## DCPI 245/2019

[2021] HKDC 1246

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 245 OF 2019

BETWEEN

SO CHI KEUNG Plaintiff

and

HOSPITAL AUTHORITY Defendant

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Before: His Honour Judge MK Liu in Court

Dates of Hearing: 13, 14 and 24 September 2021

Date of Judgment: 11 October 2021

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JUDGMENT

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1. The plaintiff (“P”) sustained personal injuries as a result of an accident at work which occurred on 12 December 2014 (“the Accident”). He claims against his then employer, the defendant (“D”), damages for personal injuries.
2. Liability was admitted by D in favour of P per a consent order dated 11 February 2021. This is the assessment of the quantum of damages.

*THE PARTIES’ RESPECTIVE CASES*

1. There is no dispute that:-
2. P was born in 1959. He was aged 55 at the time of the Accident and is 62 years at the time of this trial.
3. At the time of the Accident, P was employed to work as a Health Care Assistant (“HCA”) by D and was assigned to work at Pamela Youde Nethersole Eastern Hospital (“PYNEH”). He had been working in this employment for D since 6 October 1997.
4. Prior to the Accident, P had suffered chronic sciatica and low back pain. In the few months before the Accident, P sustained a mild back exacerbation. He took sick leaves on and off until 7 September 2014 due to low back pain. He resumed work on 7 September 2014.
5. P’s case is that on the date of the Accident, when he was, working in a team with a co-worker, trying to lift up and turn a heavy patient in bed, P sprained his back, lost balance and fell backwards. As a result, he had his low back hit the bedside cabinet and sustained back injuries. He suffered both physical and psychiatric symptoms and disabilities including low back pain aggravated by exertion, prolonged walking, standing and sitting, impaired weight handling capacity, sexual dysfunction, emotional/anxiety problems and insomnia which have persisted until now despite treatment.
6. P claims that his severe back symptoms had caused him to be on sick leave from the date of the Accident until January 2016, and rendered him unable to resume his pre-accident work. He was made to apply for early retirement which took effect on 1 September 2015.
7. As per the Re-Revised Statement of Damages, the quantum of damages as claimed by P is as follows:-

|  |  |
| --- | --- |
| PSLA | HK$300,000 |
| Pre-trial loss of earnings | HK$975,329 |
| Future loss of earnings | - |
| Loss of retirement benefits | HK$146,299 |
| Loss of earning capacity | HK$100,000 |
| Special damages | HK$19,000 |
| Future medical expenses | - |
| Less: Employees’ compensation received by P | (HK$320,274.87) |
| TOTAL | HK$1,220,353 |

1. P himself is the only factual witness in his case. He has given oral evidence in the trial.
2. D’s case is as follows:-
3. The physical and mental injuries and disabilities suffered by P as a result of the Accident are not as serious as what he claims. There is an element of exaggeration. And some, if not most, of P’s alleged physical and mental symptoms and disabilities are unrelated to, and not caused by, the Accident.
4. After a reasonable period of sick leave, P should have recovered sufficiently from his physical and mental injuries and disabilities that were caused by the Accident, and should be able to return to his pre-accident occupation. That he has not done so is a result of his own choice, failure to mitigate his loss, exaggeration of his disabilities and/or pre-existing medical conditions.
5. The reasonable period of sick leave after the Accident should be no more than a total of 8 months (6 months’ orthopaedic sick leave and 2 months’ psychiatric sick leave), and in any event no more than 10 months.
6. By reason of P’s pre-existing back and related conditions, damages in this case should be discounted by no less than 70%.
7. In D’s Answer to the Revised Statement of Damages, D states that the quantum of damages should be as follows:-

|  |  |
| --- | --- |
| PSLA | HK$30,000 |
| Pre-trial loss of earnings | HK$61,714.05 |
| Future loss of earnings | Nil |
| Loss of retirement benefits | Nil |
| Loss of earning capacity | Nil |
| Special damages | HK$8,000 |
| Future medical expenses | Nil |
| Less: Employees’ compensation received by P | (HK$320,274.87) |
| TOTAL | - HK$220,560.82 |

1. In other words, D is saying that notwithstanding that liability has been established, no award in favour of P should be made.
2. D has filed one witness statement for the purpose of assessment of damages, i.e. the witness statement of Ms Chan Ka Yee Clare, who is D’s Human Resources Manager. The matters in that witness statement concern P’s employment with D and earnings received by P in the year before the Accident. Those matters are not in dispute. The parties agreed that the matters in that witness statement be treated as agreed facts. As a result of this agreement, D has not called Ms Chan to give oral evidence in the trial.
3. Specialists in orthopaedics Dr Chan Wai Fu (“Dr Chan”, appointed by P) and Dr Danny Tsoi (“Dr Tsoi”, appointed by D) jointly examined P on 19 October 2017 and commissioned two Orthopaedic Joint Medical Reports dated 8 December 2017 (“OJMR1”) and 16 December 2019 (“OJMR2”) respectively.
4. Specialists in psychiatry Dr Cheung Hung Kin (“Dr Cheung”, appointed by P) and Dr Gabriel Hung (“Dr Hung”, appointed by D) jointly examined P on 22 January 2019 and commissioned a Psychiatric Joint Medical Report dated 18 February 2019 (“PJMR”).
5. By previous orders made by the court, these 3 reports were adduced as evidence in the trial without calling the makers thereof.

