DCPI 634/2003

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 634 OF 2003

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BETWEEN

WU CHOI LAN ( 胡賽蘭 ) Plaintiff

and

TONGE (HONG KONG) LIMITED 1st Defendant

PAUL-Y-CREC JOINT VENTURE 2nd Defendant

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Before: Her Honour Judge Barnes in Court

Dates of Hearing: 10th, 11th and 12th May 2004

Date of Handing Down Judgment: 1st June 2004

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J U D G M E N T

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Introduction

The Plaintiff claims against the Defendants for loss and damages as a result of an accident on 12 February 2001 at a site situated at Tseung Kwan O Extension, Tiu Keng Leng MTR Station & Tunnels, Tseung Kwan O (“the site”).

1. Although no admission was made in the *Defence* it is not in dispute that at the material time the Plaintiff was working as a casual construction site worker for the 1st Defendant and that an accident did occur on 12 February 2001. It is also not in dispute that the 2nd Defendant was the main contractor.
2. Both Defendants denied liability and put the Plaintiff to strict proof. The Defendants also alleged contributory negligence on the part of the Plaintiff should liability be established. Further, the Defendants disputed the extent of disability and the amount to be awarded.
3. The Plaintiff claimed Employee’s Compensation against the Defendants under DCEC No. 92 of 2003. Judgment against both Defendants in favour of the Plaintiff was entered by consent for the sum of $272,640 inclusive of interest.

*Liability*

5. The Plaintiff, an illiterate woman from Chiu Chow, gave evidence in her native dialect. She adopted a witness statement dated 22 May 2003 (Part II pages 31 to 36 of the Trial Bundle) signed by her as part of her evidence. She confirmed that the contents had been read over to her by her solicitor.

6. The Plaintiff’s evidence was that she had worked as a causal cleaning worker at construction sites for 5-6 years prior to the accident. She came to know a sort of network of workers and acquired work through introductions. Her job required her to clear up refuse including mud and wooden planks. She was doing the same kind of cleaning job at the site when the accident occurred. It was her first day of work there.

7. She said she was required to remove refuse stacked on top a wooden plank. The refuse include mud, ‘metal things’ and other wooden planks. She said originally she worked with another worker. That worker was subsequently instructed by the supervisor to work elsewhere, leaving her to work alone.

8. Immediately prior to the accident, she had already cleared all the refuse save and except the very wooden plank on which the refuse was stacked earlier. She described the said wooden plank being 6 feet long, 2 ½ feet wide and ½ inch think. She said when she lifted the wooden plank (lengthwise in the middle) with her two hands, she fell into a hole unexpectedly. She was not aware that there was a hole underneath the wooden plank. There was no notice or warning about its existence, nor was there any fencing. The supervisor did not tell her about the hole either.

9. She was unable to describe in court in detail how or why she fell. She repeatedly said that when she lifted the plank she ‘unexpectedly’ fell and she lost consciousness. It should be noted that in her witness statement there was more detailed description regarding the accident. The Plaintiff described stepping her right foot forward in order to apply force to lift the wooden plank when her right foot stepped into ‘mid-air’ and she fell into the hole underneath.

10. Her evidence in court was that the wooden plank completely covered the hole so she was not aware of its existence. Since she has given the measurement of the wooden plank (6 feet x 2 ½ feet x ½ inch), she was asked whether the hole was narrower than the width of the plank. In reply she said the width of the hole was ‘*more or less the same as the sand well at the site, square in shape*’. When asked further about the size of the sand well, she said for those sand wells she had come across in the past they were all fenced off.

11. The Plaintiff did not give any measurement regarding these sand wells. She said she had only seen big sand wells, not small ones. She claimed that when she said ‘the width of the hole was more or less the same as the sand well at the site’, she was only making an estimate. She did not see the width nor did she know the depth of the hole. She further said that she had not seen any sand wells at the site as it was only her first day of work there when she met the accident.

12. There is no independence evidence regarding this ‘hole’ except what was described under ‘description of accident’ in the Form 2 filed by the 2nd Defendant dated 8 March 2001: “The IP was assigned to do the site cleaning work. When the IP removed the 3’ x 6’ timber board which covered the opening, she fell into the chamber at the height of 1.7 metres” (Part II page 26 of the Trial Bundle).

13. Since this information was provided by 2nd Defendant as required by law and there is no indication from the defence that such information is incorrect, I rely on such information when considering the issue of liability.

14. Although the said information also indicated that the board (‘plank’ according to the Plaintiff) covered the opening, it is unclear whether the opening was completely covered. It is also of interest to note that the cavity was described as ‘chamber’ and not simply a hole. One may think the word ‘chamber’ denotes a place big enough for at least a person to enter. Indeed, in the present case, there is no dispute that the Plaintiff fell into this cavity.

15. While I appreciate the danger of relying on witness statement prepared by solicitors acting for a party, in the present case, I am satisfied that the Plaintiff did inform her solicitors how she applied force and stepped her right foot forward into mid-air immediately before she fell. I am satisfied that due to her illiteracy and background, without fairly leading questions she was not able to repeat these details in court. I am satisfied, on a balance of probabilities, that that was how she came to meet the accident.

