# DCPI 2576/2019

[2022] HKDC 858

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2576 OF 2019

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BETWEEN

LAI FOR YAU Plaintiff

and

GAMMON CONSTRUCTION LIMITED Defendant

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Before: His Honour Judge Andrew Li in Court

Dates of Trial: 3 to 4 & 13 May 2022

Date of Judgment: 11 August 2022

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JUDGMENT

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*INTRODUCTION*

1. This is a personal injury case involves a plaintiff who worked for the defendant and met with an accident at work on a construction site managed by the defendant.

*BACKGROUND*

1. The plaintiff was 53 years old at the time of the accident and is now 59. He had been employed by the defendant since October 2015 until the date of the accident.
2. On 5 August 2016, the plaintiff was instructed by the defendant to work at a construction site situated at 780, Cheung Tung Road, Sunny Bay, Lantau Island (“the Site”).
3. The defendant was the main contractor responsible for the Site and the plaintiff was employed by the defendant as a rigger on the Site.

*The Accident*

*The plaintiff’ pleaded case*

1. According to the plaintiff’s case, on the date of the accident, the plaintiff was instructed by his superior “Lap Gor” (“Brother Lap” / 「立哥」) (“Lap Gor”), the defendant’s foreman, to transport a large water tank from the steel-bar bending area (where a number of water tanks had been stored) to the seafront loading/unloading area of the Site. The 2 locations were both situated within the Site and were about 20-minute drive apart. It had been raining heavily for a few days before the occurrence of the accident.
2. After the particular water tank had been loaded onto the back of a crane lorry, the plaintiff took a photo of the water tank and sent it via WhatsApp to Lap Gor as instructed. The plaintiff also informed Lap Gor that he had noticed some rainwater accumulated inside the other water tanks.
3. He was then instructed by Lap Gor to climb on top of the water tanks to take photos of the inside of those water tanks and to send the photos to him for the purpose of assessing whether they could be moved by the lorry without draining off the water first.
4. According to the plaintiff, he told Lap Gor that the water tanks were very tall and had specifically asked for a ladder. However, he was told by Lap Gor that none was available. The plaintiff also tried to look around for a ladder with a Napalese co-worker who was working with him at the time. But they were not able to find one.
5. The plaintiff then climbed up to the top of one of the water tanks (which was about 9.5 feet or 3 metres in height) and took photos of inside of 2 of the water tanks.
6. After the plaintiff had taken the photo of the second water tank, he lost his balance and fell onto the ground from the top of the water tank where he was standing on. He sustained serious personal injuries as a result (“the Accident”).

*The defendant’s pleaded case*

1. The defendant puts the plaintiff to strict proof of the occurrence and the circumstances of the Accident.
2. According to the defence filed, the defendant basically contends that:
3. The plaintiff had not been instructed to take photos of the water tanks;
4. There was no obvious need for him to do so;
5. Instead the plaintiff was assigned to carry out a lifting operation in order to lift water tanks from the seafront loading / unloading area to a vessel by crawler crane; and
6. It had been reported that the plaintiff slipped and fell when he was walking back after the lifting operation.

*Issues on liability to be determined*

1. Based on the above pleaded case of the parties, the factual issues which need to be determined by the court on liability will include the follows:-
2. Whether the plaintiff was instructed by his superior Lap Gor to climb up the water tanks to take photos;
3. Whether the plaintiff had requested for a ladder; if so, was one available;
4. Whether the plaintiff was asked to carry out a lifting operation to transport a water tank from the seafront loading/unloading area to a vessel by crawler crane; and
5. Whether the plaintiff had sustained his injuries when he slipped and fell on the ground level after the lifting operation.
6. Depending on the findings of the court, the questions to decide will then include whether the defendant was (i) in breach of its common laws duties of care under tort and contract; and (ii) in breach of any statutory duties.
7. If the defendant is found to be liable, there will also be the issue of contributory negligence on the part of the plaintiff to be determined.
8. In relation to quantum, the court has to decide the following issues:-
9. The nature and extent of the plaintiff’s injuries and the treatment received by him;
10. The effects the injures have on the plaintiff, including his day to day activities and enjoyment of life; his pre-trial and future income; and
11. The losses he has sustained as a result of the injuries suffered in the Accident.

