# DCPI 1127/2017

[2021] HKDC 1415

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1127 OF 2017

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BETWEEN

TSUE LAI KEE Plaintiff

and

NANYANG COMMERCIAL BANK, LIMITED Defendant

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

Dates of Trial: 26-27 May 2021

Date of Judgment: 12 November 2021

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JUDGMENT

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*INTRODUCTION*

1. This is a personal injury claim brought by the plaintiff against the defendant for loss and damage arising out of a slip and fall accident. Both liability and quantum are in dispute.

*BACKGROUND*

1. The plaintiff was employed by PI Business Consulting Limited as a senior direct sales agent. He had been assigned to work at the Peninsula Centre Branch of the defendant’s bank which is located at Shop G48 and Shop 152 of Peninsula Centre, Tsim Sha Tsui, Kowloon (“the Bank”).
2. On 5 June 2014 at or around 1715 hours, the plaintiff intended to walk into Shop 152 in order to pass some documents to a colleague of his. Since it had already passed the usual business hours, the rolling metal gate of the entrance of the Shop had been rolled down halfway, preventing customers from entering. In order to get into the Bank, the plaintiff had to stoop down and lowered his upper body to get pass the half-shut rolling gate. In the process of doing so, he slipped and fell on the floor (“the Accident”).
3. The plaintiff alleges that at the spot where he fell (“the Accident Spot”), it was wet and slippery. Hence, the plaintiff attributes his fall to the slippery condition. On this basis, the plaintiff claims that the defendant has been negligent and was in breach of the common duty of care owed to him under the Occupiers Liability Ordinance, Cap 314 (“OLO”). The plaintiff says that the defendant has failed to ensure that he was reasonably safe while working in the Bank, *inter alia*, by failing to prevent the Accident Spot from being wet; failing to devise a proper system of inspection of the floor; failing to erect warning sign; and failing to cordon off or prevent access to the slippery area.
4. As a result of the Accident, the plaintiff was sent to the Accident & Emergency Department (“A&E”) of Queen Elizabeth Hospital (“QEH”) where he was treated and discharged.
5. The defendant denies that the floor of the Bank, in particular near to the Accident Spot, was wet and slippery. Further, the defendant claims that it had engaged a reputable cleaning contractor by the name of Lap Hing Cleaning Services Company Limited (“Lap Hing”) to carry out cleaning duties within the Bank on every working day. The defendant says that if the floor was wet and slippery, the staff members in the Bank would have informed the security guard who was posted at the entrance of the Bank to dry it up. The defendant further claims that a yellow warning sign would be placed in a conspicuous location in the Bank on rainy days. In addition, an A4 size metal warning sign has been permanently displayed on the wall at the entrance near to the gate of the Bank.
6. The defendant further alleges contributory negligence on the part of the plaintiff by walking too fast; failing to pay attention to or avoid this slippery substance at the Accident Spot and; failing to pay attention to the warning notice inside the Bank, in the event if the Bank is found liable for the Accident.

*LIABILITY*

*The Law*

1. As held by *Sakhrani J in Wat Kwing Lok v The Kowloon Motor Bus Company (1933) Ltd* [2008] 1 HKC 168, at §17:-

“17. The mere fact of the occurrence of the accident is not sufficient to give rise to a presumption of negligence on the part of the defendant. The burden of proof is on the plaintiff to show on a balance of probabilities that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault. If, and only if, the plaintiff proves that the unusual event is more consistent with fault on the part of the defendant than the absence of fault, the evidential burden then shifts to the defendant to show, on a balance of probabilities, that the accident happened without negligence on its part.”

1. Hence, in order to succeed, a claimant in a slip and fall case has to first establish that there is an “unusual event” and that in the absence of explanation, the “unusual event” is more consistent with fault on the part of the defendant.
2. In *So Wang Chun v Rainforce Ltd & Others* [2008] 3 HKC 196, Sakhrani J held at §§50, 61, and 62 that:-

“50. I accept that slipping and falling on a patch of water on the floor in the area outside McDonald’s is an unusual event. However, before the evidential burden of showing that the accident happened without negligence on their part is shifted to the defendants, the plaintiff must go on to prove, on a balance of probabilities, that in the absence of explanation, the unusual event is more consistent with fault on the part of the defendants than the absence of fault.”

1. Further, it is clear that the duty imposed on a defendant in such cases is only a reasonable and not an absolute one.
2. In*Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Ltd trading as The Excelsior*[2000] HKCU 886; (CACV 38/2000, 22 November 2000, unreported), Rogers VP said at p 17:-

“It seems to me that the plaintiff is attempting to put far too high an onus on the defendant not merely to remove any spillages if and when they occur but in terms of stationing people, presumably at all corners of the hotel, at all times, to guard against spillages. The evidence was that there was at least one cleaner on duty that night. In my view that would have been sufficient. Furthermore, in the absence of there being any evidence that anybody, at all, saw any water, moisture or any slippery substance at or near the scene of the accident, it cannot be said that there was a hazard which should have been seen and cleaned before the plaintiff arrived.”

