## DCPI 960/2019

[2022] HKDC 298

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 960 OF 2019

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BETWEEN

LAM KA WAH Plaintiff

and

FAN KIN SHING 1st Defendant

(范堅成)

KOON WING MOTORS LIMITED 2nd Defendant

(冠榮車行有限公司) (Discontinued)

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Before: Deputy District Judge Charles Wong in Court

Dates of Hearing: 15-16 December 2021 and 6 January 2022

Date of Judgment: 14 April 2022

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JUDGMENT

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*Introduction*

1. This is a case of a taxi backseat passenger claiming damages for personal injuries suffered as a result of a traffic accident which happened on 18 October 2016 involving a taxi with registration number KG2646 (“the Taxi”) (“the Accident”).
2. The 1st defendant was the driver of the Taxi. Proceedings against the 2nd defendant, the registered owner of the Taxi has been discontinued.
3. The 1st defendant admitted liability on the first day of trial with the issues of contributory negligence and quantum to be determined.

*The Accident*

1. The Accident involved three vehicles in a chain collision on 18 October 2016 at around 8:31 pm inside Tate’s Cairn Tunnel Wong Tai Sin Kowloon. The Taxi was the last vehicle in the chain travelling behind private vehicle KR4773, which followed LZ6534. The Taxi failed to maintain a safe distance and did not brake in time when following a slowed down traffic. The Taxi hit KR4773 and caused a chain collision. As a result, the plaintiff suffered head, neck and back injuries.
2. The 1st defendant was convicted of careless driving on 26 May 2017 at West Kowloon Magistrates’ Court and was fined $1,000.

*Contributory Negligence*

1. The 1st defendant alleges that the plaintiff had failed to wear or properly wear a seat-belt while travelling as a passenger of the Taxi.

*The Evidence*

*The A&E triage notes states “not on seat-belt”*

1. The Accident and Emergency triage note of the Prince of Wales Hospital dated 18 October 2016 (“the A&E notes”) states “not on seat-belt”. The reports of the Government hospitals as to the treatment and care of the plaintiff were adduced as agreed evidence without calling the makers thereof.
2. Whilst there is no evidence as to the circumstances surrounding the making of the A&E notes, the maker could only have been a staff or medical officer of the hospital making a reference to the plaintiff not wearing a seat-belt.
3. At trial, the plaintiff maintained his case that at the time of the Accident he was wearing a three-point lap and shoulder seat-belt and no medical staff had asked him whether he wore a seat-belt when he was treated in the hospital after the Accident.

*The 1st defendant did not give evidence*

1. On the issue of whether the plaintiff wore a seat-belt, the 1st defendant would have been in the position to observe whether the plaintiff wore a seat-belt before the Taxi drove off and whether he was still wearing a seat-belt immediately after the collision. The 1st defendant nevertheless did not give evidence.
2. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, Brooke LJ observed at P339–P340 that the court may drawn an adverse inference from the absence of a witness who might be expected to have material evidence to give on an issue:-

“In *R. v. IRC ex parte T.C. Coombs & Co.* [1991] 2 A.C. 283 Lord Lowry explained at p. 300 the benefit which a court may be willing to confer on a silent defendant who gives some sort of explanation for his failure to give evidence, even if it is not a very good one. He said:

‘In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party’s failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.’

From this line of authority I derive the following principles in the context of the present case:-

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness’s absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.””””’’’””

*Other available evidence*

1. In the Magistrates’ court proceedings, the 1st defendant admitted that it was drizzling, the road surface was wet and the speed limit was 70 kmph at Tate’s Cairn Tunnel.
2. The plaintiff states in his police statement dated 31 October 2016 that the Taxi was travelling at 60 kmph. Whereas the 1st defendant in his police statement states that he was driving at 40 kmph with about half a vehicle’s length behind another vehicle.
3. The plaintiff gave evidence stating that the shoulder strap of the seat-belt was loose whereas the lap seat-belt strap was tight when fastened. When the Taxi was in motion, the plaintiff leaned towards his right whilst playing with his mobile phone. His head was not leaning on or touching any part of the rear seat headrest. At the time of collision and when he was thrown forward, his right side body was thrown forward and it was the right side of his head that hit against the rear of the front passenger seat head rest.