*DISCUSSION*

*LIABILITY*

*The plaintiff’s evidence*

1. Theplaintiff’s case is simple and straightforward. In essence, the Plaintiff was instructed by his direct supervisor Lap Gor (who was undisputed to be the defendant’s foreman) to climb up on top of some large water tanks to take photos. He fell down from the top of one of such water tanks after taking 2 photos pursuant to the said instructions.
2. At the outset of the trial, leave was granted to the plaintiff to amend his reply dated 1 September 2020 to clarify the plaintiff’s case that he was initially instructed to transport one water tank and he was then instructed by Lap Gor to take photos of the other water tanks.
3. The plaintiff was the only witness for his case at trial. He adopted his first witness statement dated 23 February 2021 (“P’s WS”) and his supplemental witness statement dated 16 September 2021 (“P’s Supp WS”) as his evidence-in-chief, which was subject to the following clarifications / changes:–
   1. In line 2 of §9 of P’s WS, the words 「幾個」 (several) should be replaced with 「一個」(one). Thus, rather than having been instructed by Lap Gor to transport a few large water tanks by truck, the plaintiff was only instructed to transport one large water tank; and
   2. In line 3 of §11 of P’s WS, rather than having fallen on top of the water tank he was standing on when he was taking photos, the plaintiff actually fell after taking 2 photos, namely, the photo at [5/G/1228] and then the photo at [5/G/1224].
4. In my view, theplaintiff’s testimony as to how he took the 2 photos of the water inside the 2 water tanks (which photos were exhibited to P’s WS) was clear and unequivocal. There was no indication of any attempt of exaggeration or disingenuous bolstering of his case. He simply presented the facts as he knew them to be. In fact, there was no challenge at all during cross-examination about this aspect of his evidence as to how he climbed to the top of the water tank depicted in the photo produced at [5/G/1226] which was marked as “P’s Exhibit No 1” (“P-1 Photo”) without any working platform or ladder being provided to him by the defendant.
5. I find the plaintiff’s case and his evidence wholly credible and inherently probable. In my view, he gave his evidence in a frank and direct manner, without any hint of exaggeration or embellishment. I have no hesitation in accepting his evidence in regard to how the Accident happened.
6. It is to be noted that the defendant has not produced Lap Gor to give evidence at the trial. The only witness they tendered is Mr Ng Hui Hang (“Ng”), the senor safety officer of the Site at the time of the Accident, who was DW1 in this case. However, Ng has no direct knowledge about the Accident itself. Whatever he knew was obtained through a person called Marco Cheng (“Marco”) who was the immediate superior of Lap Gor. Instead of trying to find out about the details of the Accident directly from Lap Gor, Ng chose to enquire and obtain the information from Marco only. His evidence therefore at best is hearsay and at worst can be regarded as unreliable.