1. In *Cheung Wai Mei, supra*, Mayo VP held at pp 6-8 that:-

“The first is what reasonable steps have to be taken to ensure that the floor and steps are in a safe condition. There is the evidence of Ms Liu that members of the staff were required to make a report to the cleaners if they saw that their services were necessary.

The problem in the instant case is that no one including the plaintiff ever saw any accumulation of liquid at the relevant area. It would seem that if any of the members of the staff had minutely examined the coconut matting they may have seen some discolouration. Ms Liu gave evidence that if the matting was wet it would be a different colour.

What is not clear is whether even if a person had been stationed at the entrance they would necessarily have detected the discoluration when exercising a reasonable degree of vigilance. While I accept the validity of the submission made by Mr Griffiths SC for the plaintiff that once it has been established that there has been a degree of negligence on the part of a defendant a burden is placed on it to show all reasonable steps have been taken I am by no means convinced that it ever was proven that the defendant had been guilty of any negligence.

...

A deposit of yoghurt on the floor of a supermarket is very different from an accumulation of liquid which no one saw and which could only be inferred to exist as a consequence of a damp patch being found on the plaintiff’s dress.

What steps would it be necessary to take to obviate this risk. It would appear that it would be necessary for staff to be posted at every entrance to the hotel and for them to be equipped with cleaning utensils capable of removing any liquid detected on either the marble or more likely coconut matting at short notice. To state this proposition in this way is to virtually state that the hotel in the present case had an absolute duty to ensure the safety of the plaintiff. Or to put the matter another way all the plaintiff would have to establish is that she slipped and fell and suffered injury for her to recover damages. This is not the law.”

*Issues in dispute*

1. The following are the main disputes between the parties in this case:-
2. How the Accident happened;
3. Whether the defendant was negligent and/or in breach of common duty of care owed to the plaintiff;
4. Whether the plaintiff was guilty of any contributory negligence in the event that the defendant was found liable for the Accident; and
5. The quantum of damages.

*How did the Accident happen?*

1. The plaintiff has described in his witness statement the Accident happened in the following manner:-

“7. 該意外發生於2014年6月5日，當日下午大約5時15分左右，我需要由位於香港尖沙咀半島中心內的南洋商業銀行（“該銀行”）的一間舖前往隔離的另一間舖（以下簡稱“該舖”），將手頭上的文件交給另一位同事。

8. 因為當時已經過了下午5時，所以該舖已經落下半閘。當時我彎腰過這半閘以進入該舖時，我一踏入該舖便突然跣倒了!我的臀部先落地，後尾枕之後也落地受傷。

9. 跣倒後，我發覺當時我跣倒的地下是濕濕的，我相信該意外是因為該舖的地面上有水蹟，地面濕滑，才令我突然跣倒受傷了！之後，救傷車前來將我送往伊利沙伯醫院的急症室接受緊急治療。＂

1. It is not disputed by the defendant that the plaintiff did slip and fall at the Accident Spot on the day of the Accident. However, the defendant says that it was caused by the plaintiff rushing into the Bank at the time and he did so while trying to duck under the half-shut gate. The defendant says that the Accident Spot was dry, not wet and slippery as alleged.
2. On this issue, the plaintiff gave evidence at the trial. The defendant has called Mr Yu Kwok Hung (余國雄) (“Yu”), one of the managers of the Bank, who worked at a desk just by the entrance of the Bank, about 4 to 5 metres in front of the Accident Spot location where the plaintiff fell, to give evidence on its behalf. The defendant has also called Madam Lee Fai(李輝) (“Li”), who was an operation manager of the Bank at the time of the Accident (who has since retired), to give evidence on the cleaning arrangements inside the Bank.

*Undisputed facts*

1. At the end of the evidence, the following facts are not disputed or subject to serious dispute:-
2. The plaintiff had worked at the Bank for about a year prior to the Accident. He worked for a consulting company associated with the Bank selling financial products (mainly credit cards) to clients. On the 1st floor of the Bank, the defendant has a wealth management centre. The plaintiff usually worked outside of the defendant’s shop on the ground floor. He only used this particular shop of the Bank as his base to store documents and sometimes would use the photocopier situated inside;
3. According to the plaintiff, he worked at the Bank on every working day while Yu remembered that he worked about 3 to 4 days a week on average. Nevertheless, it is not disputed that the plaintiff was very familiar with the physical layout of the Bank, including the fact that the rolling gate would be half shut at 5:00 pm each day when the Bank closes for business so that nobody else except the staff of the Bank would be able to get inside;
4. On those days when the plaintiff was working, he would go in and out of the Bank for no less than 5 or 6 times on average in a day;
5. Yu worked at a desk near the entrance of the Bank which was directly facing the Accident Sport;
6. A security guard would be posted at the entrance of the Bank near the metal gate during business hours of the Bank;
7. There was no water source at or anywhere near the entrance of the Bank; and
8. Only a few customers would go inside the Bank on each day. According to Yu, less than 30 customers on average per day would attend the wealth management centre while the plaintiff suggested that only several customers per week would visit that particular shop of the Bank.