*The Legal Principles*

1. In *Froom v Butcher* [1976] QB 286, it was held that according to whether the injuries sustained would have been less severe or avoided altogether had a seat-belt been worn, the reduction should vary between 15% and 25%. At p 296 of the Judgment, Lord Denning stated:-

“*Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat-belt had been worn. In such case the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat-belt had been worn. But often enough the evidence will only show that the failure made a considerable difference*.”

1. Apart from the burden of proving that the plaintiff had failed to wear or properly wear the seat-belt, the 1st defendant also bears the burden of proving that the failure to wear or properly wear the seat-belt was causal to the injuries sustained[[1]](#footnote-1).
2. Mr Cheng, counsel for the 1st defendant, relies on *Tsoi Kwok Kuen v Chan Wah Hin* HCPI 1019/2005, by Recorder P Fung, SC dated 30 July 2010 and *Ho Wing Cheung v Liu Siu Fun* [1980] HKC 212 to support a case of 20% contributory negligence for the plaintiff’s failure to wear a seat-belt.
3. Mr Cheng submits that the court should not conduct a factual inquiry on the effect of wearing or not wearing a seat-belt and refers to the case of *Patience v Andrews* [1983] RTR 447 which states at P.454B:-

*“….. What the court must do is examine the injuries which were actually suffered and for which the plaintiff is receiving compensation. It makes a deduction depending on the extent to which those injuries were caused or contributed to by the failure to wear a seat belt. That is clear from the judgment of Lord Denning MR in Froom V. Butcher [1975] RTR 518, 526J -527B. But one cannot reduce the appropriate percentage of contributory negligence – that is to say, the degree of blameworthiness – by investigating what the injuries might have been, but were not, caused in the circumstances which did not arise. That is pure speculation. One simply does not know what they might have been.”*

1. In *Patience v Andrews[[2]](#footnote-2),* the court had before it evidence from two experts, including one consulting engineer. The court accepted the experts’ evidence that the plaintiff’s head injuries would not have occurred had the plaintiff been wearing a seat-belt. It is only when the plaintiff is able to establish the fact that the failure to wear a seat-belt was causal to the damage, then the court looks into the deduction to be made and to what extent the failure to wear seat-belt have contributed to the injuries sustained but without speculating on the extent of injuries the plaintiff would have suffered had he worn a seat-belt.
2. *Patience v Andrews* does not depart from the principle that in establishing contributory negligence against a plaintiff in failure to wear a seat-belt, the 1st defendant bears the ultimate burden to establish the fact that the failure to wear a seat-belt was causal to the damage suffered.

*The analysis*

1. There has been a dispute on the speed of the Taxi when it was travelling inside the tunnel. The 1st defendant elects not to give evidence and no explanation was provided for his failure to give evidence. I find that this is an appropriate case to draw an adverse inference against the 1st defendant. I attach little weight to his police statement. The travelling speed of other vehicles in front of the taxi are only good reference if there is evidence that the taxi was following the vehicle in front at a constant distance and speed. There is no such evidence. From the available evidence, in particular the *viva voce* evidence of the plaintiff, I find that the Taxi was more likely to have been travelling at 60 kmph.
2. Whilst I give due weight to the A& E notes, it is noted that the same record also states, “Hit by another car from behind”, which in light of the undisputed fact that the Taxi was the last vehicle in the chain collision, this entry must therefore have been incorrect. Since the plaintiff was conscious after the Accident and managed to take photographs of the damaged vehicles, it is less likely that this piece of information had come from the plaintiff. The circumstances surrounding the making of the A&E notes are uncertain, it cannot be ruled out that the maker may have obtained the information from a source other than the plaintiff or had made the entry based on the maker’s own observation. I therefore have reservations on the accuracy and reliability of the A&E notes.
3. The plaintiff was subject to extensive cross examination on the issue of whether he had worn a seat-belt. His evidence on having put on the seat-belt remains unshaken.
4. On the other hand, I find the plaintiff to be incredible in his case that the shoulder strap was loose as this was a material fact which should have been pleaded in the Reply to Defence and Counterclaim. More important, the plaintiff had not taken photographs of the alleged loose seat-belt despite seeing fit to take photographs of the scene of the Accident and the damage to the vehicles after the collision.
5. On balance, upon drawing adverse inference against the 1st defendant’s failure to give evidence, I prefer the plaintiff’s evidence to the A&E notes and find that the plaintiff did wear the seat-belt. I nevertheless find upon the plaintiff’s own admission that he was not sitting upright but leaning towards his right at the time of collision.