16. I am, on the other hand, not satisfied that she did not see the hole at all before she fell. The comparison of the hole to a ‘sand well’ was done spontaneously and, I may add, out of the blue by the Plaintiff. I am satisfied she did see the hole/chamber immediately before she fell. What she saw resembled a sand well she had seen before. (I would add here that although her evidence appeared to suggest she had seen a sand well at the very site, I am satisfied she was talking about sand wells she had seen in other sites). I find that the Plaintiff did not want to admit that she had actually seen the hole before she fell. Nevertheless, I am satisfied that she only saw the hole when she was in the process of lifting the plank, after removing refuse stacked on the same wooden plank upon instruction. Whether the hole/chamber was completely covered by the plank/board or not, I am satisfied she did not see or know it was there before she lifted the plank.

17. As employer and main contractor of the site respectively, both Defendants should have taken adequate precautionary measures to ensure the safety of their workers, including the Plaintiff. I find that by the time the Plaintiff came to be aware of the chamber/hole, although she could see it, it was already too late. She fell as she lost her footing. I am satisfied that the Plaintiff did not expect nor foresee a cavity underneath the wooden plank she was instructed to remove. She was left to perform the duty by herself. I find both Defendants fully liable for the accident. I do not find the Plaintiff partially liable for her fall.

*Quantum*

18. I will now deal with the quantum of damages.

*Injuries, Treatment and Disabilities*

19. The Plaintiff said she lost consciousness after she fell. There is no independent evidence to support her assertion. She was taken to the Accident & Emergency Department at Tseung Kwan O Hospital (“TKOH”) where she received initial treatment. According to the medial report by the TKOH she was attended to at 17:10 hours on 12 February 2001 (Part III, page 60 of the Trial Bundle). She complained of ‘brief loss of consciousness’ and headache. She was found to be alert and conscious. Two lacerations in her scalp were noted. X-ray showed no fracture and she was transferred to the Neurosurgical Unit of Queen Elizabeth Hospital (“QEH”).

20. At QEH, physical examination at the Orthopaedic and Traumatology Department revealed tenderness at the thoracolumbar junction. No neurological deficit was noticed at the lower limbs. Left shoulder examination showed bruising at deltoid region. X-ray examination of the spine revealed anterior wedge fracture of T-12 vertebral body (Part III page 54 of Trial Bundle).

21. Physical and neurological examination at the Neurosurgical Department of QEH revealed a 4-cm scalp laceration over her left parietal scalp region. The laceration was sutured. C-T brain scan done on 12 February 2001 was normal. She was treated with physiotherapy and given a thoraco-lumbar brace. All other injuries were treated conservatively. She was discharged on 17 February 2001 (Part III page 55 of the Trial Bundle).

22. After her discharge she attended up follow-up treatment at QEH. In the Revised Statement of Damages it is claimed that she attended altogether 43 sessions of follow-up treatment. I am not able to decipher from the papers before me when exactly these sessions took place. It appears she attended regularly at the Orthopaedic & Traumatology Out-Patients Clinic until 3 December 2001 (Part III Page 54 of the Trial Bundle) and on 4 occasions at the Neurosurgical Out-Patients Clinic until May 2002.

23. She attended physiotherapy treatment at Yung Fung Shee Memorial Centre (“YFSMC”) from 14 March to 10 August 2001 (Part III page 59 of Trial Bundle), a total of 32 sessions.

24. She attended occupational therapy at the United Christian Hospital (“UCH”) from 4 September to 5 December 2001 (Part III page 117 of Trial Bundle), a total of 20 sessions.

25. She attended physiotherapy at QEH from 1 February to 25 October 2002, and again from 6 January to 14 February 2003 (Part III page 120 of Trial Bundle), a total of 33 and 10 sessions respectively.

26. She was granted sick leave from 12 February 2001 to 22 October 2002 (Part IV pages 1-16 of the Trial Bundle). She was further granted sick leave from 25 February to 19 March 2003 (Part IV page 17 of the Trial Bundle).

*Medical Experts*

27. The Plaintiff was examined by 4 medical practitioners who gave their expert opinions. In terms of time she was first seen by the two experts arranged by the defence: Dr. Edmund K. W. Woo (Neurologist) whose report was dated 16 January 2002 (Part III page 89 of the Trial Bundle); and Dr. Lam Kwong Chin (Orthopaedic and Traumatology specialist) whose reported was dated 23 January 2003 (Part III page 104 of the Trial Bundle). She was then seen by her own experts: Dr. Yu Yuk Ling (Neurologist) whose report was dated 20 March 2003 (Part III page 64 of the Trial Bundle); and Dr. Lee Po Chin (Orthopaedic surgeon) whose report was dated 14 April 2003 (Part III page 78 of the Trial Bundle).

*The Plaintiff’s complaints*

28. The Plaintiff gave fairly detailed evidence regarding her present complaints. When one compares her evidence in court with what she said in her witness statement and what she told the four medical experts, one can easily spot discrepancies. I am indebted to Ms. Corrine Remedios, counsel for the defence, who has very helpfully listed the Plaintiff’s various complaints in schedule-form for my reference. I will list out the Plaintiff’s complaints under three headings: head, left shoulder and back.

*Head*

29. I have mentioned the Plaintiff claimed to have lost consciousness when she fell. In her witness statement she said she regained consciousness at TKOH. To both Dr. Woo and Dr. Lam she could not recall when she regained consciousness. To Dr. Yu she said she regained consciousness 3 hours after the accident.

