# DCPI 421/2018

[2022] HKDC 1346

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 421 OF 2018

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BETWEEN

ALAM ZAFAR Plaintiff

and

CHEUK FUNG ENGINEERING

COMPANY LIMITED Defendant

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##### Before: His Honour Judge Andrew Li in Court

Date of Hearing: 8, 9 & 17 August 2022

Date of Judgment: 17 November 2022

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JUDGMENT

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1. *INTRODUCTION*
2. This is a personal injury (“PI”) claim brought by the plaintiff arising from an accident which occurred in the course of his employment.
3. *BACKGROUND*

*B.1. The Accident*

1. The plaintiff was injured on 15 April 2015 while he was working as a general labourer for the defendant at a hillslope near Nam Fung Road Rest Garden at Nam Fung Road, Hong Kong (“the Site”).
2. The fact that the plaintiff was under the employment of the defendant is not in dispute.
3. The plaintiff’s duties at the Site include counting trees, making holes in the tree trunks and fixing detectors into designated trees on a hillslope at the Site under the instructions of Mr Tam, the supervisor/ immediate supervisor of the plaintiff who paired up with the plaintiff (“the Foreman”).
4. While the plaintiff was doing his task, he slipped and rolled down the hillslope for about 10 feet (approximately 3 metres): (see Exhibit [P-1]). As a result, the Plaintiff sustained injuries to his left shoulder, left elbow and left wrist (“the Accident”).

*B.2. The plaintiff’s case*

1. Mr Patrick Szeto for the plaintiff in his opening submissions refers to the amended statement of claim which states that the Accident happened because “(i) the [h]illslope was wet and muddy, (ii) the [p]laintiff was not provided with work and/or safety apparatus, (iii) there were no risks assessment and warning of work hazards and (iv) there was no work/safety instructions given”.
2. Before the plaintiff perform his duties, he was provided with a plastic hammer, a smartphone containing a mobile app called “*Treeapp*”, as well as detectors for fixing into the designated trees and to be scanned by the smartphone. On some occasions when the plaintiff needed to make holes in the trees, a drill was provided as well.
3. According to Mr Szeto, the defendant knew or ought to have known that the plaintiff was not provided with or required to buy a pair of anti-slippery safety shoes; a walking/hiking stick; protective gloves; and equipment or tools to carry the hammer and detectors.
4. In his witness statement dated 9 October 2018 (“P’s WS”) and his supplemental witness statement dated 29 October 2019 (“P’s Supp WS”), the contents of which have been adopted as part of his evidence-in-chief, the plaintiff stated that it had rained on the day before the Accident and the surface of the hillslope was wet and muddy. Besides, the defendant had neither inspected the Site nor guided the plaintiff in any safety instructions about the Site prior to the Accident.
5. It is also the plaintiff’s contention that from around 9:30 am to 10:00 am, after the plaintiff had climbed up to the hillslope and moved forward after counting 2 to 3 trees, the plaintiff lost his balance and rolled down the hillslope which has a gradient of 20 to 30 degrees: (see Exhibit [AZ – 2]).
6. At the time, according to the plaintiff at least, the Foreman was standing at the bottom of the hillslope which was 20 to 25 feet away from where the plaintiff fell.
7. After the Accident, the plaintiff yelled out in Cantonese that he felt very painful and the Foreman then came to console the plaintiff. He later took the plaintiff to the Queen Mary Hospital (“QMH”) for treatment.