*The plaintiff’s evidence regarding the Accident*

1. In evidence-in-chief, the plaintiff simply adopted the contents of his witness statement and supplemental witness statement he has filed for the purpose of the proceedings as his evidence. He did not elaborate further.
2. In his witness statement, he mentioned that at around 5:15 pm, he was going from one shop to another shop of the Bank with the view to handing some documents over to another colleague. He confirmed that since it was after the normal business hours at 5 pm, half of the metal gate had already been rolled down. While he was bending down to enter the Bank underneath the half-shut gate, he slipped as soon as he stepped into the shop. His buttocks first landed on the floor, followed by the back of his head.
3. Allegedly, after he had fallen down, he found that floor at the Accident Spot was “a little bit wet” (「地下是濕濕的」). Hence, he believed the Accident was caused by the accumulation of water (「水蹟」) (sic) causing wetness to the floor and thereby causing him to slip and injure himself.
4. The plaintiff confirmed that his job was to sell credit cards and loan products to his clients. While he would be based in that particular shop of the Bank, his main work would be carried out at the other shop situated on the ground floor. He would also go to different parts of the Tsim Sha Tsui area where he would meet up with his clients. He also stated that he had to get in and out of the 1st floor shop of the Bank at least 5 or 6 times a day while he was working. On the day of the Accident, there was no difference.
5. In regard to the floor condition, the plaintiff confirmed under cross-examination that, prior to the happening of the Accident, he did not look at the floor. After the Accident, while the plaintiff claimed that he did not see any water patches on the floor, for the first time in these proceedings, the plaintiff claimed that he used his hands to touch the floor and felt that it was wet. I notice that such allegations had never been made in any of his witness statements or pleadings or the Form 2 filed with the Labour Department. During cross-examination, he further made the allegation that the floor was “moist and wet” as if the floor had recently been mopped or it was affected by humid weather (「用濕布抺完地下的濕，我會用水蹟去形容」) (「拖完地果種濕」) (「類似天氣潮濕，牆有濕氣」).
6. In my judgment, the plaintiff’s account of having discovered water stains/water spills/water collection (「水蹟」) (sic) is clearly not believable for the following reasons:-
7. There was no source of water anywhere close to the Accident Spot which could explain the wetness or water patches claimed by the plaintiff;
8. According to Yu, the cleaners from Lap Hing would sweep and wipe the floor near the entrance of the Bank and clean up all the rubbish in the morning during every working day. There is no suggestion that any cleaning have to be done by using a bucket and mop, particularly on the day of the Accident;
9. The plaintiff, who had been inside the Bank at least a few times on the day of the Accident, did not witness any cleaners mopping the floor with water. In fact, he had never seen any cleaners using water to mop the floor at any time;
10. The plaintiff himself agreed that the floor of the entrance was not mopped in the afternoon of the Accident;
11. The plaintiff cannot explain, if there was any wetness or moisture on the floor as claimed by him, why the security guard who had the responsibility to clean up any water stains and to prevent others from stepping onto it, would not have done so on that particular day;
12. The cleaning record from Lap Hing also showed that the carpet on the other part of the Bank was not cleaned after 15 May 2014. It supported the defendant’s case that any alleged moisture or wetness could not have come from cleaning of the carpet on the day of the Accident; and
13. The position where Yu worked at his desk means that he would able to spot any water patches or moisture on the shiny ceramic tiles by the entrance of the Bank.
14. I do not accept the plaintiff’s claim that the black mark or stain (「黑色痕跡」) left on the floor after Accident – which has also been noticed and confirmed by Yu and Li -- was evidence of any water stains or patches (「水漬」). In my judgment, it is more consistent with the plaintiff who was trying to duck under the half-shut gate at a fast pace had lost his balance, causing the black mark on the tiles by the sole of his shoes when he suddenly tried to “brake” and stop while shifting his body weight at the same time.