*Factual findings on the Accident*

*Findings on the plaintiff’s case*

1. I make the following factual findings, which are based on the plaintiff’s evidence and the contemporaneous documents / photos produced by the parties:-
   1. As per P’s WS, the plaintiff was instructed by Lap Gor to move one large water tank from where it was stored to the seafront loading and unloading area (the 2 locations being 20 minutes driving distance apart) where it would then be loaded onto a vessel: (See: P’s WS, §9 at [1/B/83].
   2. In his evidence, the plaintiff explained that he went to the location where the water tanks were stored with 2 other colleagues – a Nepali co-worker and the driver of the crane lorry – and this was the first time he has been to that location.
   3. There were around 7 to 9 water tanks stored at the location.
   4. The plaintiff took and sent a photograph of 3 water tanks [5/G/1225], which was marked as the plaintiff’s Exhibit No 2 (“P-2 Photo”) to ask Lap Gor if they were of the appropriate type for the operation and Lap Gor confirmed it was the case. They conversed by voice messages.
   5. After the water tank was loaded onto the back of the crane lorry, the plaintiff took photograph at [5/G/1227] to inform Lap Gor he had completed the loading task: (See P’s WS, §10 at [1/B/83]).
   6. The plaintiff also informed Lap Gor that he also noticed some rainwater accumulated inside the other water tank(s) and was thus instructed by Lap Gor to climb on top of the other water tanks to take photos of them so that Lap Gor could assess the situation: (See P’s WS, §10 at [1/B/83]).
   7. The plaintiff told Lap Gor the water tanks were very tall and asked for a ladder. However, Lap Gor replied none was available. The plaintiff also tried looking for a ladder / working platform with his Nepali co-worker but to no avail: (See P’s Supp WS, §§3&4 at [1/B/115]).
   8. The plaintiff explained that he climbed on top of the water tank shown on the right side of the photograph which was marked as P-1 Photo, ie the taller water tank. He also explained clearly how he held the “ear” at the top left corner (from the perspective of the photograph) of the tank (where he stood on) with his right hand, crouched with his left hand holding his phone and took a photograph of the lower tank (which was depicted as the slightly shorter water tank on the left-hand side of P-1 Photo), which he identified the photo taken by him at [5/G/1228].
   9. The plaintiff explained how then he stood up, turned his body to face the direction towards the trees as shown in P-1 Photo and with both feet (spreading apart) on the edge of the taller water tank. His left foot was stepping at the corner with the “ear” and his right foot step on a position some distance apart where he marked on P-1 Photo. He then held his phone with both hands tilting rightward and took photo of the water inside the water tank where he stood and which he identified as the photo produced at [5/G/1224].
   10. After taking the 2 aforementioned photos, the plaintiff then placed his phone back into his pocket and as he was doing so, he lost his balance and his right foot slipped and he fell onto the ground.
2. I accept the plaintiff’s evidence above as they are well supported by the contemporaneous evidence which included:-
3. The photos taken by him on his mobile phone were not disputed by the defendant as had been taken by him on the date of the Accident. The fact that one of the photos at [5/G/1228] captures the 2 top edges of the shorter water tank supports the plaintiff’s account that he was standing with such posture at the corner of the taller tank when he took that photo.
4. It is not disputed that the plaintiff had consulted a private doctor on the defendant’s doctors’ panel one Dr Or Yu Wah (“Dr Or”) on the date of the Accident. In his medical notes, Dr Or recorded that the plaintiff “fell with head and right wrist injury”. Physical examination revealed that the plaintiff “had bleeding inside ear canal and suspected fracture at base of skull”. Dr Or therefore referred the plaintiff to the Accident and Emergency Department (“A&E”) of Tuen Mun Hospital (“TMH”).
5. During his 5-day hospitalization at TMH, it has been recorded that the plaintiff had experienced episodes of headaches at different times and was assessed to have right ear hearing impairment.
6. In my judgment, the above objective and contemporaneous evidence point very clearly to the direction that the plaintiff could not have sustained such serious head injuries by simply “slipped and fell” on level ground while walking as the defendant claims. I have no hesitation to dismiss such inherently improbable and wholly unsubstantiated allegation.
7. Mr C K Wong, counsel for the defendant, cross examined the plaintiff extensively on the height he estimated he had fallen which was based on the information the plaintiff had supplied to the doctors at the public hospitals. The medical notes recorded the estimates given varied between 1.2 and 1.5 metres. While the estimates could not be correct as it is not disputed that the top of the water tank was about 3 metres (or 9.5 feet) in height, all the medical notes (except the initial A&E admission at TMH) recorded that he had “fell from height” and *not* “slipped and fell” on level ground.
8. As the evidence transpired during the trial, the plaintiff who came from a fishing family and who had only received a few weeks of primary school education, was totally unfamiliar with the metric system and in fact measuring units in general. He could not even tell what his own height is, whether in metric or imperial measurements. I find the plaintiff was honest when he told the court that he did not know his own height in feet or metres. I also find him truthful when he said he told the doctors that the height he had fallen from was “about a container tall” (「好似貨櫃咁高跌落嚟」**)**. While he was not able to tell the doctors the exact height of the water tank when he attended the medical appointments, it does not, in my view, mean that he had not fallen from the top of the water tank at all.
9. Given the fact that the defendant has not put forward any positive evidence to show that the plaintiff did not fall from the top of the water tank, I do not consider the inaccurate estimates that he had previously given to the doctors would in any way distract from the fact that he had fallen from the top of the water tank.
10. In the aforesaid circumstances, I accept the plaintiff’s evidence on how the Accident happened. Despite the very vigorous and thorough cross-examination undertaken by Mr Wong on behalf of the defendant, I find the plaintiff’s account to be perfectly plausible and inherently probable. They are also well supported by the contemporaneous evidence in terms of the 2 photos taken immediately before his fall. I much prefer his evidence and the account of events given by him than the unsubstantiated version put forward by the defendant.

*Findings on the defendant’s case*

1. At the trial, the defendant essentially put the plaintiff to strict proof of his case. Although Mr Wong has very fairly conceded that the defendant was not going to advance any positive case at the trial, I note that this was not the defendant’s original position and certainly was not its pleaded case. The defendant’s pleaded case was:-
2. The plaintiff had not been instructed to take photos of water tanks as alleged or otherwise: (See §5(a) of defence at [1/1/14]); and
3. It had not been reported that the plaintiff slipped and fell when he was walking back after the lifting works: (See §5(d) of defence at [1/A/14]).
4. Ng, who was the only witness called by the defendant at the trial, clearly has no direct or personal knowledge of the above matters. As said, Lap Gor was not called to give evidence and no explanation was given other than the causal mention by Ng during his evidence that Lap God had left the employment of the defendant. No explanation was given by the defendant, through its counsel or solicitors, as what efforts, if any, it had made in order to secure Lap Gor to provide a witness statement or to give evidence at trial.
5. The same applies to Marco. Despite the fact that Ng has stated in his witness statement that Marco had left the employment of the defendant in or around February 2018 and allegedly could not be contacted, it has not been mentioned by Ng of what steps, if any, had been taken by the defendant to try to locate Marco in order to secure him to provide a statement or to give evidence at the trial.
6. Given the fact that both Lap Gor and Marco are crucial witnesses to the defendant’s case, I am entitled to and will draw an adverse inference against the defendant for failing to secure them to give evidence at the trial. I find that the main reason of failing to call those two crucial witnesses at trial is that the defendant knows well that their evidence will be at odds with the photos and the contemporaneous documents. It must also realize that both Marco and Lap Gor are unlikely able to offer any plausible explanations for the serious injuries sustained by the plaintiff if he had only slipped and fell on the ground level.