*B.3. The defendant’s case*

1. The defendant agrees that the plaintiff was employed as a general labourer to work at the Site on the day of the Accident.
2. However, the defendant disagrees that there were no safety measures as claimed by the plaintiff. Instead, by the defendant’s “reimbursement policy” which subsidised employees to buy safety footwear; the induction briefing given to the plaintiff when he started his work; and the Foreman’s supervision to ensure the plaintiff wore suitable shoes, the defendant says that it had taken all necessary safety measures at all material time.
3. Mr Simon So for the defendant also points out in his closing submissions that the Site was not controlled or owned by the defendant, ruling out the possibility of the defendant being the occupier.
4. The defendant further claims that, from the records of the Hong Kong Observatory, there had not been any rainfall for 3 consecutive days in the Site’s region immediately before the occurrence of the Accident. Further, there was no rainfall recorded on the day of the Accident. Therefore, Mr So contends that the hillslope was neither wet nor muddy.
5. According to the defendant, at the material time of the Accident, the plaintiff was standing beside the Foreman and another subcontractor called Mr Ng (“Ng”) at the lower part of the hillslope, which is described as “*very shallow and gentle*” in both the opening and closing submissions of Mr So.
6. It was also the defendant’s contention that the plaintiff, the Foreman and Ng were not working at the time of the Accident. It has been submitted that if the plaintiff had worked at that time, he would have been counting trees and assisting with registering detectors to the “*Treeapp*” as an ongoing survey project rather than fixing detectors into trees. Hence, the plaintiff’s original duties were neither one that was governed by the Arboricultural Occupational Safety and Health’s Guidelines (“the Guidelines”) nor tree works according to the understanding of the industry.
7. As to how the Accident happened, the defendant claims that the plaintiff fell suddenly instead of having slipped. In order words, he had simply lost his balance and fell.
8. *DISCUSSION*

*C.1. Liability*

1. Both liability and quantum are in dispute in the present case.

*C.2 Factual issues to be determined*

1. Though Mr So in his closing submissions concedes that most of the plaintiff’s case is not disputable on facts, he seeks to establish that either there was no breach of duty of care on the part of the defendant or the plaintiff was contributory negligent for the Accident.
2. On this issue, this court has to make findings on the following factual matters before deciding whether the defendant should be held to bear primary liability for the Accident. Then the court has to decide whether the plaintiff is contributorily negligent and, if so, the appropriate level of contributory negligence.
3. Hence, in relation to the occurrence of the Accident, the court has to make factual findings on the following:-
   1. whether the ground was slippery at the material time of the Accident;
   2. where was the plaintiff standing at the time of the Accident;
   3. was the plaintiff holding any tools at the time of the Accident; and
   4. had the plaintiff started working at the time of the Accident? If so, what was the duty carried out by the plaintiff at the time?
4. Further, for the safety measures taken at the time of or before the Accident, the court must make factual findings on the following:-
   1. whether the plaintiff knew or ought to know he had to wear/hold safe equipment; and
   2. whether the Foreman had made sure that the plaintiff wore/had any safety equipment before the Accident?

