only few occasions when she was helping with her daughter in carrying the schoolbag was in fact with a trolley type of schoolbag which require pulling on wheels at ground level rather than carrying on her back.

*Special features in this case*

1. Besides the usual discomforts associated with a coccygeal and the desiccated L4/5 disc (which I found to have resulted from the accident), in my judgment, there are other special features in this case which would justify a higher than normal PSLA award. They include:-
2. The prolonged bedbound period during the first 4 weeks after the accident which she could not: (see §6 of her witness statement dated 30 April 2015);
3. Her injuries had caused her not even able to participate in most of the ordinary outdoor or school activities of her own children: (as supported by her husband’s oral evidence);
4. As a mother, she could not even carry her own young daughters and let them run towards her in order to give them a hug: (again supported by her husband’s oral evidence);
5. The injuries have clearly affected her marital relationship and with her husband in that the plaintiff has declined to have any sexual intercourse with her husband since the accident due to the fear of pain (which is corroborated by her husband’s evidence) ;
6. the plaintiff’s relatively young age (she was 36 at the time of the accident), which means the injuries and associated disabilities would have a particular negative and profound impact on her daily life.
7. In my judgment, the above special features in my view would justify a departure from the normal PSLA awards found in cases where victims suffered from similar injuries.

*PSLA award*

1. Mr Patrick Lim, the plaintiff’s counsel, has submitted that an appropriate award for PSLA in this should be at HK$380,000 based on the following authorities:-

“(a) *Cheung Oi Yan Rudy v Wong Hoi Sum* [2012] 4 HKLRD 334. In this case the x-ray taken after the accident showed the back was normal. MRI did more than 2 years after the accident revealed a large annular tear and moderate disc degeneration of the L4/5 disc. Dr Johnson Lam opined that even though there was a probable element of symptom magnification objectively the MRI showed a large annular tear and moderate degeneration at L4/5 which were not typical of natural degeneration. According to Dr Lam the back injury had an overall mild to moderate effect on the plaintiff on prolonged sitting, standing or lifting heaving objects would cause pain or discomfort. The Court of Appeal increased the master’s award under this heard from $100,000 to $300,000.

1. *Lauw Ka Fong v Best City Ltd* HCPI 436 of 2014. The plaintiff suffered linear fracture of S1 and fine cortical fracture of S3 of her sacrum. Suffiad J awarded $300,000 under this head.
2. *Yau Tse Hin v Broadway Theatre Co Ltd* [2013] HKEC 473. The plaintiff sustained acute fracture of the 4th sacral vertebra but there was no direct compression on the nerves. Whilst scan showed the sacral fracture had united, she had residual pain over her sacrum. G Lam J awarded $350,000 under this head.
3. *Wong Wai Man v Yi Wo Yuen Aged Sanatorium Centre Ltd* HCPI 77 of 2007. The plaintiff was initially diagnosed to have a sprained back but MRI performed later showed degenerative changes and possibly protrude disc at L4/5 and L5/S1. The plaintiff claimed to have pain in her back and lower limbs. After viewing the video the court was satisfied there was much exaggeration on the part of the plaintiff of her resultant disability. Suffiad J awarded 250,000 under this head.
4. Mr Sakhrani on the other hand submits that an appropriate PSLA award should be at $150,000 based on the following cases:-
5. *Chan Yuk King v Tung Chun*, unrep., DCPI 2289/2008;
6. *Wong Wai Man v Yi Wo Yuen Aged Sanatorium Centre Limited*, unrep., HCPI 77 of 2007;
7. *Chan Kwei Duen v East Country Company Limited*, unrep, DCPI 665/2005; and
8. *Chan Ha v Lee Hon Ming and Anr*, unrep.,HCPI 414/2001.
9. In my view, the plaintiff’s injuries are closer to the injuries suffered by the victims in the cases cited by Mr Lim rather than Mr Sakhrani.
10. Having taken all the circumstances into account, in particular the special features mentioned above, I would consider that an appropriate PSLA award in this case should be at $350,000.
11. *whether the plaintiff is entitled to claim a loss of annual leave which was taken to attend physiotherapy treatment, valued at HK$11,855.84?*
12. This represents the value of her annual leave which the plaintiff had to take in order to attend physiotherapy treatment instead of taking holidays with her family. The plaintiff’s evidence is that her employer’s company policy is that leave taken is to be deducted from annual leave and only when the annual leave is exhausted that there will be cash deductions from the salary. Further, any annual leave not taken in the year cannot be rolled over to the next year. Thus, she suffered an actual financial loss when she had to take time to attend the physiotherapy treatments.
13. Unfortunately, despite it is plainly obvious that she is entitled to recover such monetary award representing the value of her annual leave, this was not conceded by the defendant until at the final submission stage.
14. In my judgment, the plaintiff is entitled to recover the sum of $11,855.84 representing the value of her annual leave taken to attend her physiotherapy treatments.
15. This, together with the loss of earnings of $23,630 which represents the difference between her salary and the 4/5 payment she had received from her employer during the sick leave period (which the defendant has admitted in the defence), the total loss of earnings in this case has now been agreed at $35,485.84.
16. I shall make such an award for loss of earnings accordingly.
17. *whether the plaintiff is entitled to an award for loss of earning capacity, if so, what is the appropriate amount?*
18. On this issue, I agree with Mr Sakhrani that there is simply no

evidence to support her claim that she has suffering a handicap in the labour market and that, she may run a real risk of losing her present employment and if she has to complete with others in the open labour marker, she would suffer a handicap as a result: *Chan Wai-tong & Anr v Li Ping Sum* [1985] HKLR 176 at 183D. I further agree with Mr Sakhrani that evidence is required to establish how the plaintiff’s earning capacity would be adversedly affected by the disability: *Cai Guoping v Yim Hok Wing and Others*, unrep., CACV 96/2015.