*Ng’s evidence not credible*

1. Ng was the senior safety officer of the defendant at the time of the Accident and is now its divisional safety manager. He did not witness the Accident himself nor had Marco, who was the superior of Lap Gor, the person who allegedly had reported the matter to him. Ng only learned about the version of the plaintiff having “slipped and fell” on level ground while walking back after the lifting operation of the water tank to the vessel from Marco.
2. I do not find Ng’s evidence on the defendant’s version of event believable at all for the following reasons:-
3. As senior safety officer of the Site, Ng did not bother to find out directly from the plaintiff of what happened during the Accident even though he had seen the plaintiff on the date of the Accident and around the Site.
4. As the person who was responsible to carry out investigations into the Accident and who subsequently prepared the Incident Notification Form dated 8 August 2016 (“the Incident Form”), instead of finding out directly from the 2 material witnesses directly involved with the Accident, namely, the plaintiff and Lap Gor, Ng chose to rely solely on what Marco had told him before he complied the Incident Form.
5. What is more alarming being his admission to the court during his evidence that he was not even sure what Marco had told him was true or not. This begs the question of why he could not have ascertained the truth from Lap Gor who was still working on the Site. This is something which Ng could not explain.
6. In view of the remark made by Dr Or, who was one of the doctors on the defendant’s panel, in his report that *“CT brain: suspected base of skull fracture with blood-filled ear canal”*, Ng must have been aware that the plaintiff’s injuries at that time could be considered as rather serious. Yet Ng did not bother to find out from the plaintiff directly as to how he had sustained those serious head injuries before he complied the Incident Form. I find that totally incredible and defies common sense.
7. While Ng confirmed under cross-examination that he saw both Marco and the plaintiff together when Marco reported the Accident to him, he chose to accept from Marco that the plaintiff had slipped and fell and the injuries were minor. He could not explain why he did not ascertain those matters directly from the plaintiff when the plaintiff was standing right next to Marco.
8. His explanation that from his “preliminary observations” (「初步觀察」), the plaintiff’s injuries were not serious could not be treated seriously as he is not a medical doctor and could not have been maintained once he received the medical report from Dr Or which was before he compiled the Incident Form.
9. When asked whether as the senior safety officer he should have properly investigated into the Accident, Ng tried to deflect the question by saying that “*if the plaintiff had slipped, it may have been because there were some loose objects* ***(***「鬆散物件，碎料」***)*** *lying around the rebar bending yard”.* In my view, this at best was speculative as Ng did not even know where the “slip and fall” supposed to have taken place.
10. Ng admitted that he had only checked on the area where the Accident supposed to have taken place (according to the defendant’s case) 2 or 3 days after the date of Accident itself, but it is surprising to learn that he as senior safety officer of the defendant had not bothered as much as to take any photographs or make any contemporaneous records of the scene.
11. Ng could not give any plausible explanations at all as to why he had never asked the plaintiff directly as to how he met with the Accident when the plaintiff was standing right in front of him on the occasion when Marco and him first reported the matter to him. Nor could he explain why no statement or declaration was taken from the plaintiff or Lap Gor.
12. Based on the above, I have no hesitation to reject the evidence of Ng and the version of events regarding how the Accident happened put forward by the defendant in its defence.