30. As to her present complaints, she said in court she felt ‘stirring sensation’ in her brain. She suffers from headache. When she turns her head to the left she experiences pain from her tendon/ligament from her ear/neck region. She has pain on the top of her head. She repeatedly said that when she defecates and cleans herself, the pain goes up to her neck and head. She also felt pain on her head when the wind blows. She has constant pain where she had the stitches, such pain affects her right eye. She described a water bubble going to and fro in her right eye. She also complains of poor memory. She said even when she was sitting in the witness box she felt incessant head and neck ache.

31. In her witness statement she complained of dizziness and poor memory.

32. To Dr. Woo she complained of ‘stabbing’ headache that may spread to the whole head. The pain was aggravated by weather change and associated with nausea at times. There was also impairment of memory.

33. To Dr. Lam she complained of headache which was worse at night time. She also complained of poor memory.

34. To Dr. Yu she complained of constant bilateral headache of a dragging character and mild intensity. The intensity may increase with changes of weather. If the headache is severe, nausea and dizziness may be associated. She also complained of intermittent dizziness with disequilibrium and vertigo. These occurred once or twice a month lasting for 3-4 hours. She found difficulty in concentration and her memory was affected.

35. To Dr. Lee she complained of pain radiated to the vertex, headache and pain when the wind blew, and dizziness.

*Left shoulder*

36. The Plaintiff complained in court that when she lifts her left arm she experiences headache. Her left armpit also hurts. She cannot fully lift her left arm. When she presses her left shoulder bone it hurts. When she presses the part of her chest (below her neck) it also hurts. She experiences a little pain when she uses her left hand to wash her hair. She hardly feels any pain in her left arm. She can hold a bowl with her left hand to eat.

37. She also said that she does not have sufficient strength in either hand to carry foodstuff after shopping at the market. If she did so her heart would ‘throb abnormally’. She can only carry ½ catty of vegetable from the market.

38. In her witness statement she said when she lifted her left hand she felt pain over her left shoulder.

39. To the various doctors, she complained of pain on her neck and left shoulder. She said she could not reach her back (to Dr. Lee) and could not raise her arm above her head (to Dr. Woo).

*Back*

40. The Plaintiff said in court that when she breathes she suffers pain and numbness in her spine (indicating a spot between the mid section and tailbone). When she coughs or sneezes that particular spot hurts. She experiences pain in her tailbone when she sits down. The tailbone hurts more when she stands. There is a sensation of tenderness when she walks and when she lies in bed.

41. She said that after each meal (she particularly mentioned breakfast, lunch and dinner), the bone in the middle of the spine would protrude, causing her pain so unbearable that she has to lie down. The pain she experiences (indicating the part of the spine between the shoulder blades - about 1/3 down the spine from the top) is so excruciating that it was like her heart being pinched. The worst time is at 4-5am. Generally she feels tenderness.

42. She also said that at times she experiences pain like ‘electric current’, sending the pain to both her feet and she felt pain in her soles. She said when she gets up each morning she feels pain (indicating the right waist towards her back). Because of this pain she has to get up slowly. She said she experiences numbness after walking for 15 minutes and she cannot walk for long. Whenever she sits on something soft (like the sofa at her home) or low she feels pain in her spine.

43. In her witness statement she complained of back pain. After sitting or walking for 10 minutes she felt back pain, and pain and numbness in her left leg. She was unable to squat. She also felt pain and numbness when ascending or descending stairs and has to use the handrails.

44. To Dr. Woo she complained of constant back pain associated with tingling sensation at her back and hips, the pain was aggravated by walking and lying supine.

45. To Dr. Lam the Plaintiff complained of back pain at the mid and lower back. She said she has difficulty in bending. She suffered from bilateral heel pain, which was more on the right side. The pain was worse in the morning or when weight-bearing. She could not squat. She could tolerate sitting for ½ hour or walking for 15 minutes.

46. To Dr. Yu she complained of ‘low back pain not radiating to her legs’. The pain was brought on by walking or sitting for more than 10 minutes. She could not run, jump, squat or carry heavy weights.

47. To Dr. Lee, she complained of low back pain and painful numbness in the coccygeal region. The pain irradiating to the left greater trochanter and both thighs and was increased by coughing, sneezing and speaking with raised voice. There was pain when she stood up from a seated position. After sitting for 1½ hours she noticed pain and deformity of the back. She has difficult in bending her body. There was no pain at night. She could not squat. She could not walk for 5 minutes.

*Medical findings and expert opinion*

*Neurological*

48. Dr. Woo noted that the Plaintiff suffered a mild head injury yet she demonstrated a moderate degree of global cognitive dysfunction on mental state examination normally observed when one suffers a severe head injury. Though the Plaintiff demonstrated moderate diffuse weakness in all 4 extremities, the weakness was not characterised by a differential involvement of the agonist and antagonist muscles. Nor was there any hypertonia or hyper-flexia indicating brain injury.

49. Dr. Woo commented that if the Plaintiff’s demonstration of diffuse weakness in all the muscle of both lower extremities and impaired nociception in the entirely of the right lower extremity are genuine, they would indicate an extensive legion spanning from L2 down o S2. Yet there was no muscle wasting and all the deep tendon reflexes are preserved.