*P’S EVIDENCE*

1. In assessing whether P’s evidence should be accepted, the principles have been summarized by DHCJ Au (as he then was) in *Lee* ‍*Fu Wing* ‍*v Yan* ‍*Po Ting Paul[[1]](#footnote-1)*. In that case, the learned judge said:-

“53. In assessing the credibility of a party’s case on a particular issue, I accept the submissions of [counsel] that the Court should take into considerations the following:-

1. Whether the party’s case is inherently plausible or implausible.
2. Whether the party’s case is, in a material way, contradicted by other evidence (documentary or otherwise) which is undisputed or indisputable.
3. Where it is shown that a witness has been discredited over one or more matters to which he has given evidence using the above tests. This is relevant to the assessment of his overall credibility.
4. The demeanour of the witnesses.”
5. Having seen and heard P’s evidence, in my judgment, P is not a credible and reliable witness. His evidence is contradicted by the documents and the medical evidence in many aspects. He has exaggerated the injuries suffered by him as a result of the Accident. His words cannot be taken for granted for the purpose of this assessment exercise.
6. Counsel for P accepts that P’s evidence is unsatisfactory and on occasions inconsistent with the medial records. Counsel submits that this is understandable for P’s memory may not serve him right on the matters that took place 6-7 years ago. I fully appreciate that P has been asked to tell the details of some events occurred years ago, and giving evidence in a trial is not a memory test. However, when P’s evidence has been contradicted by contemporaneous medical records on some material aspects, this is an important factor which the court must take into account in assessing P’s credibility and reliability.

*Seriousness of P’s injuries*

1. The hospital medical reports show that after the Accident, although P complained of back pain, physical examination showed only tenderness. There was no lower limb numbness or weakness. There was no neurological deficit. P claimed that at the time of the Accident, he hit his waist or back against the bedside cabinet, causing him serious pain (“the cabinet episode”). However, the hospital medical reports and records show no evidence of any redness, swelling, bruises or “bony contusion”.
2. After the Accident, P received only conservative treatment. P has not been hospitalized. There was also no need for P to have any surgical operation. Dr Chan says that no operation is recommended and the prognosis is satisfactory. Dr Tsoi is of the view that P needs no further treatment and the prognosis is excellent. As to P’s residual disability, Dr Chan says that P would only be mildly affected by his alleged injury. Dr Tsoi is of the opinion that P’s residual discomfort should only be of a very mild degree.
3. The consultation summaries of the staff clinic of Tang Shiu Kin Hospital show that P’s condition improved within a short period of time after the Accident.
4. During the consultation on 18 December 2014 (i.e. 6 days after the Accident), P claimed at that time that his low back pain was less than before but still painful. Physical examination showed only tenderness.
5. During the consultation on 22 December 2014, P claimed that his low back pain to be static. Physical examination showed that the right lumbar paraspinal muscle was only mildly tender and examination of the range of motion of the back revealed slightly limited flexion.
6. In P’s evidence, P claimed that since the Accident, he had been suffering from various problems including (a) pain and weakness of the back, (b) aggravation of back pain after prolonged sitting, getting up, bending the back or changing postures, (c) inability to lift heavy weight. In [16(ii)] of his Re-Revised Statement of Damages, P claimed that his back pain is more severe when sitting for about 45 minutes, and he is unable to lift heavy objects. However, these allegations are contradicted by the following:-
7. It is recorded in the PJMR that when P attended the joint psychiatric examination on 22 January 2019, he was able to sit through the interview which lasted for 3 hours.
8. Further, the DVD surveillance evidence produced at the trial reveals the following:-
9. 18 March 2016: P was carrying a backpack on his back, walking swiftly on the street overtaking other pedestrians, running quickly to catch the bus at the bus-stop, and walking upstairs without holding onto the handrail.
10. 21 March 2016: P was carrying a backpack on his back, holding an opened umbrella as it was raining and walking rather swiftly on the street, walking down a long flight of stairs swiftly without holding onto the handrail, overtaking other pedestrians on the road.
11. 8 June 2017: P was retrieving and driving the way a motor vehicle from a carpark, without any difficulty.
12. 5 August 2017: P was carrying a backpack on his back and holding a boy in his arms (the boy was over 1-year old according to P, and the boy could in fact walk as shown in the DVD surveillance), bending down to lift up the boy from the ground and carry him in his arm, jerking the boy up while holding him in P’s left arm only while carrying the backpack on P’s back. P was also sitting at ease in the restaurant, carrying the backpack on his back, holding the boy in his arms and walking upstairs on that day.
13. In my judgment, P has clearly exaggerated his injuries. The injuries suffered by him as a result of the Accident are not as serious as claimed by him.

