## DCPI 948/2019

[2021] HKDC 15

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 948 OF 2019

-------------------------

BETWEEN

CHAN NGA Plaintiff

and

CATHAY PACIFIC CATERING SERVICES Defendant

(H.K.) LIMITED

-------------------------

Before: His Honour Judge KC Chan in Court

Dates of Hearing: 27-29 May 2020

Dates of Supplemental Written Submissions : 12 June 2020 and 17 June 2020

Date of Judgment: 8 January 2021

---------------------

JUDGMENT

---------------------

1. On 25 August 2013, the plaintiff sustained an injury during work. She was then employed by the defendant and worked as a kitchen assistant. The defendant was a well-known aircraft caterer specialized in the preparation and provision of food and meals for flights.
2. On 21 March 2016, the plaintiff commenced HCPI 295 of 2016 (“the HCPI Action”) against the defendant claiming that her injury was caused by the negligence of the defendant. The defendant disputed liability and quantum. By an order made by the Master on 26 February 2019, the HCPI Action was transferred to the District Court.
3. The plaintiff used to be legally aided and is now acting in person. At trial, she was assisted by her daughter, a university student who was quite conversant in English, acting as Mckenzie’s friend. The defendant was represented by Mr Leon Ho of counsel.
4. The plaintiff herself was the only witness for her case, while the defendant called 3 witnesses: Ms 劉笑冰, who was a senior supervisor (“Ms Lau”), Ms 顏思敏, who was a safety officer (“Ms Ngan”) and Ms 黎淑慧, who was a personnel manager (“Ms Lai”).

*Background matters*

1. The plaintiff was 47 years old at the time of the accident. She was educated in the Mainland up to primary school.
2. So far as relevant background information relating to the operation of the kitchen, not much was provided by the defendant. The evidence Ms Lai gave mainly related to the income of the plaintiff, while that given by Ms Ngan related to the safety training received by the plaintiff and a number of telephone conversations she had with the plaintiff in the few months after the accident. Ms Lau was made a senior supervisor only on 1 July 2013 and said that her duties mainly consisted of desk work and she seldom visited the kitchen and the cold rooms. It is not explained why the defendant has not called as witness anyone else who is familiar with the daily operation of the kitchen, like one who occupied the position of an immediate superior of the kitchen assistants.
3. Such background information was therefore mostly given in evidence by the plaintiff. In light of such lack of evidence proffered by the defendant to contest, I accept the evidence given by the plaintiff related to her duties and the relevant operation of the kitchen, as narrated below.
4. It is common ground that prior to the accident, the plaintiff had to work 9 hours each working day, from 6 am to 3 pm, six days a week; and additionally, she had to work overtime on average for another 2.6 hours each working day. She worked therefore on average about 11.6 hours a day.
5. The plaintiff’s job title was Production Attendant. Her general job duties, in gist, consisted of collecting trays of the cooked food from the refrigerated rooms (“the cold rooms”) and bringing them to her working area, then putting and arranging the right serving of the food into individual tin-foil dishes or such other utensils to make it into one of the dishes of the flight meals, and then transport them to the next station for processing. She would receive written instructions each day as to the number of meals she would need to prepare in respect of which dish and for which flight and such.
6. She had to work standing as no chairs were provided. She had to finish her assigned tasks within time. She was always working under time pressure.
7. The plaintiff’s case is that her work was made more arduous by reason of the following arrangements regarding the collection of trays of food.
8. After the food were cooked in the central kitchen, they would be placed either in standard size stainless steel trays that shaped like a large deep dish (“the Stainless Steel Tray”) or in large tin-foil trays, 4 of which would fit onto a standard size stainless steel plate (“the Stainless Steel Plate”). These standard size trays and plates would then be slid into standard size trolleys. These trays and plates could only be slid in or out from one side of the trolley (“the Opening Side”). A standard size trolley could hold about 16 such trays or plates. There were wheels fixed onto the legs of the trolleys to move them around.
9. For hygienic reasons, these trolleys of cooked food would then be moved to one of the cold rooms to rapidly cool them off, and then moved to another cold room for storage while awaiting the kitchen assistants to fetch them and prepared them into individual meals.
10. There was no system organizing or labeling the trolleys, the trays or the plates of cooked food according to flights and/or dishes. The kitchen assistants had to search amongst the various trolleys of food to look for the particular tray(s) or large tin-foil tray(s) of food required.
11. It was only made clear in the middle of trial, and is now common ground, that:-
    1. the cold room in question was room 2093 (“Room 2093”);
    2. Room 2093 was about 7 to 8 meters in length and about 4 meters in width;
    3. The trolleys would usually be first lined up along the walls of Room 2093 with the Opening Side facing out;
    4. Room 2093 could store up to a maximum of 28 trolleys – 4 lines of 7 each.
12. It is the defence case that if the Opening Side of a trolley is blocked by another trolley, the safe and proper way for a kitchen assistant to retrieve the food required was by moving the blocking trolley(s) sufficiently out of the way first, and then sliding the Stainless Steel Tray or Plate out completely with both hands.
13. Since late 2012, the plaintiff has been assigned to prepare meals for the first-class passengers, which work consisted of the same duties as aforesaid. Because the number of meals to be prepared was much smaller compared to that of the economy class, which would be prepared by a team of kitchen assistants, the plaintiff was arranged to work as a “one-man team”. That meant that she, alone by herself, had to go find the right tray of food, fetch it from the cold room to her work area and complete the pre-set number of meals in time.