*Findings on the defendant’s liability*

*Breach of defendant’s common law duties*

1. The plaintiff submits that the defendant is liable for the breaches of its common law duty of care under both tort and contract as owed to the plaintiff.
2. It is trite and uncontroversial that the defendant, as the plaintiff’s employer, owes a duty at common law to take reasonable care of his employee’s safety while the latter discharges his work: *Cathay Pacific Airways Ltd v Wong Sau Lai* (2006) 9 HKCFAR 371 *per* Bokhary PJ at §§1&24.
3. A reasonable employer is under a continuing obligation to provide proper plant and appliances, including all such tools, equipment and machines, which an employee would need to use in order to do the work required: *Charlesworth & Percy* on Negligence, 14th ed, at [12-56].
4. An employer (the defendant) would also be vicariously liable for the tortious act of its employee (Lap Gor in this case): *Charlesworth & Percy* on Negligence, 14th ed, at [7-14].
5. In essence, the plaintiff’s case is that the defendant breached its common law duty, through its foreman, Lap Gor, by instructing the plaintiff to take photographs of the water tanks when it was unsafe for him to do so and failing to provide a safe place and system of works for the plaintiff to perform the said task in a safe manner: (see §5 of statement of claim (“SoC”) at [1/A/6-7]).
6. The defendant also failed to provide the plaintiff with the necessary equipment, such as a suitable ladder or working platform, to perform the task of taking photographs at height, the defendant also effectively forced the plaintiff to work under an unsafe system and in an unsafe workplace.
7. In *Tamang, Tikaram v Tong Kee Co Ltd & Ors* (unrep, HCPI 19/2013, 1 April 2015), the plaintiff therein suffered injuries after having fallen onto the ground while standing on a stool to erect and fix aluminum formwork about 2.8 metres above the ground at the external wall of a balcony. DHCJ Paul Lam SC expressed no difficulties in finding the defendants negligent in failing to provide a suitable working platform to the plaintiff and by causing or permitting him to do the job by standing on the stool.
8. Similarly, in *Yu Pun Yuen v Ng Kwok Man T/A East Mountain Engineering Co & Ors* (unrep, HCPI 293/2002, 9 May 2003), Suffiad J held the defendant breached its duty to provide a safe system of work where he only provided a ladder of about 6 or 7 feet tall to the plaintiff who had to work on an engine outlet that was some 9 feet from the ground.
9. *A fortiori*, in not providing any ladder or platform to the plaintiff at all, I am of the view that the defendant was in clear breach of its duty of care towards the plaintiff.

*Breach of statutory duties on the part of the defendant*

1. Apart from the common law duties, I also find the defendant was in breach of the following statutory duties as submitted by the plaintiff’s counsel:–

(a) Regulations 38A and 38B of the Construction Sites (Safety) Regulations (Cap 59I) (“CSSR”):–

* + 1. It is not disputed that the defendant is the contractor responsible for the Site.
    2. The defendant failed, so far as reasonably practicable, to identify the hazardous condition of and to safeguard the plaintiff working at a height, and safeguard the plaintiff against such hazardous condition, namely, working at height without providing the any equipment protecting him from fall from height: (See Reg 38A(1)(a) and (c)).
    3. The defendant failed to take adequate steps to prevent the plaintiff from falling from a height of 2 metres or more: (See Reg 38B(1)-(2))

(See also: SoC, §§6(a) and (c) at [1/A/7])

(b) Section 6 of the Occupational Safety and Health Ordinance (Cap 509) (“OSHO”)

(i) D (being P’s employer which is undisputed) has likewise violated section 6(1) and (2)(a) and (d) by failing to provide safe system of work, safe workplace and safe plant (i.e. appropriate equipment that would enable the plaintiff to work at height to take photos of water inside the tanks safely)

(See also: SoC, §§7(a) and (c) at [1/A/8])