50. Dr Woo was of the view that all these discrepancies and inconsistencies defied neurophysiological principles and they raised the strong suspicion that the Plaintiff’s deficit were either feigned or grossly exaggerated.

51. Dr. Yu gave his opinion that patients with head trauma may be complicated by post-concussional syndrome (“PCS”). The Plaintiff’s complaint of headache, dizziness, impaired concentration, subjective impairment of cognition and memory, and irritability indicated that she has PCS. Dr. Yu said most patients with PCS achieve maximum recovery within 12 months of the head injury. By the time he examined the Plaintiff more than 2 years has elapsed since the injury, Dr. Yu opined that the Plaintiff’s PCS is probably permanent.

52. It is of interest to note that according to Dr. Yu, the Plaintiff’s own doctor, the Plaintiff tended to avoid eye-contact and gave approximate answers to his questions. While she claimed memory loss of many items, such as her home address, she retained good memory in certain areas and events, such as details of her pre-accident work. Dr. Yu noted that there were discrepancies between the Plaintiff’s complaints and objective findings during examination.

*Orthopaedic*

53. Dr. Lam found the Plaintiff’s neck motion was relatively well preserved, with no muscle spasm. The shoulder motion was restricted. Exertion of power of the left upper limb was affected by the shoulder pain, but there was no objective neurological deficit or upper limb radiculopathy.

54. Dr. Lam thought it possible that the Plaintiff suffers from what is commonly known as ‘frozen shoulder’ as a result of the minor sprain of her left shoulder. However, such symptoms are predisposed by aging and chronic overuse, which are common among manual workers around 50 years of age. Frequently such symptoms occur independent of any trauma.

55. Dr. Lam said the frozen shoulder is not a static one. The Plaintiff could continue to have non-steroidal anti-inflammatory drug and mobilization exercise. Most patients could recover to have a better range of motion.

56. As to the anterior wedge fracture of T12, Dr. Lam said such a fracture without any neurological deficit is compressive in nature and a stable one. The usual treatment is with medication, physiotherapy and rest. Most patients would respond satisfactorily to treatment in a few months’ time.

57. The Plaintiff was seen by Dr. Lam on 14 January 2002, 11 months after the accident. She still complained of disabling back pain which affected her mobility. On examination, she had diffuse tenderness at the back and very poor trunk motion, complaining of pain to whatever direction she moved. Dr. Lam opined that as the fracture is a well healed one, the condition should not deteriorate and the Plaintiff is expected to have less back pain and better trunk control in the future.

58. According to Dr. Lee, examination revealed diffuse tenderness of the back. There was limitation of movement of the left shoulder with no evidence of nerve compression. There was muscle spasm surrounding the low back, which was not sustained during radiological examination. There was no evidence of neurological deficit or radiculopathy. X-ray showed there was 40% wedge compression fracture of the T-12. Dr. Lee agreed with Dr. Lam’s view that frozen shoulder tends to heal with time, but added that there were occasions when recovery was not complete.

*Contents of the tape in conjunction with the Investigation report*

59. Unbeknown to the Plaintiff, she was followed by a firm of investigators employed by the defence in early March 2002 and videotaped on two occasions: 1 and 5 March 2002. The tape was played in Court. The investigation report dated 13 March 2002 was adduced (Part III, page 122 of the Trial Bundle).

60. The Plaintiff was seen leaving the QEH at about 1300 hours with a male (her husband) on 1 March 2002. They walked to Jordan Road and boarded a KMB bus. After alighted alone at Lam Tin MTR Station the Plaintiff went into Sceneway Plaza. At one stage she obtained a drink from a store. I note that she first used her left hand to hold the drink before transferring to her right hand later.

61. She later left Sceneway Plaza and walked to Kai Tin Road. She was seen raising both her hands over her head to examine some curtains or bedspreads. She bought something and carried the bag in her left hand most of the time. She then bought some vegetables and fruits (appears to be apples and pears) from a market stall and walked into the Kai Tin Shopping Centre. She carried all three bags with her left hand most of the time, leaving her right hand free.

62. She later went to Tak Shing House in Tak Tin Estate. It was noted that when she walked uphill she did not hold on to the railing when she mounted the steps. She was seen to be holding the railing once when going up a short flight of steps into the shopping centre. There was no expression of discomfort or pain on her face though occasionally she placed her hand or hands on her waist.

63. On 4 March the Plaintiff stayed home and did not go out.

64. On 5 March the Plaintiff left Tak Shing House with a young woman (her daughter) at about 11 am. They boarded a KMB bus. She and her daughter alighted at Kwun Tong Road and changed to another KMB bus to Tin Shui Wai. I note that while on the bus, the Plaintiff was about to go upstairs when she noticed an empty seat on the lower deck and sat downstairs instead.

65. The Plaintiff and her daughter went to Tin Wah Estate and eventually made their way to Wah Sui House. They later emerged with two other women and all four went to Chung Fu Shopping Centre. They entered a Chinese restaurant to have ‘Dim Sum’ for almost an hour. She was not taped for the whole time but from what can be seen, there was no sign of pain or discomfort when she ate and chatted with the others. She was not seen to be standing up now and then either.