*C.2.1 Observations on the credibility of the witnesses from both sides*

1. I have had the opportunity to listen to the evidence given by the plaintiff, the Foreman and Ng in court and observed their demeanour when they gave their evidence.
2. For the occurrence of the Accident, Mr So for the defendant in his closing submissions disputes that the plaintiff was not credible on the following grounds:-
   1. the extremely brief description given by the plaintiff of how he fell could not help the court to ascertain how the Accident happened;
   2. he failed to explain whether he fell 10 feet from above to the ground or he rolled down 10 feet from the place he stood to the bottom of the hillslope. When he was cross-examined on this issue, all he could say was “OK”; and
   3. he asserted that the Site was raining heavily but the Hong Kong Observatory’s records do not show any rainfall at all.
3. I do not accept Mr So’s contention that the plaintiff has only briefly described how the Accident happened in his evidence. In fact, in P’s WS, it has been provided that at the material time, *“[the plaintiff] had just counted 2-3 trees. When I was moving forward, I slipped and lost my balance and eventually fell on ground*”: [B/92] at §5.
4. Further, in the witness box, the plaintiff drew the position of where he fell; he also clarified he may not have fallen for exactly 10 feet but “*could be 2 to 3 feet*”, more or less. In this regard, I am satisfied that the plaintiff has adequately assisted the court in knowing how the Accident occurred, given the fact that it was a very simple, straightforward and brief incident.
5. Hence, I am convinced that the Accident actually took place in the manner as described by the plaintiff and I do not find him incredible in this regard.
6. Mr So also nitpicked the minor point that some duties of the plaintiff were not provided in P’s WS, but rather, they were raised in P’s Supp WS. I accept matters like drilling of the tree trunk; putting the detector in the hole and hammering were not mentioned in the P’s WS because the plaintiff’s solicitors did not ask him in detail about the Accident at first. In fact, adding more details by way of a supplemental witness statement is a practice encouraged by the court so long as the additional details can assist the court in understanding how an accident took place and provided that they are prepared well before the trial and with plenty of notice given to the opposing party and proper application made to the court.
7. On quantum, Mr So in his closing submissions also argues that the plaintiff was not credible based on the following:-
   1. the plaintiff was found to be able to take up substituted occupations during the paid sick-leave period from the defendant;
   2. he was absent from physiotherapy sessions at QMH which “*helps [the plaintiff] a lot*”. During cross-examination, the plaintiff responded that he was in Pakistan during the period when QMH could not contact him. Thus, Mr So in his closing submissions concluded that it was “*inherently improbable given that he was able to attend some of those sessions on Monday/Wednesday/Friday*”;
   3. he did not frankly disclose 2 sets of settled DCPI/DCEC actions and one action in which he had commenced against his employer; and
   4. 2 surveillance videos illustrate that the plaintiff recovered to a large extent in November 2015 which leads to the conclusion that he was not injured that seriously but he denied that he had much recovered.
8. In my judgment, even if a witness/ litigant lies about one thing, it does not necessarily mean that he lies about another. As the credibility issues on quantum do not affect the plaintiff’s credibility on the part of establishing the defendant’s liability, I am convinced that liability attaches to the defendant, subject to the below factual findings on facts and credibility in relation to the issue on quantum, which would only affect the amount of damages recoverable by the plaintiff.
9. On the other hand, although Ng was observed to be an honest and reliable witness, which is something not seriously disputed by the plaintiff’s counsel, I find the Foreman not being a credible witness at all. Some of the reasons are as follows:-
   1. he nitpicked on the point of whether detectors were in plural or singular form, but he was later attempting to say that he did not understand what “detectors” mean; and
   2. he mentioned he had informed the plaintiff of the notice about safety equipment, but I incline to believe the notice was produced after the Accident and before the trial took place (see below in C.3.5.).
10. Needless to say, as this case involves fact findings, the court follows the often cited guidelines set out by DHCJ Eugene Fung in *Hui Cheung Fai & Anor v Daiwa Development Ltd & Ors* [2014] HKCFI 650 (unrep, HCA 1734/2009, 8 April 2014) at §§77 to 82:-

[77] Generally speaking, contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility: *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at 431 (Lord Pearce)…

[78] In deciding whether to accept a witness’ account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events: eg *Lam Rogerio Sou Fung v Tan Soon Gin George* (unreported, HCA 2576/2005, 5 May 2011) §39 (Chu J (as he then was)).

[79] In determining a witness’ credibility, I have also attached importance to the consistency of the witness’ evidence with undisputed or indisputable evidence and the internal consistency of the witness’ evidence. The latter type of consistency is often tested by a comparison between the witness’ oral testimony and his or her witness statement.

[80] I have cautioned myself against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses (*Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 at §§36-37 (Bokhary PJ), or from assessment of the witnesses’ character (*Esquire (Electronics) Ltd v HSBC* [2007] 3 HKLRD 439 at §135 (Stock JA)).

[81] The practical approach to assessing credibility of witnesses in a case…may have best been summarised by the words of Robert Goff LJ, as he then was, in *The Ocean Frost* [1985] 1 Lloyd’s Rep 1 at 57:

Speaking from my experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining a truth.

[82] Whilst these words were spoken in the context of a fraud case, I believe they are applicable to any case where a witness’ credibility features prominently in the court’s determination…

1. I remind myself that the above factors are far more important than the witnesses’ demeanour and appearance in the witness box.