*Seriousness of P’s symptoms and disabilities*

1. P claimed that he suffered sprain injury causing him serious pain as well as contusion injury also causing him serious pain. P said that when he attended the Accident and Emergency Department (“AED”) of PYNEH on the day of the Accident (i.e. on 12 December 2014), he did tell the doctor how he suffered his back injury including the cabinet episode. He also said in evidence that he was told by the doctor who examined him on that day that there was redness at his back. However, all these are contradicted by the relevant medical record. According to the medical record, when P attended the AED of PYNEH for treatment on that day, he only complained of back pain after helping a patient to turn while on duty. There was no record of his telling the nurse or doctor the cabinet episode and suffered contusion injury to his back. Clinical examination showed only diffuse pain over the lumbar region. There was no finding of contusion injury or any redness.
2. During his subsequent attendance for treatment on 15, 18 and 22 December 2014, physical examination showed only tenderness with no lower limb weakness or numbness. There was no record of any complaint of contusion injury or back injury as a result of the cabinet episode. It was only on 23 December 2014 when P attended Occupational Health Centre (“OHC”) of PYNEH that he mentioned the cabinet episode. However, the relevant medical report and record do not contain any record of redness, swelling or bruises that would be consistent with contusion injury.
3. In my view, the allegation that the cabinet episode occurred during the Accident and P sustained injuries as a result of the cabinet episode is untrue. It was a story made up by P after the Accident.
4. If there is any truth in this allegation, the cabinet episode would be a significant contributing factor to the injuries sustained by P during the Accident. In these circumstances, there would be no reason for P not mentioning this event when he attended the AED on 12 December 2014 and during the consultations on 15, 18 and 22 December 2014.
5. Counsel for P submits that when P attended the AED, P had painkilling injection. This suggested that he was likely having sever back pain and might not be in his best shape to recall and report all details to the treating doctor of the AED. With respect, I am unable to accept this submission.
6. It is P’s oral evidence in the trial that he did tell the AED medical staff the cabinet episode. However, P’s evidence is contradicted by the AED record. Counsel’s submission cannot be an answer to this contraction.
7. What has been submitted by counsel is not something said by P in his evidence. In other words, the submission is not supported by evidence.
8. Further, not only the AED record, the records of the consultations on 15, 18 and 22 December 2014 also do not contain the mentioning of the cabinet episode by P during those consultations. There is no explanation, let alone satisfactory explanation, as to why P did not mention the cabinet episode in those consultations.
9. All the medical records during the period shortly after the Accident do not contain any record of redness, swelling or bruises. There is no medical record showing that P has sustained contusion injury during the Accident.
10. According to the medical report dated 12 June 2015 prepared by Dr Cheuk Yau Lin of OHC of PYNEH, at the work capacity evaluation on 27 January 2015, P “*self-perceived to have cripple level of disability and his capacity did not match with job demand*”. P claimed to have fair sitting and walking tolerance. However, Waddell test was positive. His gait was found to be normal and brisk. He was observed to be able to get in and out of chair smoothly. Driving was okay. It was also reported that there were some inconsistencies in his reported symptoms and the observed findings.
11. At the joint medical examination on 19 October 2017 by the orthopaedic experts engaged in this case, P complained of intermittent back pain which was of a crushing type of pain. He rated the maximum pain intensity to be 8/10 and there was only 20 to 30% improvement since the injury. However, the joint medical examination showed that there was only tenderness. No spasm was elicited on palpation. Three indicators in Waddell’s Simulation Tests were positive.
12. Counsel for D refers me to *Wong Yun Chiu v Union Printing Company Limited*[[2]](#footnote-2), in which Bharwaney J said:-

“20. …… A test performed to detect Waddell’s signs, used to detect malingering in patients with back pain, elicited 3 out of 5 positive signs. 3 out of 5 positive signs are considered to be clinically significant and, absent a psychological component, are suggestive of symptom magnification.”

1. There is no evidence showing that P’s back pain was aggravated by his psychiatric condition, or had a psychiatric or psychological component. Neither Dr Cheung nor Dr Hung has given such an opinion.
2. By reason of the aforesaid, I am of the view that P has exaggerated his symptoms and disabilities since an early stage after the Accident.

*P’s pre-existing back condition*

1. In his evidence, P said that during the Accident, he suffered injury only at his right lower back/waist in the region above the buttock. He did not suffer any injury to his buttock. This is consistent with the sketch in the relevant medical record of the AED of PYNEH. The relevant contemporaneous medical reports and records relating to P’s consultations on 12, 15, 18 and 22 December 2014 also show that P complained only of back pain and/or tenderness at L4 level or L4/5 level. There was no complaint of buttock injury or pain.
2. By 18 December 2014 and 22 December 2014, P had reported that his low back pain was less than before and physical examination on 22 December 2014 revealed only mild tenderness of the right lumbar paraspinal muscle.
3. On 3 February 2015, when P attended OHC for follow-up, it was reported that his right lower back pain and right buttock pain were on an improving trend and he was then mainly suffering from right mechanical buttock pain. He was taking less analgesics. Physical examination showed his gait to be normal and brisk. There was no tenderness over the paraspinal muscle. And there was only mild tenderness over the right gluteus muscle. It was also reported that “Piriformis stretch +/-”.
4. The evidence shows that by 3 February 2015, P was then mainly suffering from right buttock pain which was his pre-existing condition before the Accident. He did not suffer any buttock injury during the Accident. P had been attending the OHC for chronic low back pain since 26 September 2013 and he further developed right buttock pain with suspected Piriformis syndrome in December 2013. He was treated with physiotherapy, occupational therapy and medical treatment and his symptoms gradually improved.
5. In my view, Dr Tsoi’s opinion as set out in OJMR1 is correct. P had pre-existing back condition which caused him to suffer from sciatica for 20 years and chronic low back pain since 2007. Even by September 2013 and December 2013, P had to visit OHC for treatment of his symptomatic back and right buttock. P’s musculotendinous injury of the lower back would have healed up to a great extent, if not completely, after conservative treatment and rest for a few weeks and at most up to 6 months. The chronic back pain unresponsive to conservative treatment was mainly due to the pre-existing L4-5 spondylolisthesis, which had been bothering P for 10-20 years before the Accident. Most of the P’s back pain was related to the pre-existing symptomatic back condition.