66. After leaving the restaurant they all went to the Chung Fu Modern Market at the said Shopping Centre. They bought seafood and groceries before returning to Wai Sui House. The Plaintiff was not carrying any of the items bought. She was observed to be touching both side of her lower waist just above her hips.

*Findings re injuries and disability*

67. First of all, did the Plaintiff lose consciousness when she fell? Although there was no independent evidence and there were different versions by her of the length of being out-cold, I accept that she did lose her consciousness briefly; and by the time she was examined by any of the doctors at the government hospitals she was fully conscious.

68. There is no doubt that the Plaintiff did suffer laceration on her head requiring suturing, abrasion on her left shoulder, and wedge compression of T-12. I have to decide whether the Plaintiff’s complaints of the various disabilities are true or an exaggeration.

69. When the Plaintiff was gesturing in Court, it is noted that she was using her left hand as freely as, if not more often than, her right hand. When she complained about the pain on the top of her head, she raised her left hand to point at the spot. That is certainly in conflict of her claim (in her witness statement and to the various doctors) that she could not raise her left hand without feeling pain.

70. From what can be observed from the tape, she was using her left hand frequently and freely. She picked up things with her left hand first. She could examine items on display with her left hand above her head. She carried all three shopping bags (which included the heavier fruits) most of the time with her left hand. One would have expected her to favour the left hand if she was indeed experiencing pain on her left shoulder and did not have strength to carry anything more than ½ catty of vegetable. The absence of muscle wasting on the left side also does not support her allegation.

71. While it is understandable that the Plaintiff may not have described in detail her head injury and resultant complaints to the two orthopaedic experts, her more-detailed complaints to the two Neurologists did not include anything about pain in turning her head; or in cleaning herself after defecating; or the alleged bubble going to and fro in her right eye. These complaints, if true, would have affected the Plaintiff’s everyday life to such an extent that one would have expected her to mention them to the specialists.

72. While pain is subjective, it is difficult to hide the discomfort when one is feeling painful. Throughout the time when the Plaintiff was secretly filmed, apart from an occasional touching of her waist near to her hips, there was no sign of discomfort. She was walking fairly normally. She could mount steps without difficulty, only occasionally using the handrail. Her contemplation of going to the upper deck of a bus tends to indicate, at least at that moment, she was not suffering from acute back pain hindering her walking!

73. In court however, the Plaintiff walked very slowly and appeared to be in pain most of the time. She also claimed to be in such great discomfort that she could not sit or stand for long, but needed to constantly stand up and sit down while in the witness box.

74. It is unfortunate that neither the Plaintiff nor the Defence (particularly the Plaintiff, who bears the onus of proof) do not see fit to have any of the medical expert evidence reviewed in light of the tape! I do not know, for instance, the diagnosis of ‘frozen shoulder’ would still stand had the doctors seen how she was able to utilise her left hand and arm.

75. After considering all the evidence before me carefully – in particular the Plaintiff’s testimony that what she had told me in court (some aspects of which are more serious than what she had said in her witness statement or to the doctors) was not even up to 30% of her actual pain or suffering - I am satisfied that the Plaintiff has grossly exaggerated her complaints.

76. Having said that, it does not mean that the Plaintiff did not or does not suffer from any form of disability. I accept that for the first three months after she was injured and when she was wearing the brace she was indeed confined to her bed and relied on her daughter to assist her.

77. I find that she did and still does experience lower back pain which could be severe at times. I accept that she did and does need to stand or sit to relieve the discomfort though not as often as she wanted me to believe. I accept she has difficulty in bending, squatting or jumping. I also accept that she suffers from headache from time to time but I don’t think her memory was affected as much as she has claimed. Further, I accept there is some restriction on her left shoulder though that does not impair the use of her left hand. I am not convince that she suffers from ‘frozen shoulder’.

78. Further, Dr. Yu’s opinion that the Plaintiff suffered from PCS was based on the Plaintiff’s description of her complaints, which I have found to be grossly exaggerated. I find that the Plaintiff has failed to satisfy me, on a balance of probabilities, that she suffers from PCS. Alternatively, if she did suffer from PCS, such syndrome lasted for less than 12 months.

79. Despite my findings that she had grossly exaggerated her disabilities, I am satisfied, on a balance of probabilities, that she was required to have the courses of physiotherapy and occupational therapy treatments. While her conditions were not as bad as she claimed, I don’t think she managed to fool the government doctors into arranging for physiotherapy when it was not necessary to do so. I accept that when she was having treatment she was not able to return to her previous labour-intensive work. I find that she was not able to work during the whole of the period covered by the sick-leave certificate issued by government doctors.

*Pain and Suffering and Loss of Amenities of Life (PSLA)*

80. Ms. Alice Tsang, counsel for the Plaintiff, referred me to the following authorities and suggests $380,000 under this heading:

1. *Cheng Lai Kwan v Nan Fung Textile Ltd.* [1998] HKLRD G27;
2. *Lawati Bhawani Bikram v Ting Kau Contractors Joint Venture,* HCPI 1242 of 1999
3. *Wong Sun Ming v Chung Kam Tim trading as Viking Contractors Company* HCPI 117 of 1999
4. *Lau Kau Ih v Wan Kei Geotechnical Engineering Company Limited & Others* HCPI 130 of 2001; and
5. *Ng Shing Kwai v Chan Yu Chuen* [2002] HKLRD J14.