*C.3. Findings on different factual disputes about the Accident*

1. The factual issues would be discussed under the following sub-headings.

*C.3.1. Was the ground slippery at the material time of the Accident?*

1. Mr So submits in both his opening and closing submissions that the hillslope was not wet, muddy or slippery at the time of the Accident. He heavily relied on the Hong Kong Observatory’s records.
2. When the plaintiff was being cross-examined, he was asked why he thought that the Site had been raining heavily the day before. The plaintiff responded by saying that: “*but I assumed that it would be raining there because where I was living [Reclamation Street in Mong Kok] was raining*”.
3. It is a matter of common sense that even though when one place is raining in Hong Kong, it does not mean another part of the territory is raining. This is something beyond dispute. However, Mr Szeto in his closing submissions stated that there had been a rainfall record of 37 mm at the Site 4 days before the Accident and therefore the ground of the Site could still be wet: [F-1/291].
4. In my judgment, as the hillslope was covered by tall grass, fallen leaves, tree branches, soil and mud, it would absorb and retain any water from the rainfalls, as opposed to any concrete or hard surface which rain water could easily run off from the surface. I therefore agree with Mr Szeto that it would take longer for the ground to dry up than a concrete or dry surface. For those reasons, I accept the plaintiff’s claim that the hillslope was slippery when the Accident took place. I do not find him to be dishonest at all when he said this. In my view, the plaintiff’s allegation on this is consistent with the contemporaneous records in the form of the photos taken by the defendant on the day of the Accident.

*C.3.2. Where was the plaintiff standing at the time of the Accident?*

1. Though Mr So for the defendant describes the hillslope as “*very shallow and gentle*”, from the photographs found on [F-1/253-255] and Exhibit [AZ – 2], I do not accept Mr So’s description at all. Based on the gradient of the hillslope observed from the documents, it is steeper than what the defendant tries to depict.
2. However, in my opinion, it is not important whether the plaintiff was standing beside the Foreman and/or Ng. The only real issue is whether the plaintiff stood higher up or lower down on the hillslope.
3. Since I have accepted that the plaintiff is credible concerning his description of the Accident, I will also accept the version that he was standing higher up on the hillslope than the position of the Foreman and Ng.

*C.3.3. Was the plaintiff holding any tools at the time of the Accident?*

1. It is the plaintiff’s pleaded case that the plaintiff was given a plastic hammer, a smartphone and detectors at the time of the Accident.
2. The Foreman accepted that no carrier (e.g. waist bags) had been given to the plaintiff: [B/141] at §6. I accept the plaintiff’s evidence that he had to carry the plastic hammer, smartphone and detectors by his hands in order to carry out his duties, making it difficult for him to keep his balance and prone to fall when walking/working on a slope.

*C.3.4. Was the plaintiff carrying out any duty at the time of the Accident?*

1. I find that, as opposed to the defendant’s version that the plaintiff was not working, the plaintiff was actually performing his duties at the material time as supported by the following instances:-
   1. the Foreman, when giving evidence, unequivocally said “*the plaintiff, myself and another employee had arrived at the Site on that day around 9:00 am to continue work on the Project*”; and
   2. more importantly, if only surveying and risk assessment were carried out (as alleged by the defendant), it is unnecessary for the Foreman to bring the plaintiff as a general labourer at all the material time to the hillslope. The presence of the plaintiff suggests that he had to work at that time, instead of following the Foreman “*to learn the surveyor’s skills as alleged by the defendan*t”.

*C.3.5. Did the plaintiff have any knowledge about safety equipment?*

1. As stipulated as part of the defendant’s company policy, the defendant has a duty to provide proper safety equipment, namely safety shoes, to its employees: [B/146]. The relevant part of the policy reads as follows:

“*[employees] must wear appropriate safety equipment…according to safety regulations…must wear appropriate safety shoes…the company is responsible for providing each employee with sufficient safety equipment.” (“根據安全條例 … [員工] 必須穿着合適的安全設備 … 必須穿着合適的安全鞋 … 本公司有責任為每位員工提供足夠的安全設備 …*”)