*Was there any water on the floor?*

1. I accept the defendant’s counsel Mr Ho’s submission that the plaintiff’s evidence on this issue should be rejected for the following reasons:-
2. Since the plaintiff agreed that he did not see any water or slippery substance on the floor, the allegation that he could feel the moist and wetness on the floor by touching with his hand must be an essential part of the plaintiff’s case. There is no plausible explanation why this very important piece of evidence cannot be found anywhere in the two witness statements filed by the plaintiff;
3. Prior to the trial, the plaintiff’s case is that there was an accumulation of water or water patch (「水漬」) on the floor. However, by the time when he gave his evidence in the witness box, his case has changed. I agree with Mr Ho that once the plaintiff accepts that there was no accumulation of water, then the alleged wetness on the floor could not be explained by the spillage of any water, food or drinks (which would necessarily cause a patch or patches of water). I further agree with Mr Ho that, by changing his case, the plaintiff has no basis to suggest why the floor was wet without accumulation of any liquid:-
4. There is no suggestion that it was raining on the day of the Accident. As the branch of the Bank was located on the 1st floor of the shopping centre, even if it was raining, it was extremely unlikely that water would be carried up to that level due to the rain. Further, as the Bank was situated within a well-known shopping centre and would be fully air-conditioned, the floor could not have been wet or moist due to any humid weather outside; and
5. The records of Lap Hing also showed that the floor of the Bank was not mopped in the afternoon of the day of the Accident. In fact, as the plaintiff has testified, nobody would clean the floor after around 10:15 am each morning. There is also no evidence to indicate that there was any water leakage or dripping from the air-conditioning system. Therefore, without any mopping or dripping of water, there is simply no plausible explanation offered by the plaintiff as to why there was “moisture and wetness” existed on the floor as asserted by him during his evidence.
6. In contrast, I find Yu’s evidence to be inherently much more probable and therefore more credible. As stated by him in evidence, he worked at a desk only a few metres away from the entrance of the Bank where the metal gate was located. As frankly admitted by him, he would not be observing the condition of the floor all the time. However, because of his location, he was able to look directly at the Accident Spot. He did not notice there was any water stain or spillage of liquid which could explain the “moisture or wetness” that is now being alleged by the plaintiff.
7. In my view, once the plaintiff has failed to prove the presence of water or liquid which could explain why the floor has become slippery, his claim can be dismissed as there was no “unusual event” which would require the defendant to do anything at all. Under such circumstances, the defendant does not need to prove anything.

1. However, for the sake of completeness, I would deal with the defendant’s case briefly here. I consider that Yu and Li have provided some perfectly reasonable explanations for the plaintiff’s slip and fall during the Accident. I find that his fall was due to one or more of the following factors:-
2. As observed by Yu, just before the plaintiff entered the Bank, he was in a hurry. As Yu was working at the desk directly facing the entrance where the metal gate was located, there was nothing out of the ordinary that he was able to observe the coming and going of visitors and staff of the Bank, particularly after the normal business hours when the Bank was not open to the public. Hence, I accept Yu’s evidence that he was able to sense that the plaintiff was coming into the Bank in a hurry;
3. It is inherently probable that the plaintiff might have lost his balance when lowering his body while trying to enter the Bank quickly underneath the half-shut metal gate. After all, it was noticed by Yu that he had lowered his body in a hurried manner while trying to get through the metal gate (「並急速彎身穿越鐵閘」);
4. During the evidence, I noticed that the plaintiff is a young man of quite a large built for his age. Thus, I am not surprised that when he lost his balance, he would fall quite heavily on the floor; and
5. The black mark on the floor tiles can be explained by the sudden change in the plaintiff’s movement when he was trying to move quickly into the Bank and by lowering his body to squat under the half-shut metal gate at the same time.

*Was there any moisture or wetness on the floor?*

1. I also have no hesitation to reject the plaintiff’s latest version of events given during his oral evidence in court that there was “moisture or wetness” on the floor which has caused him to slip and fall. In this regard, as mentioned above, the plaintiff has failed to provide any plausible explanation as to the source of such moisture or wetness. On the contrary, the defendant was able to provide the following evidence by Yu and Li during the trial which in my view has convincingly explained why it was most unlikely that there was any moisture or wetness on the floor as alleged by the plaintiff:-
2. The floor was cleaned by the cleaners of Lap Hing every morning during the working days by sweeping and vacuum cleaning only but not mopping with water;
3. Yu worked at a desk directly facing the Accident Spot and therefore would have a clear view of the floor if there was any spillage or moisture or wetness which could be found on the floor;
4. The security guard who was posted right at the entrance of the Bank would also have a clear view of the Accident Spot. There is no reason why the security guard would not have clean up any spillage or “wet or moist” surface if they actually existed as claimed by the plaintiff;
5. Nobody, including the plaintiff himself, had seen any water patches or stains (「水漬」) on the floor prior to the Accident; and
6. A permanent warning sign against slippery surface (probably referring to the shiny ceramic tiles) was placed on the wall by the entrance of the Bank. The warning sign has been displayed at that position for years and there was no reason why the plaintiff who had worked in the Bank for almost a year prior to the Accident could not have noticed it.
7. Under the aforestated premises, I am of the opinion that the plaintiff has failed to establish what the defendant could have done in order to prevent the Accident. The plaintiff is not saying that the defendant should have inspected the floor by touching the surface from time to time in order to ensure the floor was completely dry, this is not what the defendant was expected to do as explained: See *So Wang Chun v Rainforce Ltd & Others* [2008] 3 HKC 196 and *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Limited trading as The Excelsior* CACV 38/2000, unreported, 22 November 2000.

*Conclusion on liability*

1. In conclusion, I am of the opinion that the plaintiff has failed to establish liability in this case. First, the plaintiff has failed to prove there were any water patches or stains (「水漬」) existed on the floor at the Accident Spot. Further, the plaintiff has failed to establish that there was any moisture and wetness on the floor which was raised by him for the first time during his evidence. In addition, the defendant has provided unequivocal evidence demonstrating the most inherently improbable scenario that there could be any water patches or moisture or wetness on the floor at the time of the Accident. In my judgment, the most likely cause of the plaintiff’s slip and fall is that while he was trying to negotiate his half squatted body underneath the half shut metal gate in a hurried manner, he has lost his balance and therefore fell and slipped on the floor.
2. Under such circumstances, I simply do not see why the defendant should be held liable for the Accident.
3. In the aforestated premises, I have no hesitation to dismiss the plaintiff’s claim herein.