*Early retirement*

1. As a HCA, the retirement age is 60. P has chosen to have an early retirement, and he retired on 1 September 2015.
2. In P’s witness statement, P said that after the Accident, he had all along intended to return to work. During the period of sick leave in 2015, he also wrote to D requesting for returning to work with light duties. But the only reply that he got was that there was no light duty work that could be arranged for him. He also said that the medical board of PYNEH (“the medical board”) assessed him on 20 April 2015 and informed him on 29 May 2015 that he was assessed to be permanently unfit and not suitable to perform the tasks of his pre-accident occupation. He also said that the doctors recommended him to have early retirement. Therefore, he had to apply to D on 10 July 2015 for early retirement and he formally retired on 1 September 2015.
3. P’s alleged requests by letter and in person to return to work with light duties is an allegation not supported by any documentary evidence. P has not disclosed any letters or written communications between him and D relating to his alleged requests. It is inherently unlikely that while P was still on sick leave and presumably attending medical consultations and receiving treatments, he should request to return to work during that period.
4. In his evidence, P unequivocally claimed that that he never thought of early retirement before June 2015. It was only in June 2015 that the doctor(s) first raised the issue of his early retirement and recommended him to have an early retirement. He refused the doctor’s suggestion at that stage. It was only in July 2015, when he was assured of his medical benefits after his retirement, that he reluctantly agreed to have an early retirement. P claimed that he was forced or made to have an early retirement.
5. However, the documentary evidence show at an early stage, P had started to think of, or plan for, his early retirement.
6. The consultation summary dated 10 February 2015 of OHC of PYNEH shows that P’s right side low back pain were improving though persisted. He was then taking less analgesics. But he said that he was worried about repeated injury and enquired about early retirement if unable to return to work.
7. On 24 February 2015, it was recorded in the consultation summary that P enquired about medical benefits and procedures for early retirement if unable to return to work. It was also recorded that P said he was willing to try light duty later on but had discussed with wife about retirement.
8. Under cross-examination, P denied that he had ever talked about the issue of early retirement with the doctor as stated in the above medical records. However, upon further questioning, he agreed to the following medical record relating to the consultation on 9 March 2015.
9. The consultation summary dated 9 March 2015 shows that P told the doctor that his son was then applying for a new job and P would decide the retirement issue after confirmation of the son’s application for the new job.
10. On 28 April 2015, it was reported that P told the doctor that his son passed entrance test and got a new job and he was glad about it.
11. On 9 July 2015, P was reported to have further improvement of the right low back pain and right buttock pain. He was then “*self-tailing off Gaba*”. The physical examination showed minimal tenderness at right L5/S1 area and right gluteal region. And it was reported that he was “*keen to retire early, req letter to support*”. The letter that was then issued by OHC of PYNEH dated 9 July 2015 shows that instead of the doctor recommending him to have an early retirement, the letter was issued to support P’s application for early retirement on medical ground. In the said letter, the doctor supported P’s application for early retirement on the ground that P was unable to perform his current job duty permanently due to his deteriorated physical condition. However, as set out in the above, the available medical reports and records in fact show that P’s physical condition had improved instead of deteriorated.
12. Contrary to P’s assertion in his evidence, the documentary evidence shows that instead of P being keen to return to work after the Accident, he was keen to have early retirement. It was P who raised the issue of early retirement and requested a letter from the doctor to support his application for early retirement after the confirmation of his son’s getting a new job.

*Events after the early retirement*

1. Since the Accident until his early retirement on 1 September 2015, P was on sick leave without returning to work and he had been claiming to have similar back pain after the Accident. However, according to the consultation summary dated 24 September 2015 of the Department of Orthopaedics and Traumatology of PYNEH, in the consultation on 24 September 2015, he was recorded to have a non-tender back, with full lower limb power and full straight leg raising. This tends to show that P had not been suffering from serious injuries and disabilities resulting in his having to have the early retirement as claimed by him.
2. Despite his claim that he could not return to his pre-accident occupation, he was able to take up a new job after his early retirement. He worked as a full-time non-emergency ambulance man since October 2015, pushing patients on wheelchairs, transporting elderly patients for follow-up appointments, or doing simple first-aid work.
3. In his witness statement, P claimed that after the expiry of his sick leave in January 2016, since he could not find any suitable full-time job, he resumed his previous service with the Auxiliary Medical Service (“AMS”). However, under cross-examination, he agreed that in fact he started to work for the AMS again in October 2015, i.e. before the expiry of his sick leave.
4. He denied that he had to push patients on wheelchairs alone in his service with the AMS. He said they worked in a team of 3 to transport one patient on one wheelchair. When the patient was a heavy one, one worker would be pushing the wheelchair while another worker would be pulling the wheelchair in front by holding on one side of the armrest even on level ground. In my view, this is contrary to common sense. The way of moving the wheelchair as suggested by P is an odd and difficult manoeuvre than simply one worker pushing the wheelchair on the level ground.
5. P said that when the patient on the wheelchair had to be moved up stairs, the 3 workers, including P, would have to work together to lift up the wheelchair and the patient and walk up the stairs. This is evidence showing that it would not be correct to say that the residual disabilities sustained by P as a result of the Accident has prevented him from returning to his pre-accident occupation.