1. Another part of the defendant’s company policy is that an employee is entitled to purchase safety shoes and get reimbursement for not more than HK$1,000/year: [B/121] at §5. While evidence at trial indicates that the price of a pair of hiking shoes would be around HK$400 and other safety shoes could be cheaper at the time of the Accident, the amount allowed to be claimed is far more than enough for purchasing such safety shoes.
2. It is the defendant’s pleaded case that the plaintiff was made known of the safety equipment in the induction briefing when the plaintiff became a “new colleague”: [A/59] at §6B(c), which was given by the Foreman or another staff of the defendant. Moreover, it has been alleged that, the Foreman has made sure the plaintiff had worn suitable footwear at all times.
3. However, the Foreman in the witness box denies the provision of safety equipment by the defendant. This aligns with what he said in [B/121] at §5 that “*there is no such legal requirement*”, which relied on the trade practice to override the company policy.
4. When the Foreman was asked to repeat what he had conveyed to the plaintiff about the company policy during the induction briefing, he also could not provide the exact alleged message he gave.
5. In my judgment, the aforementioned shows the Foreman must have chosen convenience over safety by acting contrarily to the company policy. This explains why the plaintiff said he had not been informed about the company policy or safety measures. I accept the plaintiff’s evidence in this respect and will reject the Foreman’s allegations.
6. Worse still, when the Foreman alleged that a notice about safety measures had been posted in places like the defendant’s office, it was discovered that the notice only had a commencing date, but without any date showing when it had been drafted or posted. After the defendant’s counsel informed the court that this notice is the only copy/version, with the original nowhere could be found, it makes the whole allegation much more incredible. Thus, I have no hesitation to find that this notice was made up after the Accident.
7. Thus, in this regard, I prefer the plaintiff’s version to that of the defendant where no safety measures were informed to the plaintiff.

*C.3.6. Had the Foreman made sure that the plaintiff wore/had safety equipment?*

1. It is pleaded by the defendant that at all material times, the Foreman made sure the plaintiff had worn suitable footwear.
2. Nevertheless, the plaintiff’s case is that nobody, including the Foreman, had ever questioned his attire.
3. The Foreman testified in the witness box that he only instructed the plaintiff to wear sports shoes or casual shoes because if the company policy is strictly and literally followed, a majority of workers could not carry out their work (「*字面上嘅啫, 如果話要跟, 大家都冇得做*」). He also admitted that the company’s uniform was short-sleeve T-shirts instead of long-sleeve ones.
4. Given the above admissions, it is not difficult for me to conclude that the Foreman did not fulfil his affirmative duty to ensure the plaintiff wore suitable attire on the day of the Accident.

*C.4 The defendant’s liability*

1. Bokhary PJ (now NPJ) laid down the well-established principle in *Cathay Pacific Airways Ltd v Wong Sau Lai* [2006] 2 HKLRD 586 (FACV1/2006, 23 May 2006) at §24:-

“Of course the duty of care owed by employers to employees at common law is a single duty to take reasonable care for his employees’ safety. This is so even though it is convenient to think of the duty as involving the provision of safe co-workers, a safe place of work, *safe equipment*, a safe system of work, proper instructions and supervision and (where called for) adequate training. As Lord Keith put it in *Cavanagh v Ulster Weaving Co. Ltd* [1960] AC 145 at p.165, “[t]he ruling principle is that an employer is bound to take reasonable care for the safety of his [employees], and all other rules or formulas must be taken subject to this principle”.

1. While the defendant was clearly the employer of the plaintiff, there was a serious risk of injury when the Foreman representing the defendant instructed something contrary to the company’s policy and demanded the plaintiff to work under a slippery steep hillslope with both hands occupied. It seems clear to me that the defendant was in clear breach of the employer’s non-delegable affirmative duty of safe equipment and safe system.
2. For the above reasons, I find the defendant liable for causing the Accident.