1. I therefore would reject the plaintiff’s claim for loss of earning capacity in this case.
2. *Whether an award for loss of society should be granted on a the plaintiff husband’s loss of society, if so, what is the appropriate amount?*
3. This claim is made pursuant to section 20C(1) of the Law Amendment and Reform (Consolidation) Ordinance, Cap 23. A claim of $100,000 has been made under the revised statement of damages for “no longer enjoys sex life and is unable to take care of her children who were 5 and 4 at the time of the accident”. It is said that the injuries of the plaintiff caused her spouse and children to be deprived of their society.
4. At the hearing, the evidence concentrated on the marital relationship between her and her husband, in particular the loss of society of her husband in terms of being deprived of enjoying a normal intimate relationship with his wife. In my judgment, the plaintiff is clearly entitled to an award for loss of society in this case.
5. First, the plaintiff herself has candidly stated such sensitive matters in her witness statement. This was supplemented by her oral evidence, in particular when she talked about her deprived opportunities to do ordinary things like carrying her own children and letting them run towards her in order to give them a hug. Further, the devastating effects of the injuries have on her marital relationship with her husband.
6. I believe her accounts on these matters are truthful.
7. Second, I believe and accept her husband Mr Cheng’s evidence when he says that after the accident, due to the great pain experienced by her, they have not had sex up to now. He did so out of respect to her feelings and not wanting to make her feel guilty. While the defendant is perfectly entitled to put the plaintiff to strict proof of all her claims, including this one, it is in my view most unfortunate that they have to put the plaintiff and her husband through this ordeal in order to prove this particular claim.
8. Given their relatively young age and the rather lengthy period in which they have been deprived of their intimate relationship, I consider that an appropriate award for loss of society in this case should be at $80,000: see *Law Ping* *Leung v Ng Sze Pong* [2009] 5 HKLRD 426; *Leung Kowk Biu v Tam San Yu* (2012) unrep., HCPI 810 of 2008. I so award such sum under this head of damages.
9. *What is the appropriate award for the claim of special damages?*
10. The plaintiff claims a total of $62,887.80 for consultation, physiotherapy and traditional Chinese medical practitioner. They are supported by receipts and a detailed record of when those treatments were received and how much was spent on each occasion.
11. Having considered the nature of the plaintiff’s injuries and the medical reports from her treating medical personnel, I am of the view that such treatments are necessary and reasonable. I would award the amount claimed in full.
12. For the travelling expenses claimed at $5,000, the plaintiff has given a full account of that in her supplemental witness statement filed on 13 October 2015. I consider them as perfectly reasonable and would also award them in full.
13. For the claim of fish maw which the plaintiff has been told would assist in her recovery, the plaintiff makes a claim of $30,350 which are well supported by the receipts produced. I find as a fact that she had in fact spent that amount on fish maw which she was hoping to aid in her recovery.
14. However, I have to accept the well established principle that only nominal or modest sums are normally awarded for the consumption of such tonic food, especially when the injury is relatively minor and treatment without surgery, long hospitalization and complications: *Yu Ki v Chin Kit Lam* [1981] HKLR 419.
15. In this case, I would hardly regard the plaintiff’s injuries as minor. Having found both of the fracture coccyx and the disc prolapse were caused by the accident and that they required prolonged treatments and recovery, I would consider the consumption of the fish maw was perfectly reasonable in this case. Nonetheless, I would reluctantly only allow half of the actual amount spent in view of the authorities.
16. I would agree with Mr Lim that a reasonable award to make for tonic food in this case should be at $15,000.
17. *Cost of future physiotherapy treatment*
18. For future physiotherapy treatment, Mr Chan recommended the following in his 2nd report:-

“For every recurrent episode of pain occurred, Miss Leung found that the symptoms were much improved after 8-10 sessions of physiotherapy treatment. Therefore, it is recommended that Miss Leung can arrange one physiotherapy treatment for every 1-2 months for check up and maintenance purpose during her stable period. …… If recurrence of pain occurs, active physiotherapy treatment should be resumed for symptomatic relief. ”

1. Dr Wong on the other hand considered that her continuous physiotherapy treatments only indicate that she has fluctuated residual symptoms, but not likely to improve her whole condition. Dr Wong opined that the plaintiff may need medication and physiotherapy treatment on a “need-to” basis.
2. Given the fact that the plaintiff has not had any further physiotherapy treatment since September 2015, I am of the view that it will not be appropriate to make an award for future physiotherapy treatment in this case.

*CONCLUSION*

1. In conclusion, based on the aforesaid, I have assessed the damages in this case as follows:-
2. PSLA $350,000
3. Loss of earnings $35,486
4. Loss of earning capacity nil
5. Loss of society $80,000
6. Special damages $82,888
7. Future cost of physiotherapy nil

$548,374

1. On top of the above amount, the usual interest will be awarded at 2% for general damages from date of issue of writ to date of assessment and 4% for special damages from date of accident to date of assessment, thereafter at judgment rate.
2. I would also make an order nisi for costs that the defendant shall pay the plaintiff’s costs of the assessment, such costs to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the legal aid regulations. Such order will become absolute in the absence of any application to vary the same within 14 days from the date of handing down the assessment of damages.

( Andrew SY Li)

District Judge

Mr Patrick D Lim, instructed by Li, Kwok & Law, assigned by the Director of Legal Aid, for the plaintiff

Mr Ashok Sakhrani, instructed by Cheng, Yeung & Co., for the defendant