*Contributory Negligence*

1. The defendant pleaded that the plaintiff was contributorily negligent in causing the Accident.
2. It is trite that the burden of proving contributory negligence lies with the defendant who raised the issue: See *Clerk & Lindsell on Torts*, 23rd ed at [3-98].
3. I agree with Mr Ho for the plaintiff that the defendant’s case on contributory negligence was vaguely pleaded and without focus. It was not until the cross examination of the plaintiff by Mr Wong that the defendant’s case on contributory negligence started to emerge. And it was not until the closing submissions that its case on contributory negligence has finally developed.
4. Mr Wong cited the cases of *Li Kwok Kee v China HK Wah Kee Limited* (unreported, HCPI 477/2013), *Lan Yam Kan v Ng Poi Kuen trading as Wing Sing Scaffolding Engineering & Anor*, HCPI 196/2014, unreported (15 March 2016; Deputy High Court Judge Paul Lam SC) and *Cheung Wai Kar v Dragon Kings Development Limited trading as Fomour (Dragon Kings) Restaurant* [2019] HKCFI 3114, (DHCJ Sherrington) as authorities to say why the plaintiff should be held 30% in contributory negligent in the defendant’s view.
5. Mr Wong spent quite some time questioning the plaintiff as to how he rigged the initial tank for loading onto the lorry crane, the gist of such line of questioning is to put to the plaintiff that he could have adopted the same position to take the photographs of the water tanks.
6. During cross examination, the plaintiff explained in detail the process of loading a large water tank onto the crane lorry. In essence:–
   * + - 1. The plaintiff explained that he scaled the side of the leftmost tank as depicted in P2-Photo by climbing the horizontal ledges of the tank and reaching up with his arms in a “gecko-like” stance (「好似壁虎」) until he reached the first horizontal ledge counting from the top. P-2 Photo was marked by the plaintiff with 2 blue crosses indicating where he stood.
         2. Once there, the plaintiff could peer inside and see the water level of both the leftmost tank and the middle tank as depicted in P-2 Photo. Seeing that the leftmost tank did not have rainwater collected therein, he naturally chose to load that one onto the crane lorry.
   1. In doing so, the plaintiff explained that he would hold the top edge of the tank with his right hand and press his chest against the side of the tank for balance and support.
   2. The plaintiff later explained that he had to adopt a frog-like stance bending his legs and pressing his chest against the side of the tank in order to maintain stability and balance (「屈到好似青蛙，心口挨住先穩陣」). Adopting such stance, the top edge of the tank would approximately be level with his rib cage or the mid-point of his torso.
   3. He would then bend his body inward to catch the hook of the rig with his left hand and connect it to the “ear” (「耳仔」) of the water tank to rig the tank. The “ear” is circled by the plaintiff in P-2 Photo.
7. Mr Wong sought to establish that in adopting the position he was in when rigging the tank, the plaintiff could have photographed the water level inside the tank as he could see it with his eyes.
8. Once he understood Mr Wong’s question, the plaintiff agreed that when he was in the position of rigging the tank he was able to view the bottom of the tank and, *if he raised his head to look up*, he could see the top edge of the tank that was opposite him.
9. However, the plaintiff repeatedly explained that in order to allow the foreman to assess the depth of the water, he would need to capture both the water level and the top of the tank in his photograph so that a comparison can be made. This is particularly so because the water inside was too opaque to see the bottom of the tank.
10. I accept the plaintiff’s explanations above and consider that as inherently probable and accord to common sense. In my judgment, what he did was to try to make the best out of the situation and the perilous working surroundings and to do what his superior Lap Gor had specifically instructed him to do.
11. The plaintiff explained that he could only take a photograph capturing both the water level inside the tank and the top edge of the tank if he leaned back however it was *impossible to do so* if he adopted the aforesaid “frog-like” stance as he needed to maintain his chest pressed against the side of the tank for support and could not lean back. If he maintained his stance of leaning his chest against the tank, he would not be able to photograph both the water level inside and the top of the water tank in the same frame.
12. In my judgment, that is a perfectly plausible explanation, especially given the fact that the scene that one can see with his naked eyes would be quite different from what one can capture by way of the camera. In this respect, I agree with Mr Ho’s submission that how much can be captured by the phone-camera would very much depend on the then posture which the plaintiff was permitted to adopt to grab hold of the phone and the camera angle width.
13. The plaintiff also explained he could only capture both the water level inside and the top of the water tank if he stood straight when he was at the first horizontal ledge (counting from the top) *and if he leaned backwards*. I agree with Mr Ho that such posture would be way too dangerous as the top of the tank would be around his knee level and he would have nothing to grab onto nor lean against for support. It is also observed from P-2 Photo that the horizontal metal plate protruding outside the wall of the water tank was quite narrow and could only provide quite limited foothold for him to stand on safely. That is also the reason why he needs to press his chest against the top edge of the tank to rig the ‘ear’ in the first place.
14. Thus, if it is the defendant’s contention that the plaintiff was contributorily negligent for not photographing the water tanks in the position he was in when rigging the first tank, I agree with the plaintiff that there is only the unchallenged evidence of the plaintiff that it was not possible to do so adopting the safer “frog-like” safer stance *or* it would be way too dangerous to perform if he stood straight up. In either case, I am of the opinion that the defendant’s contributory negligence contention cannot be seriously maintained.
15. In terms of causation, I further accept Mr Ho’s submission that the defendant has also failed to show that if any of its suggested alternative method to take photo was adopted by the plaintiff, the Accident could have been avoided. From such perspective, I agree that the defendant’s argument is also bound to fail.
16. In this regard, the commentary set out at [4-20] in *Charlesworth and Percy on Negligence* (14th ed) is pertinent:-

“**Fault and causation** The reference in subs.(1) to damage suffered, “as the result partly of … fault,” means “caused partly by the fault of” the person concerned. *The common law doctrine of contributory negligence was based on causation,* and that was also the basis for apportioning fault under the Maritime Conventions Act 1911, with which no distinction in principle can be drawn. *So, in every case it is necessary to consider not simply the claimant’s fault (or blameworthiness) but also the causative potency or effect of that fault*. It has been said that, “causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff”. *If the fault did not cause or contribute to the damage there can be no apportionment.*” (emphasis added)