*The evidence on the causation of failure to wear a seat-belt and the injuries sustained*

1. The 1st defendant relies on the medical expert evidence of the 1st defendant’s expert Dr Lau Hoi Kuen (“Dr Lau”) in the Joint Medical Report who referred to the A&E notes which stated “taxi passenger back seat, not on seat-belt” and Dr Lau opined “if the plaintiff had the seat-belt fastened, he should not be thrown forward and hit against the back of the seat in front. This should very much minimize the injury to his neck and back.”
2. *Hong Kong Civil Procedure 2022 Vol 1 939 O38/4/4* sets out the duties of an expert as follows:-

“Other matters which are required to be specified in the expert report are itemised in the code of conduct para. (8). These are (a) the expert’s qualifications, (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed, although this is not a requirement), (c) the reasons for each opinion expressed, (d) if applicable, that a particular question or issue falls outside his field of expertise, (e) any literature of other materials utilised in support of the opinions, (f) any examinations, tests or other investigation on which he has relied and the identity and details of the qualification of the person who carried them out. (*emphasis added*)

The code also required that if an expert witness believes that the report may be incomplete or inaccurate without some qualification, that qualification must be stated in the report (para.(9)).

If an expert considers that his opinion is not a concluded opinion, because of insufficient research or insufficient data or for any other reason, this must be stated when the opinions is expressed (para. (10)).”

1. In *Anglo Group plc v Winther Browne and Co Ltd* [2000] 1 WLR 820 it was stated that expert witnesses should make it clear whether any question or issue falls outside their expertise, or their conclusions are based on inadequate evidence.
2. Whether the plaintiff would have been thrown forward and hit against the back of the seat in front had he been wearing a seat-belt is a matter which requires the expertise of a seat-belt expert who usually assists the court by applying mechanical engineering concepts after examining the components of a vehicle’s seat-belt system. The seat-belt expert is also expected to report on the probable seat-belt usage and seat-belt functioning. Opinion on this issue clearly falls outside Dr Lau’s expertise as an orthopaedic expert.
3. Dr Lau in providing the opinion that the fastening of the seat-belt would have “very much minimize the injury to his neck and back”, does not explain the medical basis upon his opinion. Without the medical explanation provided, neither the plaintiff’s orthopaedic expert Dr Miu Yin Shun Andrew (“Dr Miu”) nor this court is in the position to evaluate the weight and test the accuracy of Dr Lau’s opinion. In my view, Dr Lau’s conclusion is not in compliance with para. (8)(c) of the Code of Practice and I cannot accept his unexplained opinion.
4. In Leung Nai Wing’s case (Supra) Deputy High Court Judge Cruden stated at para 12, which I agree that where possible, direct evidence on the consequences of not wearing a seat-belt should be called. In the absence of a seat-belt expert report or reliable medical opinion on the consequences of not wearing or not properly wearing a seat-belt in relation to the plaintiff’s neck and back injuries suffered, it would be a matter of speculation and not inference for this court to make findings that the plaintiff’s injuries would have been significantly reduced had he been wearing or properly wearing a seat-belt sitting upright. I accordingly find that there is insufficient evidence to show that the failure to wear/ or failure to properly wear a seat-belt in the circumstances of this case would have made a considerable difference to the injuries sustained by the plaintiff.

*Conclusion*

1. I find that the plaintiff was wearing a seat-belt at the time of the Accident. Had I found the plaintiff not wearing a seat-belt, I would have still found the 1st defendant has failed to discharge the burden of proving the failure to wear a seat-belt was causal to the injuries suffered for the lack of seat-belt expert and reliable medical expert evidence. I accordingly find the evidence does not substantiate a case of contributory negligence.