81. Ms. Corrine Remedios, on the other hand, referred me to the following 6 authorities and submitted $200,000 was the appropriate amount:

1. *Lam Mui v Kalex Circuit Board (Hong Kong) Ltd.* CACV 64/2000;
2. *Lung Kwong Ying v So Sai Lo & others* HCPI 206/2001;
3. *Choi Siau Bon v Chevalier Construction (Hong Kong) Limited & others* HCPI 913/2000;
4. *Li Fat Tsang v Aquality Engineering Co. Ltd.* HCPI 558/2000;
5. *Rai Bina v Pacific Crown Engineering Ltd. & others* HCPI 338/2001; and
6. *Ho Moh v Tam Yiu Keung & others* CACV 3859/2001.

82. Having considered these authorities and on my findings of the Plaintiff’s injuries, treatment and disability, the appropriate award for PSLA is $300,000.

*Loss of earnings*

83. There is no dispute that the Plaintiff was earning a daily rate of $350 at the time of the accident. The Plaintiff claimed she was earning $11,000 per month at the time. Ms. Alice Tsang adopted the figure of $9,100 based on the figure on the said Form 2, i.e. $350 x 26 days. She also conceded that the Plaintiff is assumed to be able to find job in January 2003 (23 months after the accident).

84. As to the present earning the Plaintiff did not adduce any evidence. Though she claimed she knew a network of friends who could have introduced her to work had she not be injured, none of these friends were called. The defence, on the other hand, called Mr. Cheung Wai Ping, who was working at the very site at the time of the accident, to give evidence on the present earnings of a person doing the Plaintiff’s job.

85. Mr. Cheung testified that he has formed a company sub-contracting cleaning and general labour work from major construction sites. At the time of the accident the Plaintiff’s daily wages was $350.

86. Mr. Cheung said that due to disputes over fees between the 2nd Defendant with the sub-contractors (himself included), all the sub-contractors stopped working. Had the Plaintiff not met with the accident her employment contract would have come to an end in March 2001 in any event.

87. Mr. Cheung employed a long-term female general worker at the daily wages of $310. He said on average female cleaning workers employed by him worked 17-18 days per month. He believed the Plaintiff would not be working more than 20 days a month if employed by him. He said wages for female cleaners are not fixed: some sub-contractors offer about $320 while others about $280. He chose to pay $310, which was accepted. He said that male general workers are paid more as they could do more strenuous work such as drilling (‘da pau’ **打炮**). He said there is no difficulty in getting female workers to work at present. Although he did not use these actual words, his evidence is that the supply exceeds the demand.

88. Mr. Cheung further said the long-term female worker was required to do overtime work occasionally. However, she did not get the customary overtime payment and he paid her $200-300 as compensation.

89. I find Mr. Cheung a straight-forward and honest witness and I accept his evidence.

90. Even with the recent improvement in the economy, and the ‘ease’ of female general workers to find jobs in construction sites, with the Plaintiff’s history of injury and residual back pain, and her inability to squat down or bend, she would not be able to lift heavy objects - which is an important part of the duty of general labourer. I am satisfied that the Plaintiff is not able to return to her pre-accident job.

*Pre-trial Loss of Earnings:*

91. I think it appropriate to adopt a median of $330 [($350 + $310) ÷ 2] but allow 26 days to take into account overtime payments as the monthly earnings for the Pre-trial period. The monthly earning is therefore $8,580 ($330 x 26 days). The sick-leave certificates cover a period of 25 months, with a gap from 23 October to 24 February. Even with her exaggeration, I find on a balance of probabilities that she was not able to work through out the whole period so covered. However, since the Plaintiff in her Revised Statement of Damages claimed for 23 months of total loss, and Ms. Tsang also made her submission along the same line, I will adopt the same in my calculation.

*Total loss:*

$8,580 x 23 = $197,340

92. I find Ms. Tsang’s concession regarding a notional income of $4,100 fair and I would adopt the same for the rest of the Pre-trial period (from Jan. 2003 to May 2004 - 16 months).

*Partial loss:*

($8,580 – $4100) x 16 months = $71,680

*Total Pre-trial loss of earnings*

93. The total Pre-trial loss of earnings is therefore $269,020 ($197,340 + $71,680).

*Future Loss of Earnings*

94. I have already accepted Mr. Cheung’s evidence as to the average daily wage of a female general worker. I find on average a female worker could work for about 18 days per month. To take into account overtime payments I think it appropriate to adopt a 21-day month. The future monthly earning of such a worker is therefore $6,510 ($310 x 21). I will adopt the same notional deduction of $4,100 per month.

95. The Plaintiff is now 53 years of age. Ms. Tsang referred me to the following authorities and submitted the appropriate multiplier should be 6:

1. *Ching Kam v Au Wing Keung & Another* [1999] 1 HKLRD B13;
2. *Lau Pai Yam v Tai Tung Coffee Co. Limited* [2003] 3 HKLRD J22;
3. *Chan Kin Ka v Siu Hun* [1999] HKLR (3) 489;
4. *Yu Pun Yuen v Ng Kwok Man & others* [2003] 2 HKLRD F23;
5. *Tai Kut Sing v Choi Chun Kwan* [2002] 1 HKLRD B14; and
6. *Lui Sheung Lok v Wah Wah Travel Services Limited* [2002] 2 HKLRD H12.