*C.5 Contributory negligence of the plaintiff*

1. The defendant’s fallback position is that the plaintiff should be found contributorily negligent in causing the Accident.
2. It is well-established that the burden of proving the plaintiff contributory negligent lies with the defendant who raises the issue: See *Clerk & Lindsell on Torts*, 23rd ed at §3-98.
3. Mr So for the defendants in both his opening and closing submissions has cited the following cases:-
   1. in *Baron v B French Ltd & Anor* [1971] 3 All ER 1111, the plaintiff tripped himself over the rubble in a new hospital’s construction site. Mr Justice Bagnall held at 1117J that the degree of contributory negligence on the part of the plaintiff would be 50% as the plaintiff did not look where he was going; and
   2. in *Wenda Betts v Anthony Tokley* [2002] EWCA Civ 52 at §6 (per Buxton and Latham LJJ), the plaintiff falling some steps would be 60% contributorily negligent since she should have taken great care when she walked in the dark.
4. Based on the above-cited authorities, Mr So submits that the contributory negligence on the plaintiff’s part should be in the range of   
   50% to 60%.
5. On the other hand, Mr Szeto contends that the plaintiff is not contributorily negligent because the Accident happened under the context of the plaintiff being instructed by his Foreman to be present at the Site.
6. With respect, I think Mr So has over relied on the English cases the jurisdiction of which has a very different jurisprudence and work culture. They also have a very comprehensive national insurance scheme which covers most if not all accidents happen at work. I think it is fair to say that over the years Hong Kong courts have developed our own jurisprudence on this subject and formed a judicial reluctance to readily make findings of contributory negligence against employees, particularly when they are forced to work in unsafe environment or injured due to lack of suitable equipment, instructions or supervision as in the circumstances of this case.
7. The judicial sympathy is based on their habitual carelessness about the risks that employees’ work may involve, say for example: *Sherma Phadindra v Tin Wo Engineering Co Ltd* [2012] HKCFI 1749 (unrep, HCPI 32/2011, 8 November 2012) at §§95 and 96, citing *General Cleaning Contractors LD. v Christmas* [1953] AC 180 at 189 and 190.
8. Further, when concluding no contributory negligence in the relatively old case of *Tang Shau Tsan v Wealthy Construction Co Ltd* [1999] HKLRD (Yrbk) 374 (HCPI 1092/1998, 2 December 1999), Deputy Judge Woolley also said at §14:

*“… one has to distinguish between a workman deliberately taking risks, possibly as a shortcut, where he is paid on piece work and wishes to achieve as much as possible in the time available, and one who is using the only method provided to do the best job he can.*”

1. In the present case, the plaintiff seemed to have followed the express instructions from his employer while carrying out his duties. Moreover, the defendant’s allegation that the defendant fell all of a sudden does not in itself suggest a conclusion of any contributory negligence.
2. In *Mohammad Shakil v Lam Siu Kwong & Anor* [2008] HKCFI 765 (unrep, HCPI 610/2007, 5 September 2008), Deputy Judge Longley found no contributory negligence on the part of the plaintiff who slipped and fell.
3. Therefore, on a balance of probabilities, I find contributory negligence is not established on the part of the plaintiff in this case.
4. *QUANTUM*

*D.1. General background and treatments*

1. The plaintiff was born in 1987 in Pakistan and was 27 years old when the Accident occurred. He settled in Hong Kong in 1997. His mother tongue is Punjabi.
2. He only knows a little bit of Cantonese and English. Hence, he uses a mixture of English, Chinese and gestures to communicate with his colleagues. If necessary, he seeks clarification by repeating what the others say to him to confirm the meaning.

*D.2. Surveillance videos and reports*

1. The plaintiff was placed under observation and surveillance in around mid-November 2015, both videos of which were played when Mr So made his opening submissions.
2. Despite the fact that the plaintiff did not work at any construction sites or perform duties involving heavy items in any of those videos, the following instances especially displayed that he had recovered to a large extent after half a year from the Accident:
   1. he was seen walking with a normal gait and at a normal pace;
   2. there were multiple occasions that he could swing his left hand uninhibitedly while body mobility appeared to be perfectly normal and natural;
   3. he could use his left hand to put on, take off and open the backpack which is considered to be precise tasks with one hand only; and
   4. he could use his left hand to grab things on the floor which involved both the muscles of his left hand and left shoulder.