*QUANTUM*

*Respective position on quantum*

1. For the sake of completeness, I shall briefly deal with the issue of quantum here, in the unlikely event that I would be found wrong in my findings on the issue of liability.
2. In the present proceedings, the plaintiff is seeking damages for pain, suffering and loss of amenity (“PSLA”), pre-trial loss of earnings (including MPF), loss of earning capacity and special damages.
3. The plaintiff’s position as stated in the Revised Statement of Damages (“RSOD”), the defendant’s position in the Answer to the RSOD (“the Answer”) and the plaintiff’s position after giving concession at the beginning of the trial are summarized in the table below :-

|  |  |  |  |
| --- | --- | --- | --- |
|  | **RSOD**  **(HK$)** | **Answer**  **(HK$)** | **P’s concession**  **(HK$)** |
| PSLA | $450,000.00 | $100,000.00 | $150,000.00 |
| Pre-trial loss of earnings | $1,251,833.10 | $241,716.00 | $1,099,583.10 |
| Loss of earning capacity | $150,000.00 | $0.00 | $150,000.00 |
| Special damages | $16,820.00 | $5,000.00 | $13,040.00 |
| Subtotal: | $1,868,653.10 | $346,716.00 | $1,412,623.10 |
| Less:  employees’ compensation received | ($892,144.69) | ($892,144.69) | ($892,144.69) |
| Total: | $976,508.41 | $0.00 | $520,478.41 |

*Injuries and treatment*

1. The plaintiff was admitted to the Accident & Emergency Department (“A&E”) of Queen Elizabeth Hospital (“QEH”). The major complaint was headache, back, and left elbow pain. There was tenderness at lower back and occipital region. The plaintiff was treated and discharged.
2. The plaintiff had magnetic resonance imaging (“MRI”) of his lumbar spine on 29 July 2014. The main finding was minimal posterior bulging of L5/S1 disc. The nerve roots are well demonstrated with no evidence of compression, and the paraspinal soft tissue structures are normal. Dr Fu Wai Kee, the expert appointed by the plaintiff, opined that the disc bulging “should not have caused him any symptoms”. Both experts agreed that the MRI finding was clinically insignificant.
3. Both experts agree that the plaintiff probably had soft tissue injuries at head, neck, left elbow, left thumb, and back, and the plaintiff did not have verifiable radiculopathy or neurological deficit. As the plaintiff only had soft tissue injury, there were complaints inconsistent with soft tissue injury at low back, for example:-
4. Complaint of left side low back pain radiating down left thigh on 28 July 2014;
5. numbness at left lower limb on 1 September 2014;
6. inability to perform straight leg raising test (“SLR”) for left leg on 6 September 2014;
7. alleged decrease in power over L3/4/5 on 24 November 2014, resulting in a wrong diagnosis of left sciatica and referral to the Orthopaedic Clinic of Princess Margaret Hospital.
8. Further, the treating doctors recorded “request SL” on at least 8 occasions, and the plaintiff almost always attended Yau Ma Tei Jockey Club Government Outpatient Clinic (“YMT JCGOPC”) immediately or almost immediately after the previous sick leave has expired, so as to obtain almost continuous sick leave.
9. In *Li Cheuk Lam v Cheung Sun Tai & Others* HCPI 1102/2015, unreported, 13 October 2017, Master Leong (as His Honour then was) held at §§11–14 that:-

“11. What is striking from these medical records (a summary is helpfully provided on the schedule of sick leaves) is that, in these 11 attendances, the plaintiff was given variable lengths of sick leaves after each consultation but he always attended for medical treatment the day that the previous sick leave ran out.

12. I would expect that any reasonable patient with a persisting pain and unable to work would be very keen for full recovery and to return to earn a living. So if the patient attended a doctor and was given a certain medication and a period of sick leave, and if pain persisted despite the medication, he is unlikely to wait until the sick leave period expired before seeking further medical treatment. This behavior would be even more unlikely if he has done this repeatedly and each time he has been prescribed with the same type of, if not exactly the same, medication.

13. Instead, I would expect any reasonable patient with persistent pain would return to the doctor very promptly if the treatment did not help. He would likely request stronger medications, further investigations or even referral to a specialist.

14. If a patient chooses to passively take the same medications (despite the obvious failure of such medications to cure the persistent pain) and sit out until the last day of every sick leave period, this rather suggests that the patient is more concerned in obtaining continuous sick leaves than about curing any alleged complaints.”

*JOINT ORTHOPAEDIC EXAMINATION*

1. The plaintiff was examined by Dr Fu Wai Kee (instructed by the plaintiff) and Dr Lam Kwong Chin (instructed by the defendant) on 28 December 2018. He made the following complaints:-

“56. On and off aching pain at back, more on left

Worse with prolonged sitting or standing in still posture (10 – 15 minutes), sneezing, coughing, bowel straining, bending back, local pressure, sexual activities.