*Psychiatric conditions*

1. As to the psychiatric conditions of P, both Dr Cheung and Dr Hung are of the opinion that P suffered adjustment disorder with mixed anxiety and depressed mood as a result of the Accident. They are of the view that there is no evidence of malingering, although Dr Hung opines that P had mildly exaggerated the severity of his current psychiatric condition at the time of the joint psychiatric examination. Having considered the PJMR, I would give P a benefit of doubt and would not regard P has exaggerated his psychiatric condition at the time of the joint psychiatric examination.
2. Both Dr Cheung and Dr Hung are of the opinion that P’s psychiatric condition improved with treatment. Dr Cheung is of the opinion that P’s current mental problem is mild. Dr Hung opines that P has very mild symptoms at present which no longer meet the diagnosis for adjustment disorder with mixed anxiety and depressed mood. Dr Cheung assesses P to be suffering from 3% psychiatric impairment of the whole person. Dr Hung assesses the psychiatric impairment to be 0%.
3. Having considered Dr Cheung’s opinion and Dr Hung’s opinion, I prefer the latter to the former. With respect, I am of the view that Dr Hung’s opinion is more well-reasoned and supported by the medical evidence.
4. It is an undisputed fact that P was investigated by the ICAC in 2015, and the investigation has caused him much distress. According to the consultation summary of the psychiatric clinic of Queen Mary Hospital, at the consultation on 1 September 2015, P reported that his mood was then low as he was then under investigation by ICAC. At the consultation on 29 December 2015, he told the doctor that he was still under investigation by ICAC and would meet them again in January 2016. He felt the long investigation period also a stressor.
5. Dr Hung says that P’s adjustment disorder with mixed anxiety and depressed mood had improved and recovered by 26 May 2015 and 27 July 2015. Subsequent deterioration in his condition appears unrelated to the Accident but was due to the investigation by the ICAC. On the other hand, Dr Cheung says that contribution of the investigation by ICAC to the P’s mental condition was transient since P was cleared after the investigation and the ICAC case was dropped in 2016. Dr Cheung says that any psychiatric symptoms which persisted subsequently are related to the Accident and unrelated to the ICAC incident.
6. As to the difference between Dr Cheung and Dr Hung, I note that Dr Hung was able to point out in the PJMR that the consultation notes concerning P also described of other stressors including problems with P’s three children (consultation on 3 May 2016), the death of three of P’s friends (consultation on 17 January 2017) (confirmed by P in his evidence in court that it should be the death of 2 friends and P’s sister), and the fact that P was checked again by the ICAC (consultation on 17 October 2017). In his evidence in court, P said that he was investigated by the ICAC from August 2015 until after 17 October 2017, during which period he felt stressful. In the medical record dated 6 February 2018, it was stated that the P was then “*Not being checked by ICAC*”. All these are recorded in the consultation summaries of the psychiatric clinic of Queen Mary Hospital. Dr Cheung is silent on all these matters.
7. Dr Hung’s opinion is consistent with and supported by the relevant consultation summaries. At the first psychiatric consultation on 5 May 2015, although P complained of low mood and poor sleep, mental state examination showed that he was calm and settled, with good eye contact. His speech was coherent and relevant, with normal tone, speed, and flow. His mood was observed to be not overtly depressed or elated.
8. At the follow-up on 26 May 2015, P reported improvement in his mood since the last follow-up. He felt that his mood was overall stable, not overtly depressed or irritable. Mental state examination at that time showed that P was settled, with good eye contact. His speech was coherent and relevant. His mood was neutral, affect congruent. The impression was stable.
9. At the follow-up on 28 July 2015, P reported that he had stable mental condition since the last follow-up. He reported that his mood was overall stable, not overtly depressed or elated or irritable. Mental state examination at that time also showed that P’s mood was euthymic.
10. The medical records clearly show that P’s adjustment disorder with mixed anxiety and depressed mood was mild in nature which improved and recovered by May 2015 and July 2015 as opined by Dr Hung. P’s subsequent deterioration was not caused by the Accident but by other stressors as pointed out by Dr Hung, including the ICAC investigation. In any event, his residual symptoms are very mild in nature and do not meet the diagnostic criteria for adjustment disorder with mixed anxiety and depressed mood.
11. It is also relevant to note that P is not a person who has no previous history of having to consult and obtain psychological assistance when he had psychological stressors. In his evidence in court, P confirmed that in the few years before the Accident, until about 1 year before the Accident, he had mood and emotional problems for which he sought psychological counselling.

*MY FINDINGS*

1. I have ruled that P is not a credible and reliable witness. Save and except the matters not disputed by D and the admissions made by P which contradicts his own case, I refuse to accept P’s evidence and attach no weight to his evidence. The assessment of damages should be based upon the undisputed facts, the admissions made by P, and the contemporaneous medical reports and records. Based upon the evidence accepted by the court, I would set out my findings on the issues in dispute between the parties in the paragraphs below.