*D.3. Pain, suffering, and loss of amenities (“PSLA”)*

1. Mr Szeto referred to the following decided cases where PSLA awards from HK$200,000 to HK$250,000 have been made between 2012 and 2015:-
   1. *Ho Shuk Man v Norman Wong Wai Nok & Anor* [2015] HKCFI 1599 (unrep, HCPI 314/2010, 8 September 2015);
   2. *Chong Ngan Seng v China Harbour Engineering Company Limited & Ors* [2012] HKDC 77 (unrep, DCPI 2078/2009, 3 February 2012); and
   3. *Chan Hau Yu v Li Wing Kwai* [2014] HKDC 1017 (unrep, DCPI 1883/2012, 5 September 2014).
2. Mr So submitted that a sum of HK$30,000 should be awarded for PSLA only. He relies on the following cases in support of his contention:-
   1. In *Li Kam Wah v Ng Ting Tuen & Anor* [2002] HKDC 336 (unrep, DCPI 386/2001, 9 Aug 2002), DDJ Sham awarded HK$50,000 under the head of PSLA for the minor injury to the neck, back, and waist sustained by the plaintiff, notwithstanding the plaintiff being fit to resume pre-accident job and had no fracture;
   2. In *Tam Yuen Hoi v Chan Muk Sing & Ors* [2003] HKCFI 298 (unrep, HCPI 983/2001, 1 Aug 2003), DHCJ To awarded HK$50,000 for PSLA for the carpenter who fell down the stairs and resulted in the lower back and left buttock injuries. Notably, he neither had any neurological/radiological deficit nor any persistent injury about lower back pain (though the learned judge found it to be exaggerated). He was also fit to resume pre-accident work;
   3. In *Lai Ka Yin v Chan Yiu Kei* [2009] HKDC 193 (unrep, DCPI 453/2008, 7 January 2009), the victim of a road traffic accident suffered neck and back injuries, as well as soft tissue injury, which caused her to be hospitalized for 3 days to receive physiotherapy. Particularly, she had no fracture and managed to recover fully when the trial took place. HH Judge Mimmie Chan awarded HK$50,000 for PSLA;
   4. In *Fazal Ahmed v MTR Corp Ltd* [2012] HKDC 889 (unrep, DCPI 29/2011, 25 April 2012), with a similar accident of slip-and-fall, an MTR security guard landed on his back and then his neck on the staircase. Though he had no fracture and was discharged after 3 days, he attended 52 sessions of physiotherapy. HH Judge Simon Leung awarded HK$50,000 for PSLA (if liability attaches); and
   5. In *Yip Kwok Shing v Fung Chau Tim* [2017] HKDC 712 (unrep, DCPI 2627/2015, 26 June 2017), redness and tenderness over the lower back region were caused by the defendant’s assault. While X-ray revealed no fracture and the plaintiff was analgesically administered and then discharged, HH Judge Andrew Li awarded HK$60,000 for PSLA.
3. In my judgment, although Mr Szeto in his closing submissions contended that the plaintiff’s early condition was quite serious, when he took up substituted occupations during the paid sick-leave period and was absent from physiotherapy sessions at QMH which “*helps [him] a lot*”, there is clearly a gross exaggeration of injuries for his subsequent conditions in this case.
4. Furthermore, from the joint expert report, the loss of earning capacity in the region of 2-3% demonstrates that the plaintiff’s injuries, if any, were minor and insignificant.
5. Apart from the medical evidence, the two surveillance videos played in court also showed the plaintiff recovered well 7 months after the Accident, for example, he walked with a consistent normal gait and pace, had normal and natural body movements like swinging his left hand uninhibitedly and using his left hand to open backpack.
6. Lastly, I also agree with Mr So’s submissions that when there had been no fracture and the plaintiff, a right-hander, was injured in his left limb, the PSLA to be awarded should be comparable to the cases cited by Mr So and I consider the injuries suffered by the plaintiff in this case would be slightly less serious than those mentioned in the above cases.
7. Balancing the aforementioned circumstances, I would find an appropriate PSLA award to be at HK$40,000.

*D.4. Pre-trial loss of earnings and MPF benefits*

1. Little room is there for debate that the pre-accident earnings of the plaintiff were at HK$13,000.
2. From the opening submissions of Mr So, the defendant paid 4/5 of the plaintiff’s salary during sick leave from 15 April 2015 to 15 October 2015.
3. From the video recordings, the plaintiff was found to be able to take up another job in November 2015. When giving evidence. the plaintiff alleged that he did that because he was in need of money.
4. In my judgment, I accept Mr So’s submission that the defendant only has to pay 1/5 of the outstanding 8-month salary from April 2015 to November 2015.
5. Even though Mr Szeto asserted the period of not under employment to be 13 months, I accept Mr So’s submission that the defendant is not liable for the plaintiff’s failure to mitigate his own loss.
6. Thereby, I would allow a pre-trial loss of earnings of:-

HK$13,000 x 8 months x 1.05 MPF x 1/5 = HK$21,840.