96. Ms. Remedios submitted the appropriate multiplier is 4.

97. All the authorities submitted by Ms. Tsang relate to male plaintiffs. While I accept the Plaintiff in the present case was a robust strong woman who could carry out the strenuous work required of her prior to the accident, the nature of work is such that with her getting older in age she would not have been able to discharge the duties quite the same as before. I think a multiplier of 5 appropriate. The future loss of earnings is therefore:

($6,510 - $4,100) x 12 x 5 = $144,600

*Mandatory Provident Fund (MPF) Benefit*

98. The Plaintiff is entitled to claim the loss of her employer’s contribution for MPF. The loss under this head is as follows:

($269,020 +$144,600) x 5% = $20,681

*Loss of Earning Capacity*

99. The Plaintiff claims for loss of earning capacity on the basis that even assuming she would be able to find a job she would nevertheless be placed at a disadvantage in the market due to her disabilities. I am of the view that a modest sum is reasonable. I allow $50,000 (on the basis of $4,100 x 12 months and round up the figure of $49,200).

*Medical expenses*

*Amounts not in dispute*

100. The following medical expenses amounting to a total of $7,332 are agreed:

1. A & E Department charges: $600
2. Occupational therapy fees: $3,080
3. Follow-up fees: $1,892
4. Physiotherapy fees: $1,760

*Cost for MRI and related consultation*

101. The Defendants disputed the cost incurred for consulting Dr. Lo Chi Kong at $940 (Part IV Page 67-68 of the Trial Bundle) and for the MRI at $17,500 (Part IV Page 69 of the Trial Bundle).

102. In view of my findings that the Plaintiff has grossly exaggerated her complaints and that she did not suffer from PCS or frozen shoulder, I find it not justified for her to undergo an MRI in January this year and I will not allow these sums.

*Chinese Medicine*

103. The claim of $1186 for Chinese medicine are receipted (Part IV Pages 70-75 of the Trial Bundle). I find the sum reasonable (even with the Plaintiff’s gross exaggeration) and allow the same.

*Bonesetter fees incurred in Mainland China*

104. The Plaintiff claims the sum of $11,350 for bonesetter fees incurred in Mainland China. The receipts show the figure of $10,140 (Part IV Pages 76-87 of the Trial Bundle).

105. There is indeed something very suspicious about these receipts. According to the Plaintiff, she went with her husband to the clinic (which was operated by a friend near her native place) for consultation and x-ray. Thereafter her husband travelled to the said clinic once a month to collect medication for her. Her husband is said to have incurred $1000 travelling fees to collect medication worth about $400-500 each month.

106. The receipts show that the serial numbers are so close to one another as to suggest hardly anyone else visits the clinic. For some of the amounts written on the receipts, an amount appear to be $45 instead of $450 (serial no. 20456357 dated 19.2.2002, Part IV page 77) and another amount appears to be $50 instead $500 (serial no. 20456361 dated 21.4.2002, Part IV page 78). There is a strong suspicion that these receipts are not genuine. I do not accept this part of the evidence and would not allow anything under this heading.

*Ointment*

107. The Plaintiff claimed $8,000 under this heading. The Defence agreed to the extent of $1,000. On the basis that she did suffer pain and discomfort, I allow $3,000 here.

*Damaged clothes*

108. The sum of $100 is agreed.

*Loss of earnings of the Plaintiff’s daughter.*

109. The Plaintiff claims loss of earnings suffers by her daughter Lam Lai Wah. Ms Lam gave evidence and adopted her witness statement (Part II page 46 of the Trial Bundle) as part of her evidence in chief. Her evidence suggests that her mother was practically bed-bound for 4-5 months after the accident. The Plaintiff could only sit in bed to have meals and needed her to assist when going to the lavatory. Ms. Lam said she has to resign from her job as a sales-person at a grocery shop in a market in Kwun Tong. Her monthly earning at the time was $5,200. She claimed to have work there for ½ year. She could not recall the name of the shop, or that of her employer. There was no salary statement as she was paid cash.

110. It should be noted that when the Plaintiff was first asked about her daughter’s age, she said she could not recall her daughter’s birthday, but said she was 19 years old. Ms. Lam said in court she was 20 years of age. However, when it was pointed out to her that she was only 15 years old at the time of her mother’s accident (having born 19.12.1985) she claimed that it was a Chiu Chow custom to add an extra year to a child upon birth and another year after the Chinese New Year. She said that was the reason why she said she was 20 when she was actually 18 years of age when giving evidence.

111. I find it strange for a mother to have forgotten her daughter’s birthday and sceptical about Ms. Lam’s reason for adding on the extra years. I suspect she was making herself older so to make it more convincing that she had a job when her mother met the accident and suffered injuries. I also find it strange that Ms. Lam was not able to give particulars of her so-called employment. I am not satisfied that she was gainfully employed as she and the Plaintiff claimed.

112. Having said that, I have no doubt that she did look after her mother full-time during the first 3 months after the accident. I think the Defence contention of adopting the usual wages of a domestic helper for the 3 months she looked after the Plaintiff reasonable and I will allow the following sum:

$3670 x 3 = $11,010

*Tonic food*

113. It is strange that no receipts were kept for expenses incurred on tonic food, particularly when the Plaintiff admitted that her husband was aware of the need to keep, and was also the one who kept, receipts. However, I do accept that the Plaintiff has taken tonic food and would allow her $10,000 under this heading.