*Quantum*

*The plaintiff’s injuries and treatment received*

1. After the Accident on 18 October 2016, the plaintiff was sent to the Department of Accident and Emergency (“A&E”) of the Prince of Wales Hospital (“PWH”) where he was diagnosed to have suffered from a minor head and neck injury and received conservative treatment. He was discharged on the same day.
2. Six days later, on 24 October 2016, the plaintiff attended A&E of United Christian Hospital (“UCH”) for persistent low back pain. Physical examination revealed tenderness over the right paraspinal muscles of the back. There was no neurological deficit. He was discharged with analgesic and sick leave was granted.
3. Magnetic resonance imaging (“MRI”) for the plaintiff's lumbar spine was done on 29 October 2016. There was no significant disc herniation or spinal stenosis. A 0.7cm lesion in the right intervertebral foramen at the L3/4 level was detected, which was later confirmed to be a cyst. MRI for the plaintiff’s cervical spine done on 4 September 2017 was unremarkable. For the cyst, the plaintiff was referred to the neurosurgeons at UCH for the cyst where he was put on conservative treatment.
4. On 8 November 2016 he re-visited UCH for persistent pain over the neck, back and headache. Physical examination revealed tenderness over the left paraspinal region of the neck. He was discharged and sick leave was granted.
5. On 5 December 2016, the plaintiff attended the Department of Orthopaedics and Traumatology of UCH for his neck and back pain. He was able to walk unaided. His walking tolerance was 2 hours. There was paraspinal muscle tenderness at right neck and back region. His lower limb power was full except for mild weakness at right hip flexion. There was mild numbness at right L2/3 dermatome. Upon a follow up on 21 May 2018, he mainly presented with static back pain and right medial thigh numbness. Physical examination showed diffuse tenderness at lower lumbar spine. He was seen at pain nurse clinic on 23 August 2018 and he was referred to physiotherapy for assessment and strengthening exercise.
6. The plaintiff was referred to the specialist outpatient clinic of the Department of Neurosurgery in UCH for perineural cysts in the spine. He first attended on 8 February 2017 and complained of persistent neck and back pain with numbness over the right leg after the injury. MRI of the spine was done in private and repeated again on 26 June 2017 which showed a right L3/4 neuroforamina Tarlov cyst. His condition was found to be static at his follow up appointment on 11 July 2018.
7. On 17 May 2017, the plaintiff attended the occupation therapy out-patient department of UCH where he complained of persistent low back pain and right lower limb weakness. Work rehabilitation was arranged. The plaintiff demonstrated work capacity which did not match with his previous job demand as a construction site worker.
8. The plaintiff attended 4 sessions of physiotherapy at Our Lady of Maryknoll Hospital (“OLMH”) from 17 January 2017 to 10 February 2017. When he was first assessed, he had 1/3 range in flexion and 1/2 range in extension for his back. His condition was static despite treatment. He defaulted after 4 sessions. He was referred to a second course of physiotherapy at Queen Elizabeth Hospital 6 times from 10 October 2018 to 21 January 2019.
9. When he was assessed in October 2018, he reported aggravated back pain after walking for 15 minutes, and sitting for 20 minutes. Trunk flexion and extension was limited at 1/2 normal range. No neurological deficit could be detected, but the result of straight leg raising test for his right leg was 45°. After 7 sessions, his walking tolerance reportedly improved to 20 minutes, but the range of movement in his back remained the same. The result of straight leg raising test for his right leg was 50°. He defaulted physiotherapy after January 2019.
10. The plaintiff also attended occupational therapy sessions at UCH since 17 May 2017. He reported walking and sitting tolerance of 45 minutes. He complained of numbness in his right medial thigh, persistent low back pain upon bending and squatting, and also lumbar spine tenderness at L3 level.
11. The plaintiff also sought pain relief including Chinese medical practitioner, Dr Poon Tak Lun of East Kowloon General Out-patient Clinic (“EKGOPC”) and Robert Black General Out-patient Clinic, OLMH, and UCH for about 35 times.
12. He was granted a total of 662 days of intermittent sick leave.