*Did the accident occur? Credibility and reliability of the plaintiff’s testimony*

1. The plaintiff’s evidence regarding the happening of the accident, in gist, is this:-
   1. The month of August was a “high season” for the aviation industry, and the workload in the kitchen was particularly heavy, and time pressure was particularly high.
   2. The chefs of the central kitchen would get off work each day at about 4pm. They would finish cooking the food required for the late afternoon and evening flights before they got off work. Therefore, from around 4 pm onwards, Room 2093 was particularly packed with trolleys of food.
   3. At about 5 pm on 25 August 2013 when she was working overtime, she was required to locate and fetch a large tin-foil tray of fried chicken with celery (“the Tin Foil Tray”) in Room 2093.
   4. She was then under time pressure to finish the work relating to that dish.
   5. Room 2093 then was packed full of food trolleys. She had to walk sideways between trolleys and to use her hands and body to push through. She then located the trolley, and the Stainless Steel Plate where the Tin Foil Tray was contained. However, the Opening Side of the trolley was blocked by other trolleys which were packed in Room 2093. She could not move those trolleys to provide sufficient room to slide the plate out to retrieve the Tin Foil Tray. She then got herself into the tight space between the trolleys and tried to pull and squeeze the Tin Foil Tray through the tight gap on the side of the trolley. While doing so, she sprained her lower back and right shoulder and felt pain.
   6. She tolerated the pain and managed to finish that day’s work shortly after.
   7. She felt pain the next day and called her superior one 海哥 to ask for sick leave. 海哥however asked her to come back to work as there was shortage of assistants for the work and there was no one to take her place. The plaintiff then returned to work on 26 August 2013.
   8. As the pain persisted, the plaintiff then went to Accident and Emergency Department (“A&E”) of Yan Chai Hospital (“YCH”) to seek treatment.
2. Mr Ho criticized heavily the quality of the plaintiff’s evidence and submitted that she was an incredible and unreliable witness, that she had been exaggerating and even lying. He submitted that the plaintiff’s claim should therefore be dismissed.
3. He pointed out that there were discrepancies in her evidence given in her witness statement, in chief and during cross examination (a) in the way she described how she moved between the trolleys in Room 2093 before she retrieved the Tin Foil Tray, (b) when she said she heard a “pop” sound when she was injured which was not mentioned in her witness statement, and (c) in oral testimony, initially she said the Tin Foil Tray was contained in a Stainless Steel Tray but later said it was on a Stainless Steel Plate.
4. Mr Ho submitted that the plaintiff was prone to exaggeration in that, among others, she said she could not slide out the Stainless Steel Plate containing the Tin Foil Tray even “by one inch”, that she heard a “pop” sound when she was injured, and in exaggerating her symptoms to various treating doctors.
5. Having observed and heard the plaintiff while giving evidence and in the whole trial, I am of the clear view that she was an unsophisticated and uneducated person, and importantly, an unarticulated person who was not quite able to communicate verbally in an accurate fashion. I am therefore not surprised that there were those discrepancies in her evidence relating to the detail description of such matters. I accept that the plaintiff often exaggerated. However, it seemed to me to be a usual way of hers to convey ideas by exaggerations like, among others, when she was describing the difficulty in locating the required food – “like looking for treasure”, and inability to slide out the Stainless Steel Plate – “could not slide out even an inch”.
6. Mr Ho also submitted that it was self-contradicting and unreasonable that the plaintiff was able to retrieve with ease a tin foil tray of the same dish an hour ago (about 4pm), but then an hour later, Room 2093 became so completely packed as alleged. Mr Ho also submitted that there was no reason why the plaintiff did not fetch the Tin Foil Tray and this other tray of the same dish at the same time, but fetched them one by one with an hour apart.
7. In this regard, the defendant did not proffer any evidence to contest the plaintiff’s evidence, and I find, that (a) August was a “high season”, and (b) the chefs were getting off work at 4pm and before they did they would have prepared all the required food for flights in the late afternoon and the evening, such that there would be a much greater number of trolleys of food stored in the cold rooms. Therefore, the fact that the plaintiff was able to find and retrieve with ease another tray of the same dish at about 4pm, but had difficulty an hour later, was consistent with such a scenario. Moreover, Ms Lai in evidence mentioned that there were stringent hygiene requirements for the preparation of flight meals, one of those was that cooked food should not be left unrefrigerated for too long. That explained why the plaintiff did not fetch the 2 trays in one go and only fetched the second tray of the same food after she had finished the first tray; even though the plaintiff’s evidence was that she would be “scolded by the chef and supervisor” if she fetched 2 trays at the same go.
8. Also in this regard, I do not accept Ms Ngan’s oral evidence in chief to the effect that when she investigated the accident in early September 2013 by visiting Room 2093 at about 5pm, she found that there were only trolleys placed along the walls and not in the middle of Room 2093. This piece of evidence was in my view clearly an afterthought. Her such evidence in fact was directly contradictory to what she said in paragraph 8 of her witness statement, thus:-

“我在聲稱意外發生後曾到聲稱事發現場了解，發現原告人於聲稱意外發生時，聲稱事發現場是有足夠的空間讓原告人向左右移開兩架鋼車之後，再將兩架鋼車向後拉出的，這樣便會騰出足夠的空間將托盤從鋼車中拉出來，而這亦是正確的做法 …”.