*Ability to return to pre-accident occupation*

1. One of the disputes between the parties is whether P would be able to return to his pre-accident occupation.
2. After the Accident on 12 December 2014, P was granted sick leave up to 21 January 2016. P relies upon the assessment by the medical board to say that that he was unable to return to his pre-accident occupation as a HCA, for this is the assessment of the medical board.
3. D disagrees that P would not be able to perform his pre-accident occupation.
4. Orthopaedically, neither Dr Chan nor Dr Tsoi is saying P cannot resume his pre-accident occupation as a HCA. Dr Chan says that P should be able to resume his pre-injury duty with some reduction in work capacity and efficiency. Dr Tsoi says that P’s reduced capacity in performing heavy manual work is mainly attributable to his pre-existing spondylolisthesis. The effect of the soft tissue sprain back should be mild to minimal and P is still fit to take up lighter duty job like simple nursing care, drug dispensing and all kinds of administrative and clerical duties of a nursing officer.
5. Counsel for P submits that Dr Tsoi erred in saying that P would be fit to take up the duties of “*simple nursing care, drug dispensing and all kinds of administrative and clerical duties of a nursing officer*”, for P has never been a nursing officer and does not have the necessary qualifications and skills to be a nursing officer. This is a valid criticism. However, even adopting the opinion of Dr Chan, there is still no evidence from an orthopaedic expert saying that P would not be able to resume his pre-accident occupation as a HCA.
6. Psychiatrically, Dr Cheung says that it is impossible for P to resume his pre-injury occupation now. However, the reason given by Dr Cheung is that P has formally retired and he is 60 years old. Dr Cheung is not saying that P is prevented from returning to his pre-accident occupation by reason of his psychiatric condition.
7. Dr Hung says that P is currently fully capable of performing the duties of his pre-injury occupation based on his current psychiatric condition. There is no indication that his current psychiatric symptoms would affect his work efficiency or to perform the requirements of the pre-accident job if he was allowed to take up the job.
8. In my view, the evidence before this court clearly shows that P would be able to return his pre-accident job as a HCA, albeit that there may be some reduction in work capacity and efficiency.
9. This is the view of Dr Chan, the orthopaedic expert appointed by P.
10. The psychiatric expert appointed by P, Dr Cheung, does not say that P is unable to return to his pre-accident occupation due to any psychiatric reason.
11. The psychiatric expert appointed by D, Dr Hung, opines that P would be able to resume his pre-accident job. There is nothing contradicting Dr Hung’s opinion.
12. Although the medical board has given an opinion that P would be permanently unfit to perform the work tasks as a HCA, the evidence in support of and the reasons for this conclusion are unknown. In these circumstances, only very little weight should be given to this assessment.
13. As said in the above, immediately after his retirement on 1 September 2015, P started to work for AMS in October 2015, before the expiry of his sick leave period. His work in AMS involves pushing patients on their wheelchairs and transporting elderly patients for follow-up appointments, which cannot be said as non-manual or light duties. P’s work in AMS also involves lifting and carrying patients in wheelchairs to walk upstairs when necessary, together with the other 2 workers in the team.
14. Having considered all the evidence before the court, I am of the view that after a reasonable period of sick leave, P should be able to return to his pre-accident occupation. His early retirement is not caused by the Accident and the injuries sustained as a result of the Accident, but was a choice of his.

*Reasonable period of sick leave*

1. The second issue in dispute is what should be the reasonable length of the sick leave period. After the Accident, P was granted sick leave from 12 December 2014 to 21 January 2016. P contends that the sick leave period granted to him is reasonable. However, D argues that the reasonable period of sick leave should be 8 months, and in any event should not be more than 10 months.
2. In determining the reasonable length of the sick leave period, the court is not bound by the sick leave certificates obtained by P. The sick leave certificates would merely be part of the evidence before the court. Ultimately, the question should be determined after taking into account all the evidence. In *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd*[[3]](#footnote-3), Le Pichon JA said:-

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

1. I have concluded that P has exaggerated his injuries since an early stage after the Accident. Accordingly, it would not be safe to rely upon the sick leave certificates obtained by P to determine the reasonable length of the sick leave period, for the issuance of those sick leave certificates would be primarily because of the symptoms reported to the doctors by P.
2. The parties have adduced expert evidence addressing the reasonable length of the sick leave period.
3. Dr Chan says that he would respect the sick leaves granted by the treating doctors who assessed P from time to time. With respect, this is exactly the fallacy pointed by the Court of Appeal in *Tam Fu Yip Fip*, i.e. the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by P. While P has exaggerated the injuries, it would not be safe and prudent to say that the sick leave period covered by the sick leave certificates must be a reasonable period.
4. Dr Cheung says that all previous sick leaves granted appear justifiable because of the combined effect of P’s physical and mental disturbance. With respect, the reasonable sick leave period should only be the required sick leave period solely occasioned by the Accident. It seems that in assessing the reasonable length of the sick leave period, Dr Cheung has not excluded P’s pre-existing conditions and some post-accident events (for example, the ICAC investigation) affecting P.
5. Dr Tsoi is of the opinion that sick leave for musculotendinous injury of lower back seldom exceeds 6 months, and sick leave for the treatment of the P’s pre-existing spondylolisthesis should not be included in the evaluation of the subject soft tissue injury. Psychiatrically, Dr Hung says that sick leave for a period of 2 months is reasonable for the psychiatric symptoms caused as a result of the Accident.
6. In my view, there is no satisfactory expert evidence contradicting Dr Tsoi’s opinion and Dr Hung’s opinion. I accept their opinions. I find that the reasonable length of the sick leave period should be 8 months.