*Joint Medical Expert Evidence*

1. On 9 November 2020, the plaintiff was examined by orthopaedic experts Dr Miu and Dr Lau. The Joint Medical Report was dated 25 January 2021 (“the JMR”).
2. In the joint examination, the plaintiff made complaints of (1) Continuous low back pain, more over his right side. The pain would be exacerbated by sitting for a few minutes, prolonged standing, squatting, back extension, jumping or weight lifting. His sitting tolerance was 30 minutes, and standing tolerance 15 minutes; (2) Continuous neck pain, in the right paracervical, left paracervical, and trapezius area. The pain would be exacerbated by neck movement; (3) There was numbness in his right leg, from buttock to the whole thigh, calf and lateral aspect of his right foot to his 5th toe; (4) There was also weakness in his right leg, tightness in his right hip/groin area, and a sense of joint incongruence/mismatch; and (5) Continuous bilateral anterior knee pain, exacerbated by knee extension.
3. Upon physical examination, the experts recorded (1) No muscle spasm was detected in the cervical spine. The plaintiff complained of diffuse tenderness. No neurological deficit could be detected in his arms; (2) No muscle spasm was detected in the lumbar spine, the plaintiff complained of diffuse tenderness from the upper lumbar level to the upper sacral level. (3) The plaintiff was hypersensitive to touch in his right leg. Straight leg raising test was 50° for the right side in the supine position, but 70° in the sitting position. (4) Waddell’s test was positive for 3 positions.
4. Dr Miu opined that the Accident most likely resulted in severe soft tissue sprain injury of the neck and low back and the tilting of lower lumbar spine was the result of the severe soft tissue injury. Whereas Dr Lau opined that the plaintiff should have suffered soft tissue injury (muscles and ligaments) to his neck and back in the Accident. Dr Lau opined that the soft tissue injury should not be severe. Both experts agreed that there was no pre-existing condition of the plaintiff’s neck and back. They agreed that the cyst in the plaintiff's spine was unlikely to be the result of the Accident.
5. Both experts agreed that the treatment received by the plaintiff was up to standard and appropriate. The plaintiff has reached maximal medical improvement. Dr Miu opined that the prognosis is fair whereas Dr Lau opined that the plaintiff has recovered well from the soft tissue injury to his neck and low back. Dr Lau further opined that the residual pain in the plaintiff’s neck and back, if any, can only be of a mild and occasional nature. Dr Lau opined that the prognosis should be excellent.
6. Dr Miu opined that the sick leave issued was reasonable and should be endorsed whereas Dr Lau opined that the appropriate period of sick leave should be about 3-6 months.
7. Dr Miu opined that plaintiff would have significant difficulty to resume to work as a construction site ceiling worker. His neck pain and back pain would likely be exacerbated by the strenuous work or frequent ceiling work which required prolonged period of extension of the neck and the back. His working capacity would be significantly affected as a result of the subject accident. More frequent rest time should be allowed. Otherwise, it would also be advisable for the plaintiff to consider changing to sedentary work, such as car park attendant, estate security worker or light maintenance technician.
8. Dr Lau opined that the plaintiff’s present condition of his neck and back is satisfactory and should be able to resume construction work. The plaintiff may suffer mild decrease in efficiency at work due to the need to carry out work safety advice in performing heavy manual work.
9. Dr Miu opined that the plaintiff would require symptomatic treatment (in the form of medication and physiotherapy) on a need-to basis and would require 4-6 weeks of physiotherapy treatment, twice a week, upon episodes of symptoms exacerbation, whereas Dr. Lau opined that no further treatment is necessary.
10. Dr Miu opined that the permanent impairment of the whole person (WPI) for the plaintiff’s neck injury to be 2% and back injury to be 3%. The total WPI is 5%. Whereas Dr Lau assesses the 1% WPI for residual pain for the neck and 2% WPI for the mild residual pain for the back with a total WPI assessed at 3%.
11. Mr Cheng submits that the plaintiff’s complaints are neither genuine nor reliable, as the plaintiff’s complaints are all subjective. Dr Lau opined that (1) There was a lack of objective signs supporting the plaintiff’s complaints; (2) There were signs of exaggerations, as the plaintiff returned positive results for 3 out of the 4 positions in the Waddell’s test. The neurological deficit that the plaintiff reported in his right leg was non-anatomical.
12. Mr Cheng further submits that although the plaintiff sought medical treatment from the date of the Accident (i.e. 18 October 2016) up to at least April 2019, each time he was treated for his symptoms, and no substantial finding was made by the treating doctors. When the plaintiff attended the government clinic in San Po Kong on 20 November 2016, the treating doctor noted that his alleged numbness was not in dermatomal distribution. When the plaintiff sought treatment from the A&E of UCH in October and November 2016, the treating doctors found no neurological deficit.