What she said there was that there was enough room to move 2 trolleys sideways, and then pull them out backwards (through the door to the corridor ?), so as to make enough room to slide out a Stainless Steel Plate. Thus, the fact that two trolleys need to be moved sideways and then pulled out showed that there actually **were** trolleys in the middle blocking the way. Ms Ngan was a professional safety officer investigating an accident. One would expect her to record the result of her investigation **accurately and in full** in her witness statement. Therefore, I reject her oral version and would accept the version recorded in her witness statement.

1. Moreover, I note that what the plaintiff told this court regarding how the accident happened, as mentioned above, was essentially the same as what she told Ms Ngan as recorded in paragraph 7 of Ms Ngan’s witness statement.
2. I am also mindful that if the plaintiff were lying as to the fact that there was the accident or as to how the accident occurred, unsophisticated she may be, it would be very improbable that she would lie to a version of events that involved her not following the training she received from the defendant as to how to properly retrieve the food from the trolleys.
3. Having carefully considered Mr Ho’s submissions and the above matters, I find the plaintiff’s evidence in relation to the liability issues generally credible and reliable, though I remind myself to evaluate her evidence with the *caveat* that she tended to exaggerate, and she might not be entirely accurate over detail matters. Bearing those very much in mind and those notwithstanding, I accept her evidence as to how the accident happened as set out in paragraph 18 above, and I so find.