*Discount for pre-existing spinal conditions*

1. Another issue is what discount should be applied in the assessment of damages, while there is no dispute that P has pre-existing spinal conditions.
2. Dr Chan is of the opinion that P’s residual disability is due to the localized soft tissue and *bony contusion* and exacerbation of the underlying spondylolisthesis at the time of the injury. Dr Chan apportions one-third of P’s residual disabilities to the Accident and two-thirds to the pre-existing spondylolisthesis.
3. Dr Tsoi opines that most of P’s back pain was related to the pre-existing symptomatic spondylolisthesis. The subject soft tissue injury contributed only a minor role. Dr Tsoi also emphasizes that but for the subject soft tissue sprain injury, P would have been affected by the pre-existing spondylolisthesis *at any time in any event* with similar magnitude of discomfort and disability as he is now suffering. Dr Tsoi opines that the P’s current back problem accounts for 8 to 10% whole person impairment, of which not more than 1 to 2% is attributable to the Accident. In other words, Dr Tsoi apportions 10 to 20% of P’s current back problem to the Accident, with the remaining 80 to 90% being apportioned to the pre-existing spondylolisthesis.
4. In OJMR2, Dr Tsoi says that P’s L4-5 spondylolisthesis was obviously pre-existing, and he would have been affected by the pre-existing pathology *at any time in any event*. Dr Tsoi says that he would apportion 20% of the P’s current back disability to the musculotendinous strain of the lower back. According to Dr Tsoi, most of his back and leg symptoms are caused by the pre-existing problem.
5. I prefer Dr Tsoi’s opinion to Dr Chan’s opinion.
6. As said in the above, in my judgment, the cabinet episode is untrue and is a story made up by P. Dr Chan’s opinion relating to P’s “contusion injury” would have been affected by this ruling.
7. Dr Chan says in relation to P’s pre-existing degeneration that there was absence of any significant symptoms before the alleged injury, and most people with degeneration should remain asymptomatic or only with minor symptoms. However, this is not supported by the medical evidence revealed in this case.
8. P has known sciatica for 20 years before the Accident, and chronic back pain since 2007. In September 2013 and December 2013, he was documented to be receiving active treatment from OHC of PYNEH for his low back pain and buttock pain.
9. From April 2014 to September 2014, P also had low back pain requiring medical treatment and sick leave. P confirmed in his evidence in court that he had increase of back pain after work on 20 April 2014. There was no accident on that day. He did not suffer any injury. Nothing special happened on that day. Yet he had to receive treatment and put on sick leave for almost 5 months until September 2014. This is a clear example in support of Dr Tsoi’s opinion, i.e. by reason of the P’s pre-existing back condition, he could have similar symptoms and disabilities *at any time* and in any event, *even without any accident*.
10. In his evidence, P said that after the expiry of his sick leave on 7 September 2014, he resumed work and was doing his normal duty, and carrying out heavy work. He said he did so without any problem until the occurrence of the Accident on 12 December 2014.
11. However, P’s saying is contradicted by the medical record of the consultation on 5 May 2015 at Western Psychiatric Centre, in which he was recorded to have told the doctor that “*Last year, he has increased pain and went on sick leave for 6+ months, medical board was held. After that, he returned but avoid heavy work.*” P denied that he told the doctor about that. In my view, P’s denial is incapable of being believed. The doctor would not record these in the consultation note if P had not told him the same.
12. Further, under cross-examination, P admitted that he did take sick leave in September 2014 and October 2014, resulting in his lower earnings in those two months.
13. Counsel for D submits that a discount of 70% should be applied in calculating the PSLA award. Based upon Dr Tsoi’s opinion, I accept this submission.
14. In assessing the pre-trial loss of earnings, counsel for P submits that if the court is satisfied that P’s pre-existing condition was such that it would not prevent P from working during the pre-trial period unless his condition was aggravated by the Accident, the eggshell skull rule should apply and D must take P as D finds him, and be liable to compensate P in full.
15. With respect, although this submission may be correct in law, the prerequisite in the submission has not been satisfied, i.e. P’s pre-existing condition would not prevent him from working during the pre-trial period unless the pre-existing condition was aggravated by the Accident. In this case, Dr Tsoi’s has given a clear and unequivocal opinion (which is accepted by this court) that by reason of the P’s pre-existing back condition, P could have similar symptoms and disabilities at any time and in any event, even without any accident. The opinion in fact is supported by an example given by P. See [72(2)(b)] in the above. The point made by counsel for P is not established due to the absence of evidence proving the prerequisite, and the presence of evidence showing the contrary.
16. However, eventually I come to the conclusion that in assessing the pre-trial loss of earnings, I should not apply any discount. That is because in assessing the reasonable length of the sick leave period, P’s pre-existing condition has already been fully taken into account. That being the case, the pre-trial loss of earnings should not be subject to a discount. Otherwise, P’s pre-existing condition would have been double-counted in the assessment exercise.

*QUANTUM OF DAMAGES*

1. Based upon my findings as set out in the above, I now turn to the award of damages claimed by P as set out in his Re-Revised Statement of Damages.

*PSLA*

1. In respect of the proper award for PSLA, both counsel for P and counsel for D have referred me to some cases. In my view, the cases cited by counsel for P[[4]](#footnote-4) concerning much more serious injuries or much more serious disabilities suffered by the claimants as a result of the injuries. Those cases are of limited assistance. I find that the useful cases are the following cited by counsel for D in his submissions:-
2. In *Tam Fu Yip Fip v Sincere Engineering Trading Co. Ltd.[[5]](#footnote-5)*, the plaintiff who had a pre-existing degenerative back condition, suffered a soft tissue back injury. The judge found that the plaintiff had exaggerated his condition and had fully recovered from the injury. The PSLA award was HK$75,000.00. Although an appeal against the judgment was successful, the Court of Appeal did not interfere with PSLA award.[[6]](#footnote-6)
3. In *Tamang Udas v Global Sunny Engineering Ltd. & Another[[7]](#footnote-7)*, the plaintiff suffered from degenerative conditions of desiccation, disc bulge and annulus tear at multiple levels of his spine that were pre-existing. He sprained his back while lifting heavy weight. The court found that the appropriate PSLA award should be HK$100,000, which should be further reduced by 30% due to the plaintiff pre-existing degenerative condition of his spine.
4. In *Poon Yat Chiu v AES Scaffold Engineering Ltd.*[[8]](#footnote-8), a crane truck operator suffered back injuries with tenderness, superficial abrasion over the right buttock, and low back pain. Subsequently, he also suffered from mild adjustment disorder. PSLA award was HK$180,000.00. (There is no pre-existing condition in this case.)
5. Taking all the aforesaid and the inflation factor into account, I am of the view that before applying any discount, the PSLA compensation should be HK$130,000. As said in the above, a 70% discount should be applied. Accordingly, the PSLA compensation should be HK$130,000 x (1 – 70%) = HK$39,000.