###### Future medical expenses

114. I have already accepted the Plaintiff suffers from headache from time to time. 4 consultation for symptomatic treatment at $300 per visit as recommended by Dr. Yu is reasonable and I allow the following:

$300 x 4 = $1,200

*Travelling expenses*

###### Travelling to bonesetter in Mainland

115. I have already given reasons why I disallowed the claim for the bonesetter’s fees in the Mainland. The plaintiff’s claim for $27,000 incurred by husband to travel to the Mainland is therefore also disallowed; so is the $2,200 claimed for the Plaintiff to go for treatment there.

###### Travelling expenses for treatment in HK

116. It is clear that the Plaintiff did not travel to by taxi for all the physiotherapy or occupational therapy treatments as claimed in the Revised Statement of Damages. She admitted in court that she took taxis with her daughter for the first 3 months while she was still wearing a ‘corset’. After that she took the MTR and public light buses (PLB), with either her husband or daughter keeping her company.

117. She said she frequently took the MTR to go from Nam Tin to QEH for treatment. Then on the return trip she took the MTR to Nam Lin and had to take a bus at the cost of $2.80. It is unclear what bus she needed to take after arriving at Nam Tin as the video tape showed that after she alighted at Nam Tin she went home on foot after shopping. I am prepared, for the purpose of this assessment, to accept that when she does not go shopping she took a bus from the Nam Tin MTR at a cost of $2.80.

118. The Plaintiff did not specify what the MTR fare from Jordan to Nam Tin was. I take Judicial Notice of the full single journey fare being $7.50.

119. The Plaintiff attended 33 sessions of physiotherapy at QEH from 1 February to 25 October 2002, and another 10 sessions from 6 January to 14 February 2003. The calculation comes to:

($7.50 + $7.50 + $2.80) x 2 persons x 33 sessions = $1,174.80

120. I have already mentioned that the Plaintiff also claims for travelling expenses to QEH for 43 sessions of follow-up treatment and that I could not decipher exactly when these 43 sessions took place. Since the Plaintiff did sustain injuries and was required to wear a brace, it is reasonable to infer that some of the follow-up must have occurred during the first 3 months after accident and that the Plaintiff went for such treatment by taxi, particularly when Dr. Li of the Orthopaedic & Traumatology Department of QEH said her follow-up was regular and up to 3 December 2002 (Part III page 54 of the Trial Bundle). The round-trip taxi fare of $120 is reasonable. For the purpose of this assessment I will arbitrarily adopt a figure of 12 sessions for the first three months (on the basis of one follow-up treatment per week). The calculation of travelling expenses comes to:

($120 x 12 sessions) + [($7.5 + $7.5 + $2.8) x 2 persons x 31 sessions] = $2,543.60

121. For attending UCH, she took a PLB to Kwun Tong at $3.80, then to the UCH at $2.50. She attended 20 sessions Occupational therapy at the UCH from 4 September to 5 December 2001, the calculation comes to:

($3.80 + $2.50) x 2 persons x 20 sessions = $252

122. When travelling to YFSMC she only travelled from Nam Tin to Kwun Tong at $3.80. She attended 32 sessions of physiotherapy treatment at YFSMC from 14 March to 10 August 2001, with 13 Sessions within the first 3 months after the accident. I accept the taxi fare at $70 per round trip. The calculation comes to:

($70 x 13 sessions) +($3.8 x 2 persons x 19 sessions) = $1,054.40

123. The total calculation came to $5,024.80 ($1,174.80 + $2,543.60 + $252 + $1,054.40), which is far short of what the Plaintiff claims.

124. Although the Plaintiff said in evidence in court that she took taxis with her daughter in the first three months and thereafter she took either the MTR or PLBs, she did say, which I accept, she took taxis at times to have treatment after the said three-month period. Doing the best I can, I will round up the figure to that of $6,000 and allow that sum under this heading.

###### Summary of Quantum of Damages

###### 125. A Summary of the Quantum of damages are as follows:

###### (a) PSLA $300,000

###### (b) Pre-trial Loss of Earnings $269,020

(c) Future Loss of Earnings $144,600

(d) Loss of Earning Capacity $50,000

(e) MPF Benefit $20,681

(f) Agreed Medical expenses $7,332

(g) Chinese Medicine $1,186

(h) Ointment $3,000

(i) Damaged clothing $100

(j) Loss of Daughter’s Earnings $11,010

(k) Tonic Food $10,000

(l) Future Medical expenses $1,200

(m) Travelling Expenses $6,000

Total $824,129

Less ECC Payment - $272,640

**= $551,489**

*Interest & Costs*

126. As this case has been transferred from the High Court, both Parties indicated they would like to make submission on the issue of costs. The Defence has also indicated they may wish to make submission on the issue of interest. That being the case, I will not make any order at this stage.

Judianna Barnes

District Judge

Ms. Alice TSANG instructed by M/S Tsangs for the Plaintiff

Ms. Corrine REMEDIOS instructed by M/S Hastings for 1st and 2nd Defendants