*Was the defendant negligent? Was the plaintiff contributorily negligent ?*

1. The defendant’s main defence was that the defendant had provided, and the plaintiff did receive, a training session regarding the correct procedures and posture in the performance of her work, namely – she should move the other trolleys aside and then pull them backwards to allow sufficient room, she should then face the trolley and use both hands to pull out the Stainless Steel Plate to retrieve the dish, and that she should not use other incorrect methods or postures. The defendant’s case is that had the plaintiff followed the training, she would not have injured herself.
2. The defendant also contended that Room 2093 was spacious enough for the plaintiff to move the trolleys aside and to pull them backwards to allow sufficient space. At trial, evidence was also elicited by the defendant that the door of Room 2093 was a sliding door which when fully opened would enable trolleys to be moved out from Room 2093 onto the corridor to make room for maneuvering inside Room 2093.
3. The plaintiff has never disputed that she attended such a training session and received the said training. At trial, the plaintiff also did not seriously pursue the many other allegations of negligence.
4. The plaintiff’s main case was that the workload was so heavy, in terms of long hours, with no chairs to sit on and rest, time pressure and such, and the trolleys were heavy and she worked alone, such that it was unreasonable, if not altogether unrealistic a system of work, to ask her by herself to maneuver and then to move several trolleys from the packed Room 2093 to find and then to make room to retrieve the required food. Therefore, she was “forced” at the time to try to squeeze the Tin Foil Tray from the gap on the side. She said such system of work was not reasonably safe. With leave, the parties submitted another round of authorities and short written supplemental submissions further addressing me regarding the plaintiff’s said main case.
5. In the defendant’s supplemental submissions, the defendant accepted that it was a reasonable estimate that a loaded food trolley would weight about 300 pounds, but said that the weight of 400 pounds estimated in the discussion between the court and Mr Ho during final submissions was a bit high. In evidence, Ms Lai said that it would take a kitchen worker 2 to 3 minutes to push a loaded food trolley from Room 2093 to where the plaintiff worked and the distance between them was only 25 to 30 meters. That would mean a speed of about 500 to 900 meters an hour, as compared to the usual slow walking speed of 3 to 4 kilometers. It showed, and I find, that a loaded food trolleys were of such weight that they were not easy to maneuver or move.
6. Mr Ho referred to *Poon Ching Man v Lam Hoi Pun* (DCPI 1585/2011, unrep, 11 November 2014) and *Chan Kai Man v Baiqian International Holding Limited* (DCPI 660/2013, unrep, 28 October 2016) as examples of cases in which workers used a hand pallet truck to carry the respective loads of 480kg and 250kg, and there was no issue in either case that the load was too heavy to be unsafe. He also referred me to the facts in *Wong Chun Tai v Yau Cheung Hey* (DCEC 939/2007, unrep., 6 May 2009). In that case, the applicant as a noodle factory worker used a hand trolley to carry boxes of noodles up to 300 catties in total weight for a short distance and up to dozens of times a day. Essentially, Mr Ho submitted that it was not an unsafe system of work, or not unsafe, to require the plaintiff to push a trolley of 300 to 400 pounds in weight.
7. Mr Ho further cited *Liu Kin Pong v Kee Wah Food Production Limited* (HCPI 632/2014, unrep, 6 July 2017). In that case, it was held that pushing a wheeled cage trolley loaded with cookies to the oven room was a simple task that should present no difficulty for the plaintiff in that case to do it safely.
8. The plaintiff referred me to *雲淑莉 訴 力根有限公司* (HCPI 1142/1996, [2002] HKCFI 1891) to remind the court the general duty of an employer and to point out that the court should also take into account the fact that the plaintiff worked under tight time pressure.
9. Needless to say, the cases cited by parties were decided on their own facts and this court must evaluate and decide in the context of the particular factual situation before it. As will be explained below, I do not find the cases cited by the defendant apposite.
10. The particular factual situations as I find in this case are these. The measurements of Room 2093 were about 7 x 4 meters. The measurements of a trolley were slightly less that a meter in width and in length and slightly less than 2 meters in height. If there were 16 food trolleys (7 trolleys along the 7-meter walls and 2 along the centre of the 4-meter wall) lined up along the 3 walls, it would have left an open area in the centre measuring about 6 x 2 meters. With the plaintiff’s tendency to exaggerate, I am not prepared to fully accept what she said: that at the time of the accident, Room 2093 was completely packed with trolleys. I do not think the kitchen workers would completely and tightly fill Room 2093 with 28 trolleys. It would have very little room for anyone to even get into the room. It would make little sense so to do. Considering all the evidence, I would accept and find that Room 2093 was then very full with probably 8 or 9 trolleys in the center in addition to those placed along the walls.
11. When Room 2093 was so filled, it is not difficult to picture that assess to one of the trolleys lined up against the wall or placed deep inside would be quite difficult. In such scenario, for the plaintiff by herself to retrieve a tray of food, the process would probably be this. Firstly, she would need to pull the 2 or 3 trolleys that were closest to the door out to the corridor to make room. She would need to park them properly in the corridor so that they would not cause risk or inconvenience to other workers using the corridor. Then, some of the trolleys in the center area of Room 2093 would need to be maneuvered sideways for her to pass through and to make room for her to employ the proper and safe posture to pull/push the trolleys that were in the way, so that ultimately sufficient room was created to enable the targeted Stainless Steel Plate to be properly and safely slid out and the tray of food retrieved in the manner according to the defendant’s said training. After that, she would need to put the tray of food down somewhere to free up her hands so that she could maneuver and move the trolleys in the corridor back to Room 2093. For hygienic reason, the plaintiff would probably need to carry the tray of food back to her station first and then return to Room 2093 to put those trolleys back to Room 2093, and then return to her station to carry on with her work. I would note that the above process in fact was essentially similar to that described, albeit much more briefly, by Ms Ngan in paragraph 8 of her witness statement that was quoted above.
12. The task of repeatedly maneuvering and moving the trolleys within such limited space, which would hinder the use of the proper and safe postures, in the process described above, is a very different task than pushing a trolley in a straight line or across open space where there is ample room – as in above cases cited by Mr Ho.
13. The plaintiff emphasized at trial, and I accept, that such task would be relatively easy for the kitchen assistants preparing meals for the economy class; and therefore reasonably safe for them. They worked as a team and not alone such that 2 or more of them could go together to Room 2093 to fetch the food required. They could then together move the unwanted trolleys out to the corridor to retrieve probably the whole trolley(s) of food they need and then pushed back those unwanted trolleys into Room 2093. However, the work arrangement for the plaintiff was that she worked alone. In this connection, I reject the defendant’s contention that the plaintiff could have called for help from other workers and prefer the plaintiff’s evidence that everyone was under tight time pressure to finish his/her assigned tasks in time and asking for help was simply unrealistic. I also bear in mind the factual situations advanced by the plaintiff that she had to work long hours without a chair to sit on for the whole time.
14. I find the defendant’s contention that the overtime work was “voluntary” rather than “compulsory” neither here nor there. The important point is that it was foreseeable by the defendant that the plaintiff would work extra and long hours, whether “voluntarily” or “compulsorily”, and under such time pressure and circumstances. The duty to ensure reasonable safety imposed on the defendant was such that it had to provide a reasonably safe system of work with the foreseeable work load and demand and circumstances in view.
15. I accept the plaintiff’s submission that the fact that the plaintiff was constantly working under time pressure, and particularly so in the month of August, which is not disputed by the defendant, is an important matter to take into account.
16. In the round and in my view, the system of work or the work arrangement for the plaintiff to work alone and to move the trolleys to make room as described above, and doing so under constant great time pressure, so that she could follow the defendant’s procedure to retrieve the food was, in the circumstances I found above, unreasonable and unsafe. In my judgment, it was reasonably foreseeable by the defendant that the plaintiff might be driven to retrieve the Tin Foil Tray in her own way, as she did. This system of work was not reasonably safe. I find that the defendant was negligent and had failed in its duty as employer to keep the plaintiff reasonably safe in her work.
17. The defendant contended in paragraph 11 of its supplemental written submissions that the plaintiff was contributory negligent up to 25%. Mr Ho argued that the plaintiff should have evaluated her own condition and ability at the time, and then if need be, should have taken short periods of rest before she performed the above-mentioned tasks of maneuvering and moving the trolleys and doing so in a slow and steady manner. However, as I explained above, I find the plaintiff had to work under particularly high time pressure in August and she was not provided with a chair to rest (or has it been suggested by the defendant that she was given other facilities to rest). That and also considering all the above matters, I hold that the plaintiff has not been contributorily negligent as contended.