1. Last but not least, in response to the query raised by the court, the plaintiff confirmed that he took the photographs not because he wanted to know for himself but because he was instructed to do so to allow Lap Gor to assess the water level inside. In other words, he was merely doing what he was specifically instructed by his superior to do. In my judgment, he should not be judged too harshly because he happened to choose a method which was only found out to be unsafe with hindsight.
2. For completeness sake, it has never been the defendant’s pleaded case that it would be both practicable and safe for the plaintiff to take photo of the water level inside. No evidence was produced by the defendant to that effect or along that line either. There is thus nothing from the defendant to effectively challenge or counter the plaintiff’s evidence that it was impracticable and/or dangerous to take photo in the way as the defendant suggested. Especially, the plaintiff was the one who actually took the photo at the scene and he would be in the best position to perceive the then physical setting before him at all material times.
3. In the present case, the plaintiff was not provided with the necessary safety equipment, ie a working platform or at least an appropriate ladder, to perform the work. Without any suitable equipment (such as suitable working platform) being provided by the employer to enable him to discharge the subject task safely (despite he had asked Lap Gor earlier for it but was turned down), he was effectively forced by the defendant to work under an unsafe system, hence, the court should be slow to attribute any contributory negligence on the plaintiff in such circumstances.
4. In *Lam Fung Ying v Lui Kwok Fu*(unrep, HCPI 826/2002, 26 February 2004) *per* Sakhrani J at §58:-

“58. …The deceased was the employee of the defendant and he was instructed to carry out the works. *There was no safety equipment provided to him by his employer to carry out the works whilst working on the scaffold.* As the deceased was simply following his employer's instructions to carry out the works, *I am unable to accept that there was any contributory negligence on his part*. I find that the defendant was liable for the fatal accident to the deceased and that there was no contributory negligence on his part.” [emphasis added]

1. In *Wong Woon Hei v Dickson Construction Co Ltd*(unrep, HCPI 521/2000, 3 July 2001) *per* DHCJ Muttrie at §20:-

“20. …One must be slow to put any blame on a man who is forced, by reason of *no better equipment and system being supplied to him,* to work on an unsafe ladder and plank arrangement like this one.” [emphasis added]

1. In our present case, the plaintiff was prevented from doing the work in the way in which he would have preferred to do by reason of the defendant’s breach in providing him with the proper equipment (ie safety ladder or working platform) and he followed Lap Gor’s instructions not because he was saving himself trouble but simply to get on with D’s business: *Machray v Stewarts and Lloyds Ltd* [1964] 3 All ER 716 *per* McNair J at 721F‑G.

“…when I find a workman, an employed man, adopting a course of *conduct not for the sake of saving himself trouble but in order to get on with his employer’s business*, and I find that he has been prevented from doing the work in the way in which he would have preferred to do by the employer’s breach in providing him with the proper tackle, I am very slow to put any blame on him……” [emphasis added]

1. Lastly, in *Cheung Kai Chi v Chun Wo Contractors Ltd* [2008] 1 HKLRD 102, Tang VP observed at para 35:–

“35. …The primary duty to provide a safe working place is on the employer, a worker who consents to work or continues to work in an unsafe working place should not normally be regarded as being liable for contributory negligence. If the court is too ready to find contributory negligence it might encourage employers to be less careful, and their insurers to be less eager to insist on compliance with industrial safety. I do not encourage workers to ignore their own safety. Indeed, I would earnestly urge them to refuse to work when it is dangerous to do so and report their employers to the authorities. But *the court has to use common sense and appreciate the reluctance of workers to speak up for themselves.* Yuen JA also said that there was no evidence that the deceased might have been dismissed. *I accept that there was no evidence. But it is rare for there to be such evidence*. An employer is unlikely to dismiss a worker on such ground. Lord Goddard recognized that complaints “in many cases might mean dismissal”. Also a worker who insists on his right might find it difficult to find a job and his contract of employment might not be continued. If the Site was otherwise well run and safe, a worker who took unnecessary risk could be found liable for contributory negligence, but *the situation is very different when the work place was a highly dangerous one. In such circumstances, the workers are left, in effect, with the unenviable choice of quitting or accepting exposure to great risks.”* [emphasis added]

1. Mr Ho submits that Tang VP’s observations is just as apposite in the present case when the plaintiff despite having requested for safety equipment was told there was none and instructed by his direct supervisor to perform the task regardless. Realistically, he still had to carry the job to take photo of the water inside the water tanks as per Lap Gor, or else he would be at risk of losing his employment as recognised by both Hong Kong and English Court. For his own safety protection, notwithstanding Lap Gor’s reply, he still tried to look for ladder at the site with the Nepali co-worker before he climbed the water tank, but unfortunately to no avail. At the time of Accident, the plaintiff also wore safety helmet and safety shoes. All these evidence of the plaintiff were not challenged by the defendant at trial.
2. I accept Mr Ho’s submissions above and find the plaintiff had done his best in the circumstances in trying to comply with his superior’s instructions in a highly dangerous environment.