He said he had overall improved by 50% and still took painkillers alternate day.

57. On and off paranesthesia of left lower limb, from posterior thigh and calf.

Worse with walking for 10 minutes”

1. The plaintiff claimed that it was less steady for him to stand on his left leg only, he had tenderness at midline and left side at lumbo-sacral junction, and his back movement was only fair.
2. In this connection, Dr Lam expressed the following:-

“The chronicity and intensity of the present back complaint are out of proportion to similar back injury sustained 4½ years ago.

The present back and lower limb complaints are rather vague and subjective.

Upon examination, the physical signs were based on voluntary effort. There were minimal objective signs to support his claim.”

1. Dr Fu did not rebut Dr Lam’s opinion.
2. The orthopaedic experts agreed that:-
3. The diagnosis is head contusion, neck sprain, left elbow and left thumb contusion/sprain, and back contusion. All injuries were at soft tissue level and there was no evidence of bony damage;
4. Injuries at head, neck, left elbow or left thumb were minor ones and the plaintiff had good recovery from them; and
5. The plaintiff should be able to resume his pre-injury work. However, Dr Fu opined that the plaintiff’s working efficiency will be reduced.
6. Although the experts noted that the plaintiff had adjustment disorder, the experts are not qualified to give expert evidence on psychiatry. Further, the plaintiff’s infant son had congenital problem, was hospitalized in early 2015, and passed away on 15 December 2015. The treating doctors recorded psychiatric symptoms associated with the death of the plaintiff’s son. There is no expert evidence to suggest that the plaintiff’s adjustment disorder was caused by the Accident.
7. The orthopaedic experts had disagreements in the following areas:-
8. Dr Lam opined that sick leave up to 3 months should be adequate. Dr Fu endorsed sick leave issued by the treating doctors. According to the Form 7, the plaintiff was granted sick leave from 5 June 2014 to 4 September 2016; and
9. Dr Lam assessed whole person impairment at 1%. Dr Fu assessed whole person impairment at 3%.

*Pain, Suffering & Loss of Amenities (PSLA)*

1. The plaintiff complains that he is still suffering, *inter alia*, the following discomfort because of the injuries:-
2. Pain, soreness, lack of strength and reduced in movement range in lower back and left lower limb;
3. Reduced capacity in prolonged sitting, walking and standing;
4. Having difficulty in lifting heavy objects; and
5. Having difficulty in climbing ladder and squatting.
6. Mr Kee, counsel for the plaintiff, is correct to say that the starting point for assessing the appropriate award for PSLA is a comparison of injuries in the present case with similar injuries in other decided cases. For that purpose, Mr Kee has invited me to take into consideration of the following cases for comparison and submits that the appropriate amount for PSLA should be at HK$150,000:-
7. In *Lam Kei Fung v The Incorporated Owners of Yue Tin Court & Ors* (unreported, DCPI 1237/2005, 2 April 2008), the plaintiff suffered a slip and fall when he was walking down staircase on his patrol during his work. As a result, he suffered from back contusion. He was hospitalized for about 25 days. The court accepted that his pre-existing degenerative back had no effect upon his work performance or physical condition before the accident. PSLA was assessed at HK$180,000.