*The parties’ respective positions regarding quantum*

1. The table below summaries the amounts the plaintiff claims as stated in her Revised Statement of Damages and the defendant’s response as stated in its written opening submissions:-

|  |  |  |
| --- | --- | --- |
|  | Plaintiff’s claim in HK$ | Defendant’s response in HK$ |
| Pain, suffering and loss of amenities (“PSLA”) | $550,000 | $120,000 |
| Pre-trial loss of income including MPF | $916,320.35 | $56,721.71 |
| Loss of future income | $1,472,990.68 | $0 |
| Loss of earning capacity | $150,000 | $0 |
| Future medical expenses | $50,000 | $0 |
| Special damages | $111,960 | $7,500 |
| **Total :** | **$3,251,271.04** | **$184,221.71** |

1. The defendant contends that there should be a reduction of 45% of the total award as there were pre-existing degenerations that have contributed to the plaintiff’s loss.
2. It is common ground that the plaintiff has already received employees’ compensation in the total amount of HK$280,000, which would be deducted from the total final award.

*The plaintiff’s injury and treatment; and present complaints*

1. On 27 August 2013, the plaintiff attended A&E of YCH for treatment. She complained of lower back pain after spraining her back at work. She also complained of pain at right shoulder and right-side chest wall, which she mentioned to the doctor there, were injured 3 years ago. There was no other complaint of any sphincter disturbance, limb weakness or paranesthesia. Upon examination, it was found that:-
   1. there was no bony tenderness on cervical, thoracic and lumber spine;
   2. straight leg raising test revealed 90 degrees on both legs;
   3. grade of power of all limbs was 5/5;
   4. sensation of both upper and lower limbs was intact;
   5. there was full range of active movement on right shoulder with no bony tenderness;
   6. no bony tenderness on chest walls; and
   7. X-ray did not reveal any fractures.

She was then treated and discharged with sick leave of one day given.

1. Since then until 8 October 2013, the plaintiff sought and received treatment, as follows:-
   1. The next day on 28 August 2013, the plaintiff attended Tung Chung Outpatient Clinic (“TCOPC”) for treatment. Physical examination showed diffused muscle tenderness over her left lumbar paraspinal muscle, right deltoid and right upper chest wall region. The provisional diagnosis was soft tissue injury of her lower back and right shoulder.
   2. From then until 29 September 2013, the plaintiff visited TCOPC 7 more times for symptomatic treatment. There was no significant improvement on her symptoms despite medical treatment and physiotherapy.
   3. In between the visits to TCOPC as aforesaid and on 10 September 2013, the plaintiff attended A&E of Pok Oi Hospital for treatment. There, the plaintiff complained of persistent pain on neck and right shoulder. Physical examination showed no abnormality except mild pain on elevation of right shoulder and neck movement.
   4. Between 30 September 2013 (the day next after she last visited TCOPC) to 8 October 2013, the plaintiff visited the Community Health Center of North Lantau Hospital (“CHCNLH”) for treatment on 3 occasions.
2. On 10 October 2013, the plaintiff was seen by the Orthopaedic and Traumatology Department of Prince of Wales Hospital. On 23 October 2013, she received an MRI examination. The findings were that (a) there was evidence of disc protrusion at C3/4, C5/6 and C6/7, (b) moderate significant at C5/6 with moderate central spinal canal narrowing but probably no evidence of cord compression and of nerve root compression, (c) mild disc degeneration at L3/4 and L4/5 with small posterior annular tear at L4/5 disc and (d) there was mild diffuse posterior bulging of L3/4 and L4/5 disc with no significant spinal canal stenosis, exit foraminal narrowing or nerve root compression. The diagnosis was neck pain and low back pain with underlying degenerative change over cervical and lumbar spine. The plaintiff was followed up by that department up to August 2014.
3. The plaintiff received the following therapies:-
   1. Physiotherapy from YCH from 20 November 2013 to 24 January 2014. Because North Lantau Hospital (“NLH”) was closer to where the plaintiff lived, the plaintiff was transferred to NLH for further physiotherapy treatment;
   2. Physiotherapy from North Lantau Hospital from 20 February 2014 to 5 May 2014 consisting of 10 sessions;
   3. Occupational Therapy from Princess Margaret Hospital (“PMH”) from 14 January 2014 to 20 May 2014; and
   4. Physiotherapy from NLH for neck pain from 25 August 2015 for 9 sessions. The plaintiff defaulted the appointment scheduled on 25 January 2016 and did not arrange for further appointments.
4. After having received the occupational therapy from PMH, the plaintiff’s condition was improved, but she complained of residual pain over neck, low back, left hip and right lower limb, as well as numbness over right upper limb.
5. Upon referral and from 11 November 2014 to October 2016, the plaintiff also received treatment from North Lantau Hospital Psychosomatic Clinic.
6. From the Summary of Medical Certificates[[1]](#footnote-1), it can be seen that since mid August 2014, the plaintiff had been attending CHCNLH every 4 to 5 days until late August in 2016. On each occasion, she was given sick leave for 4 to 5 days.
7. In her witness statement dated 15 March 2018, the plaintiff listed 11 aspects of orthopaedic complaints. In gist, she complained of persistent pain at right shoulder extended to right hand, right chest, back, left waist and right hip; as well as numbness and lack of strength of right lower limb. She complained that because of these pain and numbness, her ability to walk, stand and move was impaired by pain. She also complained about difficulty in sleeping, tiredness, lack of concentration, poor memory, low mood and anger.