*Discussions*

1. MRI of the plaintiff’s lumbar spine done 11 days after the Accident showed tilting of lower lumbar spine, which was likely due to spasm of paraspinal muscle and was a result of the severe soft tissue injury. This is objective evidence supporting the lower back soft tissue injury which Dr. Lau did not seek to contradict.
2. Dr. Miu noted during the joint examination that the plaintiff still “*showed tenderness over the cervical spine with decrease in range of movement as well as tenderness over the lumbar spine with paraspinal muscle tightness, decrease in range of movement of the low back. These were common physical signs for patient after severe soft tissue injury and was compatible with the reported examination findings by the various treating doctors & therapists.*” Dr Miu opined that the plaintiff’s impairment is more likely to be genuine.

*The Waddell’s test*

1. The plaintiff returned positive results for 3 out of the 4 positions in the Waddell’s test. Dr Lau opined that these were signs of exaggerations. In relation to the Waddell’s test and straight leg raising test, Mr Cheng submits that the positive Waddell’s test must indicate that the plaintiff exaggerated his symptoms.
2. In*方木溪 對 吳金妹及曾漢生經營的曾潮記及另二人* [2020] HKDC 24, HHJ Phoebe Man stated at §16:-

“*方先生在進行Waddell’s Test及straight leg raising方面均有陽性結果。某些文獻認為這乃病人誇大傷勢的證據，亦有其它文獻指出陽性反應可能與慢性疼痛有關*...”

1. Dr Miu explained that the positive Waddell’s sign only signified that “*one was in chronic pain and chronic incapacity*” and “*it is not an evidence of symptom exaggeration or malingering*”.
2. The use of Waddell’s signs as an indicator of symptom exaggeration or malingering is controversial as it does not exclude organic causes and the test results may be complexed by psychosocial behaviour. In this respect, in the absence of psychological evaluation on the subject, I prefer Dr Miu’s opinion and do not accept the Waddell’s signs to be an indicator of exaggeration.
3. I take into account the fact that Dr Lau not only was prepared to grant the plaintiff 3-6 months sick leave, he also assessed that the plaintiff had suffered from a total of 3% WPI and 2% loss of earning capacity. This is indicative that even Dr Lau accepts that the plaintiff at least suffers from mild residual pain to his neck and back.
4. The occupation therapist commenting that the plaintiff demonstrated work capacity did not match with his job capacity and Dr Miu opined that the plaintiff should be exempted from strenuous labour work and should consider changing to sedentary work, such as car park attendant, estate security worker or light maintenance technician. The fact that despite the occupation therapist and his expert orthopedist Dr Miu’s opinion that he should take up a lighter alternative employment, the plaintiff did not take advantage of these medical reports to claim for loss of earnings beyond 30 April 2020. This shows that the plaintiff’s claim is not “all-out compensation” driven. Had the plaintiff wished to exaggerate his symptoms for compensation, it is not likely that he would have made the effort to find work as an elevator technician earning comparable wages to his pre-accident work. I am therefore quite prepared to prefer Dr Miu’s opinion to that of Dr Lau’s and find the plaintiff’s symptoms to be genuine.