1. In *Ip Wan Fung*, the plaintiff slipped and fell by stepping on unknown greasy substance in the restaurant. As a result, he suffered from back contusion. He was admitted to the hospital and was discharged on the next day. The court agreed that sick leave of 6 months granted was appropriate. He complained of intermittent and daily attacks of lower back pain. PSLA was assessed at HK$150,000.
2. In *Au Yeung Mui Fan v Food Concept Co* (sued as a firm) [2019] HKDC 1531, (unreported, DCPI  2732/2017, 13 November 2019), the plaintiff who was a waitress of the defendant fell from a ladder when she was fetching some coffee. As a result, she suffered from soft tissue injury from buttock and lower back contusion with minor neck sprain. No bony fracture was found. Sick leave was granted for 747 days. The court only allowed 4 months. PSLA was assessed at HK$100,000.
3. In his closing submissions, Mr Kee further submits that the case of *Ip Wan Fung* would act as a good comparable. In *Ip Wan Fung*, the plaintiff slipped and fell by stepping on unknown greasy substance in the restaurant. As a result, he suffered from back contusion. He was admitted to the hospital and was discharged on the next day. The court agreed that sick leave of 6 months granted was appropriate. He complained of intermittent and daily attacks of lower back pain. PSLA was assessed at HK$150,000. In that case, the court also considered some other cases where the plaintiffs suffered from soft tissue injuries to their backs and PSLA in those cases were also awarded PSLA at about HK$150,000.
4. On the other hand, Mr Ho for the defendant submits that the plaintiff had only suffered from soft tissue injuries in the Accident. His soft tissue injuries at head, left elbow and left thumb were minor and he had recovered well from them. Mr Ho submits that the award for PSLA involving low back soft tissue injury without complications (eg nerve compression, injuries at lumbar spine, prolapsed intervertebral disc) should not exceed HK$100,000. He relies on the following cases:-
5. In *Yip Mau Kei v Wong Kam Tim* DCPI 1905/2013, unreported, 10 February 2015, the plaintiff, a taxi driver, was hit from behind by a private vehicle (§1). The court found that the plaintiff has suffered a soft tissue injury to his back, and there were only residual back symptoms with mild adverse effects. The plaintiff had been appropriately granted sick leave of 94 days for the injury (§71). Both experts agreed that the plaintiff could return to work (§24). PSLA of HK$90,000 was awarded (§79).
6. In *Yip Kwok Shing v Fung Chau Tim* DCPI 2627/2015, unreported, 26 June 2017, the plaintiff was pushed by the defendant, resulting in the plaintiff’s back first hit part of the chair on his left, and then his lower back/buttocks landed on the carpeted floor (§4). When the defendant was about to strike the plaintiff with a chair, the plaintiff was observed to have “jumped up very quickly and swiftly moved away from the threat” (§5). The plaintiff was able to play basketball 3 months after the accident (§17). This court awarded PSLA at HK$60,000 (§36).
7. In *Wong Chun Kin v Caritas – Hong Kong* [2019] HKDC 556, the plaintiff alleged that he injured his back while restraining a mentally handicapped student (§2). Examination by doctor showed tenderness of over left lower back and he was diagnosed of sprain back (§67). This court found that the plaintiff had grossly exaggerated his injuries and disabilities to the experts when he was examined by them, and by that time he was able to carry out normal daily activities and could carry normal weight (§89). This court assessed PSLA at HK$80,000 (§94).
8. In my judgment, the plaintiff injuries were relatively minor and was confined only to soft tissue injuries which he has recovered well from. Hence, I am of the view that the cases cited by Mr Ho in his submissions are more in line with the injuries the plaintiff had sustained in the Accident. I therefore would allow a sum of HK$100,000 as award for PSLA in this case.
9. In passing, I would like to mention the fact that it is rather astonishing to see that the plaintiff’s legal representatives would pitch a PSLA figure at HK$450,000 in the RSOD in July 2020 only to prepare to concede it to a figure of HK$150,000 by the time of trial in May 2021 when there was no change in the plaintiff’s condition or the medical evidence in support of his claim. In my view, such wholly unrealistic pitching of PSLA figures without any authorities or medical evidence in support is not only misleading but also not conducive to assisting the parties to reach an early settlement, something which goes directly against the underlying objectives of the Civil Justice Reform. Those who represent the plaintiff should be more cautious and realistic when making such a claim in their statement of claim and RSOD in future.

*Pre-trial Loss of Earnings*

1. The pre-accident monthly salary of the plaintiff has been agreed at HK$38,786. The only issue in dispute under this head would be the length of sick leave period granted to the plaintiff. It is trite that the court is not bound by the sick leave certificates granted by doctors.
2. Dr Fu opined that the entire 27 months’ period was appropriate whereas Dr Lam opined that 3 months should be appropriate. The defendant pleaded in the Answer that sick leave should only be confined to a period of 6 months at most.
3. I accept Mr Ho’s submission that a reasonable sick leave should not exceed 6 months in this case based on the following reasons:-
4. Dr Fu simply endorsed the sick leave certificates granted by the treating doctors. However, as the plaintiff had exaggerated his symptoms before the treating doctors, the sick leave was not issued because of genuine symptoms. As such, Dr Fu’s opinion should not be accepted;
5. Except for the plaintiff in *Lam Kei Fung* (who clearly suffered more serious injuries), the plaintiffs in the other 5 comparable cases in PSLA were allowed no more than 6 months of sick leave;
6. Dr Lam opined that sick leave for 3 months should be adequate; and
7. The plaintiff raised complaints inconsistent with soft tissue injuries at low back even in the first few months after the Accident. The fact that the plaintiff raised inconsistent complaints suggests that he had sufficiently recovered, such that he had to make up symptoms to justify the issuance of sick leave.
8. After the expiry of reasonable period of sick leave, both experts agree that the plaintiff should be able to resume his pre-accident job. Further, working as a sales agent or insurance agent is not physically demanding. Thus, I am of the view that the plaintiff should not be entitled to any further loss of earnings after expiry of the sick leave period of 6 months.
9. I therefore find that, had the plaintiff been able to succeed in establishing liability in this case, an appropriate award for pre-trial loss of earnings will be at:-

(HK$38,786 + HK$1,500) x 6 = HK$241,716.