*Joint Orthopaedic Expert Report*

1. In the joint report dated 10 May 2016 compiled by Dr Johnson Lam Chi Keung, as the expert for the plaintiff, and Dr Tsoi Chi Wah Danny, as the expert for the defendant, the following was reported after assessment by the experts on 28 April 2016:-
   1. There was mild tenderness and guarding over the right upper trapezius muscle but without muscle spasm and the midline of the cervical spine was non-tender.
   2. The upper limbs were both normal with full range of motion of shoulder and full power of upper limb.
   3. There was tenderness over the midline at the lower lumbar spine and lumbosacral junction and the lumbar paraspinal muscle was non-tender.
   4. The lower limbs were both normal with full grade in strength and no calf muscle wasting. The straight-leg raising test in supine position yielded 80 degrees for both legs.
   5. X-ray showed mild degenerative changes in the cervical and lumbar spine and that there was decrease of the cervical lordosis, otherwise the x-rays of the chest, the cervical and lumbar spine were unremarkable.
2. Both experts agreed on the following:-
   1. The diagnosis was soft tissue injuries to the neck and low back, that is consistent with the mechanism of injury described by the plaintiff.
   2. The treatment the plaintiff received was appropriate.
   3. She has reached maximal medical improvement.
3. Regarding the plaintiff’s present complaints orthopaedically, the opinion of the two experts were not wide apart.
4. Dr Lam opined that her present complaints were out of proportion to the objective findings and the extent of injury sustained. He further opined “that it is likely that Madam Chan still has some genuine pain and impairment in the neck/low back … However … the degree and extent of pain and disability should not be as severe as what she alleged. The degree of residue pain and impairment is estimated to be mild-to-moderate”[[2]](#footnote-2), and that “Madam Chan probably had a strong psychosomatic element to account for her residue pain and disability which is out of proportion to her pain and impairment caused by the subject injury”[[3]](#footnote-3).
5. Dr Tsoi concluded that the plaintiff’s current symptoms were grossly disproportional to the objective findings, that the plaintiff should have recovered to a great extent, if not completely, and any residue from the possible soft tissue injury so sustained by the plaintiff should be minimal.
6. Both experts agreed that the plaintiff could return to pre-accident work, though Dr Lam cautioned that it should be a gradual return with reduction in work capacity.
7. Dr Lam endorsed the sick leave given by the treating doctors while Dr Tsoi opined that sick leave should be limited to 3 months.
8. I will give my views regarding the experts’ diverged opinion in due course in the context of individual heads of claim. I will also discuss their opinions regarding the pre-existing degeneration below, in its context.

*Joint Psychiatric Report*

1. Psychiatric experts, Dr Wong Chung Kwong engaged by the plaintiff and Dr Benjamin Lai by the defendant, compiled a joint report dated 23 February 2018 after having examined the plaintiff jointly on 15 November 2016. They were in general agreement in their opinions save but two slight disagreements.
2. It was a thorough report. However, for present purposes I need only refer to the following common opinions of the two experts:-
   1. Both experts diagnosed that the plaintiff suffered from Adjustment Disorder with Mixed Anxiety and Depressed Mood.
   2. Both experts agreed that the plaintiff has reached maximal medical improvement at the time of the joint examination, that she only has mild residual psychiatric symptoms.
   3. Both experts have reviewed the surveillance video recording the plaintiff’s activities on 24 September, 13 and 15 October 2014 and 11 and 27 October and 15 November 2016. Both observed and agreed that on 11 October 2016 (about a month before their joint examination), the plaintiff was seen in the surveillance walking with smooth and normal gait, less strenuously and without need to put much weight on the walking stick she was using to help her walk; which was rather different from the way she described to the experts during the joint examination and rather different from the demonstration in the joint examination - she walked slower, with obvious limping and put more weight on the stick as support.
   4. Dr Wong put it thus: “To conclude, there are no psychiatric explanations for the severe and persistent pain in many parts of her body”[[4]](#footnote-4). While Dr Lai opined “Her current physical complaints and pain symptoms cannot be explained on the basis of her current psychiatric condition”[[5]](#footnote-5).
   5. Both experts opined that she was mentally capable of returning to her pre-accident employment;
   6. Both experts recommended the plaintiff to receive psychiatric treatment within 6 months after the conclusion of this litigation, and Dr Wong recommended she receives such treatment from the public sector at the estimated cost of HK$1,000.
3. The slight disagreements between the two experts were (a) Dr Wong recommended sick leave on psychiatric grounds of 4 months while Dr Lai opined 3 to 4 months, and (b) Dr Wong opined 3% as the figure for both impairment of functioning and loss of earning capacity while Dr Lai opined for both figures 1 to 3%.