*Pre-trial loss of earnings*

1. Since April 2014, P’s monthly salary was HK$18,803.10. Each month, on top of the monthly salary, P would have a contribution from D to his account the Hospital Authority Provident Fund Scheme, which would be equivalent to 15% of his monthly salary.
2. I have found that the reasonable length of the sick leave period should be 8 months. I have also found that P in fact would be able to return to his pre-accident occupation. His early retirement is his own choice and not occasioned by the Accident. Accordingly, the pre-trial loss of earnings should be:-

HK$18,803.10 x 1.15 x 8 months = HK$172,989.00

*Future loss of earnings*

1. P does not claim any future loss of earnings. In any event, based upon my findings, there cannot be any future loss of earnings.

*Loss of retirement benefits*

1. This has been taken care of in the pre-trial loss of earnings.

*Loss of earning capacity*

1. P claims HK$100,000.00 under this head.
2. As explained by by Lord Fraser in *Chan Wai Tong v Li Ping Sum*[[9]](#footnote-9), the award for loss of earning capacity is intended:-

“…… to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk – see *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132, 140, where Browne LJ dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant’s age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant.”

1. P was in secure employment with a public authority, the risk of his losing his employment was negligible. P’s early retirement is his own choice. In my judgment, there is no evidence justifying an award under this head in this case. I refuse P’s claim under this head.

*Special damages*

1. P has only produced only one receipt dated 23 October 2018 showing that he incurred medical expenses in the sum of HK$400.00 for treatment of his back *and left knee* (which was not caused by or related to the accident). Apart from this, P has not produced any document in support of his claim for special damages.
2. D offers a sum of HK$8,000.00 under this head. In my view, while P has not produced any satisfactory documentary evidence in support of his claim for special damages, this is indeed a generous offer.

*Future medical expenses*

1. P has no claim under this head.

*Summary of the assessment*

1. To summarize, the picture is as follows:-

|  |  |
| --- | --- |
| PSLA | HK$39,000.00 |
| Pre-trial loss of earnings | HK$172,989.00 |
| Future loss of earnings | - |
| Loss of retirement benefits | (Included in the Pre-trial loss of earnings) |
| Loss of earning capacity | Nil |
| Special damages | HK$8,000.00 |
| Future medical expenses | - |
| Less: Employees’ compensation received by P | (HK$320,274.87) |
| TOTAL | - HK$100,285.87 |

1. Counsel for D has drawn my attention to *Ho Wan Yung v A.S. Watson & Company, Limited*[[10]](#footnote-10), in which Fok J (as he then was) found after trial that the defendant in that case was liable to the plaintiff in negligence with no contributory negligence on the part of the plaintiff. However, the learned judge held that the total amount of damages in that case should only be in the sum of HK$268,486.50 plus interest, which was less than the amount of employees’ compensation of HK$366,510.39 already received by the plaintiff. In the circumstances, the learned judge dismissed the plaintiff’s action and made an order that the plaintiff should pay the defendant’s costs of the action, to be taxed if not agreed.
2. In this case, although judgment on liability has been entered by consent, the quantum of damages as assessed by this court is less than the employees’ compensation already received by P. In the light of *Ho Wan Yung*, there should be no award in favour of P.

*DISPOSITION*

1. I refuse to make any award in favour of P.
2. Counsel for D submits that in the event that the total amount of damages is less than the amount of the employees’ compensation, costs of these proceeding should be paid by P to D. Counsel for P does not dispute this. There be a costs order *nisi* that costs of these proceedings (including all costs reserved) be to D, with a certificate for counsel, to be taxed if not agreed. P’s own costs be taxed in accordance with the Legal Aid Regulations.
3. Lastly, it remains for me to thank counsel for the assistance rendered to the court.

( MK Liu )

District Judge

Ms Phillis Loh, instructed by Liu, Chan & Lam, assigned by the Director of Legal Aid, for the plaintiff

Mr Daniel K.K. Chan, instructed by Deacons, for the defendant

1. [2009] 5 HKLRD 513 [↑](#footnote-ref-1)
2. HCPI 282/2009, 19 May 2011 and 29 July 2011 [↑](#footnote-ref-2)
3. [2008] 5 HKLRD 210 [↑](#footnote-ref-3)
4. *Lai Ching v Wong Chiu Kwai t/a Wing Lai and/or Wing Lai Arts Jewellery* [1999] HKLRD A12 (12/06/1998); *Yau Shui Ming v Excellent Development Ltd* (DCPI 47/2002, 28/05/2003); *Manohar Chugh v Yoga Plus Ltd* (DCPI 1064/2008, 08/12/2008); *Wong Wai Man v Yi Wo Yuen Aged Sanitorium Centre Limited* (HCPI 77/2007, 15/08/2008); *Thapa Surendra v E W Cox Hong Kong Limited* (HCPI 451/2009, 11/7/2011); *Yuen Siu v Lau Choi Har & Anor* (HCPI 374/2002, 03/06/2003); *Lai Kam Wah v Wing & Kwong Co Ltd* (HCPI 1131/2002, 28/11/2003); *Yeung Tai Hung v Hong Kong Baptist Hospital Au Shue Hung Health Centre* (HCPI 686/2004, 20/07/2006); *Chan Yuet Keung v Harmony (International) Knitting Fty Ltd* [2010] 5 HKLRD 599 [↑](#footnote-ref-4)
5. HCPI 473 of 2006, 06/06/2007 [↑](#footnote-ref-5)
6. [2008] 5 HKLRD 210 [↑](#footnote-ref-6)
7. HCPI 732 of 2011, 07/01/2013 [↑](#footnote-ref-7)
8. [2008] HKLRD (Yrbk) 357 [↑](#footnote-ref-8)
9. [1985] HKLR 176, 183B-D [↑](#footnote-ref-9)
10. HCPI 264/2008, 03/06/2010 [↑](#footnote-ref-10)