*PSLA*

1. Mr Cheung, counsel for the plaintiff relies on *Ko Hoi Seung Korin v Liu Kwok Keung* (unrep HCPI 1206/2014, 12 August 2016); *Tsoi Wing Tak Michelle v Lau Sze Ni* (unrep, HCPI 926/2005, 8 June 2007); *Fung Yuet Hing v Mok Sun & Another* (unrep, DCPI 1706/2005, 3 November 2006). *In Chan Siu Youn v Ng Kam Man & Others* (unrep, HCPI 533/1999, 28 July 2000) *Leung Yiu Wing v Wong Lan Fun & Others* (unrep, HCPI 806/2004, 26 November 2008); *Singh Satnam v Wong Chun Fung* (unrep, HCPI 786/2009, 27 April 2011)and submits that an appropriate award under this head should be $200,000.
2. Mr Cheng on the other hand submits that damages of around $100,000 are reasonable for PSLA. He seeks to rely on *Yip Tung Fung v Pun Chi Leung* DCPI 2149/2006 (HH Judge Marlene Ng; 23 November 2007) and *Leung Hiu Yan Hilda v Lau Kam Hung* DCPI 220/2012 (Deputy Judge S P Yip; 16 September 2013)*; Lai Ka Yin v Chan Yiu Kei* DCPI 453/2008 (HH Judge Mimmie Chan; 7 January 2009).
3. I have considered the above authorities and assess that an appropriate award under this head at $200,000 to be reasonable.

*Pre-trial earnings*

1. The plaintiff claims that he earned $800 per day at the time of the Accident, and $19,200 for working 24 days a month.
2. It is not disputed that the plaintiff earned $800 per day at the time of the Accident as a construction worker.
3. The plaintiff was not paid on Sundays and public holidays. During the months before the Accident, he did not work on some week days for instance 17 September 2016 (Sat)[[3]](#footnote-3); 11 October 2016 (Tue)[[4]](#footnote-4); 18 October 2016 (Thu)[[5]](#footnote-5).
4. From 20 August 2016 to 19 September 2016, the plaintiff worked 23.5 days and earned $18,800; and from 20 September 2016 to 18 October 2016 (i.e. the date of the Accident), the plaintiff worked 21 days and earned $16,800.
5. Taking into account the fact that 20 September 2016 to 18 October 2016 was not a complete month, I find that the plaintiff to have worked on average 23 days per month earning $18,400 per month.

*Pre-trial loss of earnings*

*From 18 Oct 2016 to 7 July 2019 (32 months and 18 days)*

1. As a result of the Accident, the plaintiff was granted intermittent sick leave of 662 days.
2. I accept Dr Miu’s opinion that the sick leaves issued were reasonable and should be endorsed.
3. After expiry of the sick leave period on 26 April 2019, the plaintiff was only able to secure employment in July 2019.
4. The plaintiff seeks compensation on the basis of actual days of sick leave granted. I find that it is not reasonable to expect the plaintiff to have taken up employment in the short gap days between sick leaves. I would therefore allow full loss of earnings from the date of the Accident till the end of the sick leave period together with a two-odd months for him to seek suitable alternative employment as opposed to the mere actual days of sick leave granted. The plaintiff should therefore be allowed full loss of earnings for a period of 32 months and 18 days.
5. $800 x 23 days x 32.6 months x 105% MPF = $629,832

*From 8 July 2019 to 30 April 2020 (9 months and 22 days)*

*Employability*

1. Dr Miu opined that the plaintiff would have significant difficulty to resume to his pre-Accident occupation while Dr Lau opined that the plaintiff should be able to resume to work as a construction worker but may suffer mild decrease in efficiency at work. As Dr Lau had proceeded on the basis that the plaintiff’s symptoms were exaggerated which I have rejected, I prefer Dr Miu’s opinion that the plaintiff’s work as a construction worker required him to work as a ceiling worker which required prolonged period of extension of the neck and the back, which may aggravate the plaintiff’s neck and back pain. The UCH report dated 30 October 2017 recorded that the plaintiff’s work as a construction site worker required him to frequently climb metal frames and ladders, overhead reaching with occasional lifting overhead such as heavy metal parts and ceiling boards[[6]](#footnote-6). I find that the plaintiff with his residual neck and back disabilities is not suitable to work as a construction worker and he has adequately mitigated his duty to the best of his ability by taking up employment on 8 July 2019 as an elevator technician apprentice with Mitsubishi Elevator Hong Kong Co. Ltd earning $14,658.20 per month.
2. Hence, as a result of the Accident, the plaintiff suffered loss of $18,400 - $14,658 = $3,742 per month.
3. The plaintiff claims pre-trial partial loss of earnings from 8 July 2019 to 30 April 2020[[7]](#footnote-7). Mr Cheung submitted that partial loss of earnings should be granted up till 15 December 2021. Having considered the Revised Statement of Damages dated 1 April 2021, the plaintiff’s claim for pre-trial loss of earnings was up till 30 April 2020 only. The plaintiff made no application to amend the Revised Statement of Damages nor were there any updated earnings in his witness statement. I would therefore only allow damages under this head up till 30 April 2020 as pleaded.