*Pain, suffering and Loss of Amenities (“PSLA”)*

1. It was the plaintiff’s evidence, which I find for, that she injured herself while trying to pull the Tin Foil Tray through the gap on the side of the trolley. She was then working within the limited space between trolleys. The highly likely probability is that the force she exerted while pulling, which caused the injury, would not be very strong. The injury, one would expect should be relatively minor, and as opined by both orthopaedic experts, was an injury to soft tissue. As set out above, the complaints she made to A&E of YCH when she visited there for treatment 2 days after the accident were low back pain after she sprained her back and pain at right shoulder and right-side chest wall which were injured 3 years prior.
2. It is therefore clear that the first question to resolve is whether the plaintiff did suffer after the accident and now continues to suffer, so extensively and persistently as she now complains, the pain, numbness, lack of strength as such over her neck, right shoulder extended to right hand, right chest, back, left waist and right hip and right lower limb; and if not, what the true extent of her PSLA is.
3. Having consider the evidence and heard and seen the plaintiff at trial, and for the following reasons, I do not accept that she did suffer and now continues to suffer the PSLA to the extent and degree she now complains.
   1. As noted in paragraphs 49 and 50 above, the plaintiff’s complaints, in the numerous occasions up to late September 2013 when she sought medical treatment from various institutions, concerned only neck, right shoulder and back with no lower limb involvement.
   2. A&E of Pok Oi Hospital reported that upon examination on 10 September 2013, there was no abnormality except mild pain on elevation of right shoulder and neck movement.
   3. By August 2015, the plaintiff sought physiotherapy treatment of the neck only, which treatment she defaulted since late January 2016.
   4. Both orthopaedics experts opined that there were no objective findings that could have supported the plaintiff’s claims of pain and ailments. I particularly note that assessment by both experts in April 2016 showed that all four limbs of the plaintiff had full range of motion and full grade of strength.
   5. Both psychiatric experts were of the clear opinion that there were no psychiatric explanations for the plaintiff’s severe and persistent pain.
   6. I attach particular weight to the observation and opinion of both psychiatric experts that there was a marked discrepancy in the alleged difficulty in walking as verbally described and demonstrated to them at the time of the examination and the ease and normality the plaintiff was able to walk when she was surveilled just about a month ago. In my view, there was clearly demonstrated an element of malingering by the plaintiff.
   7. As I have already mentioned earlier, I find that the plaintiff had a tendency to exaggerate. When cross examined by Mr Ho concerning her various complaints of pain and ailments, conditions and such as recorded in the medical notes of treating doctors and therapists, the plaintiff was often evasive and hesitant. I think that during her testimony the plaintiff has shown herself to be very conscious of presenting a picture that she has suffered, and is still suffering, greatly all over her body as a result of the accident, rather than trying to tell the true as best she could remember. In all, I am unable to accept as credible or reliable her evidence regarding her pain, ailment and physical condition.
4. Based on the medical reports and the expert reports, I find that as a result of the accident she suffered soft tissue injury to her lower back and right shoulder, and some pain and discomfort over her neck caused either by the accident directly or by the accident triggering the otherwise asymptomatic pre-existing degeneration of the cervical spine. By mid to late 2014, the plaintiff’s orthopaedic injuries and pain has substantially improved as she no longer sought therapy treatment for them, save there was residual over the neck for which she resumed and received therapy from August 2015 to January 2016. By late 2014, the plaintiff developed and suffered from Adjustment Disorder with Mixed Anxiety and Depressed Mood for which she later received treatment. I find that latest by April 2016, the plaintiff was healed orthopaedically with possibly very mild residue and that latest by November 2016 her adjustment disorder has also been resolved.
5. I find that the accident either caused directly or triggered symptoms over the degenerated neck because:-
   1. Dr Lam so opined, while Dr Tsoi did not really dispute that the accident caused some injury to the neck or dispute that the accident might trigger the symptoms to the otherwise asymptomatic pre-existing degeneration of the cervical spine.
   2. As a matter of causation and as they had been asked, both experts did come up with their respective estimates of apportionment between the accident and the pre-existing degeneration (Dr Lam, 90%/10%; Dr Tsoi 20%/80%).
   3. On evidence, however, there is nothing to show that the neck degeneration was otherwise than asymptomatic prior to the accident, and as the medical reports show and not disputed by Dr Tsoi, shortly (though not immediately) after the accident, the plaintiff started to complain about neck pain and discomfort.
   4. Thus, on balance of probabilities I am satisfied and make the above finding.
6. As I hold that there is little residual ailment suffered and the accident either caused or triggered the otherwise asymptomatic degeneration thereby occasioning pain over the neck which has also been resolved, the discount as advocated by Mr Ho under *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958 is not engaged or applicable.
7. I will assess the award of PSLA according to my said findings. I have also considered the cases cited by Mr Ho, namely *Lau Wa Ying v Caritas* (DCPI 2885/2014, unrep, 6 March 2017), *Pak Siu Hin Simon v J. V. Fitness Ltd* (HCPI 574/2014, unrep, 15 May 2017) and *Chiu Man Chi v Motorola Asia Pacific Limited* (HCPI 150/2011, unrep, 16 March 2016). In these cases, the range of PSLA award was HK$120,000 to HK$150,000. In this case, while I am not accepting the plaintiff’s case concerning the pain and ailments to the degree and extent as she alleged, I do however accept that the neck pain and discomfort had been lingering up to late 2015. I also take into account the psychiatric injury suffered by her. I take the view, in the round that an award for PSLA in the sum of HK$200,000 is reasonable and appropriate.