*D.5. Future loss of earnings and MPF benefits*

1. Based on my analysis of the joint expert report, surveillance videos and the factual findings I made above, I do not consider the plaintiff is entitled to a claim for any loss of future earnings in this case at all.
2. I therefore will not allow any award under this head.

*D.6. Loss of earning capacity*

1. It is trite that loss of earning capacity is recoverable at some future date during the plaintiff’s working life due to his disadvantage in the labour market which causes him to lose employment and then suffer financial loss: *Yuk Kok Wing v Lee Tim Loi* [2001] 3 HKC 314 (CACV139/2000, 23 May 2001) per Keith JA from 319D to 320A.
2. Yet, if there is evidence showing that the plaintiff could return to his pre-accident job or if he could attain an income not less than the pre-accidental job’s income, damages under the head of loss of earning capacity will not be awarded: *Hussain Shaheen Akhtar v Yue Yi Holdings Services Ltd* [2021] HKDC 1603 (unrep, DCPI 1932/2016, 23 December 2021) at §§55-56 (per HHJ MK Liu).
3. In both the plaintiff counsel’s opening and closing submissions, the plaintiff claimed HK$150,000 under this head. An amount of HK$75,000, roughly equivalent to 6 months’ pre-accident monthly income, would also be considered an appropriate fallback sum.
4. From the joint expert report, other than concluding that the plaintiff might have suffered a loss of earning capacity within the range of 2-3%, experts from both sides agree that the plaintiff is able to return to his pre-injury job as a general labourer in the construction site.
5. In addition, though the early conditions of the plaintiff were quite serious, he recovered well as revealed by the surveillance videos. Thereby, the alternative employment’s monthly income of HK$12,000 from December 2016 to 25 April 2018 was only slightly less than the original pre-accident monthly income of HK$13,000.
6. Balancing the aforesaid, I view that the plaintiff does not have a clear disadvantage in the labour market. Hence, I would not make any award under the head of loss of earning capacity in this case.

*D.7. Special damages*

1. The plaintiff claimed HK$1,000 for medical expenses and HK$500 for travelling expenses, which has been accepted by the defendant.
2. Thus, I am satisfied to allow HK$1,500 for the total special damages in this case.

*D.8. EC payment*

1. There has been no parallel employees’ compensation claim.

*D.9. Summary of damages*

1. Based on the above findings, the following sum as damages will be allowed:-

|  |  |
| --- | --- |
| 1. PSLA | HK$40,000 |
| 1. Pre-trial loss of earnings & MPF benefits | HK$21,840 |
| 1. Future loss of earnings & MPF benefits | Nil |
| 1. Loss of earning capacity | Nil |
| 1. Special damages | HK$1,500 |
| Total | HK$63,340 |

1. *CONCLUSION*
2. In conclusion, based on my findings that the defendant should be held 100% liable for the Accident and my calculations for the damages above, the plaintiff will be able to recover HK$63,340 from the present proceedings. Therefore, judgment is entered against the defendant in the sum of $63,340 plus interest in this case.

*E.1. Interest*

1. I will allow the claim for interest as follows:–
   1. the usual award for interest at 2% per annum for general damages from the date of writ to date of judgment; and
   2. at half of the judgment rate for special damages from the date of the Accident to the date of judgment.

*E.2. Costs*

1. Costs will follow the event. I will make a costs order *nisi* that the defendant shall pay the costs of this action in favour of the plaintiff. Such costs to be taxed if not agreed on the District Court scale, with certificate for counsel. The plaintiff’s own costs will be taxed in accordance with the Legal Aid Regulations. In the absence of any application to vary the same within 14 days after the handing down of the judgment, the order *nisi* will become absolute.

( Andrew SY Li )

District Judge

Mr Patrick Szeto, instructed by Messrs LWC & Co., Solicitors, assigned by the Director of Legal Aid, for the plaintiff

Mr Simon So, instructed by Messrs Francis Kong & Co, for the defendant