$3,742 x 9.73 months x 105% MPF = $38,230.14

1. The plaintiff’s total pre-trial loss of earnings is therefore allowed at:

$629,832 + $38,230.14 = $668,062.14

*Loss of Earning Capacity*

1. For the plaintiff’s work as an elevator technician apprentice, he has to frequently squat and stand. He estimates that he has to squat for at least 10 odd times a week, varying from few seconds to 10 minutes. Taking into account Dr Miu’s opinion that the plaintiff should be more suitable for light manual work, the plaintiff’s residual neck and back pain may affect his work efficiency as an elevator technician and may therefore suffer disadvantage in the labour market.
2. Given the fact that the plaintiff has been able to hold onto this job as an elevator technician up till the date of trial, I assess the risk of the plaintiff losing his present employment to be relatively low. I shall therefore allow damages at $50,000 under this head.

*Special damages*

*Medical expenses incurred*

1. The plaintiff claims the sum of $12,202 as pre-trial medical expenses incurred as a result of the Accident[[8]](#footnote-8).
2. The 1st defendant does not dispute that the plaintiff has incurred $12,202 for medical treatment.
3. Apart from 8 February 2017 a visit to UCH for the cyst being unrelated to the Accident, I allow the medical expenses as claimed.

$12,202 -$100 = $12,102

*Travelling expenses*

1. Travelling expenses at $2,000 are reasonable and allowed.

*Tonic Food*

1. $5,000 for tonic food is agreed.
2. Total special damages is allowed at $12,102 + $2,000 + $5,000 = $19,102.

*Future Medical Expenses*

1. Dr Miu opined that the plaintiff would require symptomatic treatment (in the form of medication and therapy) on a need-to basis. He further opined that the costs of physiotherapy treatment in private sector is $800-$1,000 per session. He would require 4-6 weeks of treatment, twice per week, upon episodes of symptoms exacerbation.
2. I allow award under this head in private sector at $900 x 2 x 5 weeks = $9,000.

*Summary*

1. PSLA $200,000.00
2. Loss of pre-trial earnings

(including MPF) $668,062.14

1. Loss of earning capacity $50,000.00
2. Special damages $19,102.00
3. Future medical expenses $9,000.00

Total: $ 946,164.14

*Interest*

1. Interest is awarded as follows:-

(1) For general damages, $200,000, interest should be at 2% pa from the date of service of the Writ to the date of judgment;

(2) For Special damages, $668,062.14 + $19,102 = $687,164.14, interest should be at half of judgment rate from the date of the Accident to the date of judgment.

1. I accordingly make the following Orders:-
2. Judgment be entered for the plaintiff against the 1st defendant at $946,164.14 plus interest.
3. Costs of this application, including all reserved costs, if any, be to the plaintiff against the 1st defendant with certificate for counsel to be taxed if not agreed.
4. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.
5. This costs order shall be on a *nisi* basis to be made *absolute* after 14 days from the date of this judgment.
6. I thank both counsel for their assistance.

(Charles Wong)

Deputy District Judge

Mr Lincoln Cheung instructed by B Mak & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Alfred CP Cheng instructed by Cheng Yeung & Co, for the 1st defendant

1. Leung Nai Wing v Hsing Kieng Shing HCA 8451 of 1984 by Deputy High Court Judge Cruden at para 12 [↑](#footnote-ref-1)
2. *Patience v Andrews* [1983] RTR 447 at P.453K to 454A [↑](#footnote-ref-2)
3. 156 with 16.09.2016 being the Mid-Autumn Festival holiday [↑](#footnote-ref-3)
4. 158 with 10.10.2016 being the Chung Yeung Festival holiday [↑](#footnote-ref-4)
5. 158-159 [↑](#footnote-ref-5)
6. 114 [↑](#footnote-ref-6)
7. 34 [↑](#footnote-ref-7)
8. 84-86 A summary of medical expenses incurred [↑](#footnote-ref-8)