*Loss of Earning Capacity*

1. Loss of earning capacity has been defined as the claim which is to cover the risk that, at some future date during the plaintiff's working life, he or she will lose his or her employment and will then suffer financial loss because of his or her disadvantage in the labour market: *Chan Wai Tong & Anor v Li Ping Sum* [1985] HKLR 176.
2. There will be no loss of earning capacity if there is no substantial risk that the plaintiff will lose the present job or that he or she will have difficulty getting a similarly paid job: *Moeliker v A Reyrolk & Co Ltd* [1977] 1 WLR 132.
3. At the time of the Accident, the plaintiff received a basic salary of HK$11,200 per month with commission based on the criteria set out by his PI Business Consulting Limited. After the Accident, for the period from 1 March 2015 to 31 March 2016, he was demoted from senior direct sales agent to direct sales agent with monthly basic salary of HK$10,000, despite still being entitled to commission. His employment with PI Business Consulting Limited was terminated on 1 April 2016 with no reasons specified in the termination letter.
4. According to the plaintiff, he had been unemployed for a period of time. Thereafter, he completed his insurance agency qualification examination in 2017 and commenced his career as an insurance agent in July 2018 with an average monthly income of HK$14,000. Given the above, especially the demotion, together with the reduction in basic salary, by PI Consulting Business Limited and the reduction in average monthly income working as an insurance agent, Mr Kee submits that the plaintiff suffers from loss of earning capacity in this case and an award of HK$150,000 should be considered as a reasonable amount.
5. With respect, I do not agree.
6. First, there is no direct evidence to show that his demotion and subsequent termination of employment by his employer were linked to the injuries sustained by him in the Accident. From the joint medical expert report, it is clear that the plaintiff might have suffered from other psychiatric problems like adjustment disorder and depression due to the tragic loss of his baby son which has nothing to do with the Accident. Thus, it is not at all clear that there is a direct causal link between his reduction of income and the relatively minor tissue injuries suffered by him in the Accident.
7. Second, I agree with Mr Ho for the defendant that working as a sales agent or insurance agent is not a physically demanding job. Even if the plaintiff has any residual disabilities, such disabilities are mild and should not affect his ability to work in these jobs. There is no suggestion that he will lose such employment and hence suffer a handicap in the labour market in future as a result.
8. In the circumstances, I am of the view no award should be made under this head.

*Special damages*

1. Any needs or expenses claimed will only be compensated by way of special damages if they are found to be reasonable and if in the past, actually spent. What is reasonable will depend on the facts of each case and the particular expense which is claimed. The court will analyse these specific claims in the context of the reasonableness principle and whether they are reasonable is the burden on the plaintiff: *Ho Lau Hing v Wu Ming Lok trading as Sun Tak Wah Plastic Manufactory* (unreported, HCPI 464/1995, 21 December 1995).
2. The plaintiff claims medical expenses for a total of HK$8,820. Out of this amount, only HK$5,040 for attending Yaumatei Jockey Club General Outpatient Clinic is supported by evidence. Therefore, the plaintiff only seeks HK$5,040 as medical expenses in this case.
3. The plaintiff also claims travelling expenses at HK$3,000 and tonic food at HK$5,000. No supportive document has been adduced for both of these items. It is nevertheless submitted that the court can allow nominal damages for both items in the amount as pleaded by the plaintiff even in the absence of supporting evidence: *To Wei Kei & Ors v Vickcore Engineering Ltd & Anor* [2003] HKLRD 69, at §41.
4. Hence, the plaintiff submits that the court should allow a total of HK$13,040 for special damages.
5. Given the fact that I find a reasonable sick leave period in this case should be no more than 6 months, I consider that any sums for medical, travelling and tonic food expenses should be reduced accordingly.
6. I consider that a sum of HK$10,000 should be more than sufficient to represent special damages in this case.

*Summary of Calculations on Quantum*

1. In summary, had the plaintiff been able to establish liability in this case, I would have made the following award for damages:

HK$

PSLA $100,000

Pre-trial loss of earnings & MPF $241,716

Loss of earning capacity Nil

Special damages $10,000

Sub-total $351,716

Less employees’ compensation ($892,144.69)

Total: $0

*CONCLUSION*

1. On liability, I find the plaintiff has failed to establish his case.
2. On quantum, I find that even if he is able to establish liability in this case, there would not be any award of damages as the plaintiff had already received HK$892,144.69 from his employer on 3 April 2017. The quantum he would receive in this case will be far less than what he had already received by way of employees’ compensation.
3. The plaintiff commenced the present proceedings on 26 May 2017. In other words, the plaintiff knew that he needs to recover a sum of more than HK$892,144.69 in damages in order to justify the commencement of the present proceedings. Given the dire lack of evidence that there was any accumulation of water or water stain at the Accident Spot and there were clear signs of exaggeration of symptoms on his part, the plaintiff must have known that his claim on damages is very likely to fail in this case. Nevertheless, the plaintiff, who is not on legal aid, decided to pursue such a hopeless and much exaggerated claim.
4. In the circumstances, I would order the plaintiff’s claim to be dismissed. I will also make a costs order nisi that the plaintiff do pay the costs of the defendant, with certificate for counsel, such costs to be taxed if not agreed. In the absence of any application by the parties to vary the same within 21 days, the costs order will become absolute.

( Andrew SY Li )

District Judge

Mr Vincent Kee, instructed by Messrs Jane Lee, Yam & Associates, for the plaintiff

Mr Leon Ho, instructed by Messrs Tony Kan & Co, for the defendant