*Pre-trial loss*

1. By reason of my findings above, I am unable to accept the opinion of Dr Lam that the sick leave granted by the treating doctors – intermittently, and after August 2014 given by CHCNLH every 4 to 5 days, for a total of 1,102 days. Dr Tsoi opined 3 months of sick leave for the injury caused by the accident. It is evident from the expert report, in my view, that in giving that opinion Dr Tsoi did not take into full account the pain over the neck. Taking the neck injury and pain into account, and as I said such pain had been lingering, and also considering the 4 months’ sick leave that the psychiatric experts opined, and assessing it broadly and in the round, I think awarding pre-trial loss at 8 months’ income is reasonable and appropriate.
2. In the Revised Statement of Damages, the plaintiff pleaded that her average monthly income at the time, including overtime payment and meal benefits was HK$13,505.17. This amount was agreed to by the defendant in its written opening submissions. The plaintiff’s pre-trial loss of income, including loss of MFP is therefore: HK$13,505 x 8 x 1.05 = HK$113,442.

*No future loss of income or loss of earning capacity*

1. By reason of the matters I have stated above, I take the view that the plaintiff is not entitled to any loss of future earning or loss of earning capacity.

*Future medical expenses*

1. I accept Dr Wong’s opinion that the plaintiff should receive psychiatric treatment in the public sector after the resolution of this litigation assessed at HK$1,000.

*Special damages*

1. The plaintiff claims medical expenses totalling HK$16,960. They were all paid for medical services provided by public hospital or clinics. The larger components consisted of HK$7,120 paid to Prince of Wales Hospital and HK$2,900 paid to NLH and HK$1,780 paid to Princess Margaret Hospital. I would allow them all.
2. The plaintiff claims travelling expenses of HK$25,000. It was a broad and bare claim. I would only award HK$5,000 as a reasonable sum.
3. I would disallow the claim in the sum of HK$20,000 as fees paid to bonesetter and Chinese Herbalists. In her witness statement, she only mentioned an expenditure totalling HK$5,160. There is no evidence describing what they were for and there is no evidence suggesting they were necessary to treat her injuries over and above the medical treatment she has already received in the public sector.
4. The plaintiff claimed in her witness statement tonic food in the total sum of HK$37,253.70. The numerous receipts produced showed the purchases were made from the date of accident up to 2018, and for a variety of goods – many instances of purchase of pork and bones, a variety of medicine, and some purchases of ginseng and other valuable items. I am not satisfied that these purchases and their amounts are necessary or reasonable. I will award a lump sum of HK$7,000 for tonic food as being reasonable.

*Summary of awards*

1. I award PSLA – HK$200,000, pre-trial loss of income – HK$113,442, future medical expenses – HK$1,000, special damages – HK$28,960, totalling HK$343,402.

*Disposal*

1. I give judgment to the plaintiff and assessed damages in the total sum of HK$343,402.
2. I also award to the plaintiff the usual interest: on general damages (PSLA award of HK$200,000) at 2% per annum from the date of writ to the date of this judgment, on pre-trial loss of income and special damages at half judgment rate of 4% from the date of the accident to the date of this judgment, then on all sums at judgment rate from date of this judgment until full payment.
3. From the total award, the employees’ compensation of HK$280,000 would need to be deducted.
4. I order, on a *nisi* basis, that the defendant do pay to the plaintiff the costs of this action, including the costs of the HCPI Action before it was transferred to this court but such costs to be taxed on the District Court scale, to be taxed if not agreed; and the plaintiff’s own costs, incurred when she was legally aided, to be taxed according to the Legal Aid Regulations. This order *nisi* will become absolute unless any party applies to vary within the next 14 days.
5. The plaintiff may arrange with my clerk for this judgment to be interpreted to Punti to her, if she so wishes.
6. Lastly, I thank Mr Ho for his assistance.

( KC Chan )

District Judge

The plaintiff was not represented and appeared in person

McKenzie friend of the plaintiff, Chan On Ki, appeared in person

Mr Leon Ho, instructed by Winnie Mak, Chan & Yeung, for the defendant

1. P.384 to 390 of Trial Bundles [↑](#footnote-ref-1)
2. P.35 of the report, p.262 of Trial Bundles [↑](#footnote-ref-2)
3. P.34 of the report, p.261 of Trial Bundles [↑](#footnote-ref-3)
4. Paragraph 50 of the report at p.307 of Trial Bundles [↑](#footnote-ref-4)
5. Paragraph 62(j) of the report at p.314 of Trial Bundles [↑](#footnote-ref-5)