*Findings on contributory negligence*

1. Given the fact that the plaintiff had been specifically instructed to take photos of what was inside the water tanks by his superior Lap Gor in order to ascertain whether they could be transported by the crane lorry without draining the accumulated water, there was nothing wrong in my view for the plaintiff to climb up on top of the water tanks to take the photos. He did ask for a ladder and was not given one. He did try to locate a ladder nearby with his co-worker but could not find one. He was basically left to his own device and not given any proper instructions or means to carry out the task in a safe manner. He was in a totally unfamiliar and dangerous environment and trying to undertake an unfamiliar and dangerous task. He did the best he could. In my view, he should not be judged too harshly for doing something in pursuant to his employer’s interests whatever responsibility he had, it should be small in companion with that of his employer.
2. Balancing all the above factors, I find 10% contributory negligence on the part of the plaintiff in this case.

*QUANTUM*

*Injuries and treatments received*

1. Immediately after the Accident, the plaintiff was sent to see Dr Or, one of the doctors on the defendant’s panel, for consultation.
2. Thereafter, on the same day, the plaintiff attended the Accident & Emergency Department (“A&E”) of Tuen Mun Hospital (“TMH”) where it was revealed that he had a blood-stained tympanic membrane and he was admitted to the neurosurgical ward. The plaintiff had no loss of consciousness, but had some blood discharge from his right ear. He also complained of right wrist pain and right ear discomfort afterwards.
3. On physical examination, there was right ear haemotypanum and tenderness over right distal ulna. The right wrist was immobilized in a plaster cast while physiotherapy and analgesic medication was prescribed. During the hospitalisation, the plaintiff had complained of low back pain (5 August 2016), bilateral blurring of near vision (8 August 2016), pain at his neck as well.
4. The plaintiff was hospitalised for 5 days and was discharged on 10 August 2016.
5. After his discharge from the hospital, the plaintiff attended regular follow-ups at the Departments of Neurosurgery (“DoN”), ENT and Orthopedics & Traumatology (“O&T”) of TMH. By the time of attending the joint examination by the psychiatric experts in September 2020, he was still attending follow up treatment at the DoN clinic and ENT clinic about once every 3 to 4 months.
6. Regarding the DoN and ENT follow ups:-

(1) It appears 23 August 2016 was the first follow up DoN consultation. The medical records show that he had been attending these follow ups with the neurosurgery department for treating his recurrent headache and dizziness with prescribed medication, and 59 days of sick leave was also granted to him by the neurosurgery department at the first follow up consultation for treating his head injury.

(2) On 26 August 2016, the plaintiff first attended the ENT clinic for right side hearing loss (pure tone audiogram was done on 8 August 2016 which showed right side mild to moderately severe sensorineural hearing loss) which did not improve despite treatment with oral steroid and intratympanic steroid. In this regard, 4 minor operations by injection of steroid (dexamethasone) at his right tympanum were done on 29 August 2016, 1 September 2016, 5 September 2016 and 8 September 2016 respectively.

1. Apart from having partial hearing loss with tinnitus after the Accident, he also had recurrent dizziness, which was controlled by oral medication as observed by the neurosurgeon experts. The tinnitus also caused him headache. Since 27 November 2019, the plaintiff began wearing a hearing aid. Both ENT experts was in agreeing in attributing 5.3% for the plaintiff’s binaural hearing impairment and another 5% for presence of tinnitus, giving a total of 10.3% for such hearing impairment, which is translated to 4% impairment of whole person.
2. As for the orthopaedic aspect, the plaintiff attended the first O&T follow up on 22 September 2016, and he was treated conservatively with physiotherapy and regular analgesics. The plaintiff received 54 sessions of out-patient physiotherapy from 11 August 2016 to 9 January 2017 (30 sessions) and physiotherapy treatments for his neck, low back, right wrist, elbow and shoulder from 2 May 2017 to 6 December 2017 (24 sessions) at TMH’s physiotherapy department.
3. The initial clinical findings at the 1st referral of physiotherapy in August 2016[[1]](#footnote-1), the plaintiff reported, amongst other things, that:-
   1. deep intermittent pricking pain over central neck region with the Numeric Pain Rating Scale (“NPRS”) of 5 out of 10;
   2. deep intermittent pricking pain over right lateral elbow with NPRS of 2-3 out of 10;
   3. deep intermittent pricking pain at right wrist with NPRS of 7 out of 10;
   4. deep intermittent dull pain over left lower back and occasionally to left lateral calf with NPRS of 8-9 out of 10; and
   5. walking and sitting tolerance were 15 minutes and 1 hour respectively.
4. Upon the final discharge from physiotherapy in December 2017, it is noted, amongst others, that:-
5. the plaintiff reported slight improvement of his persistent neck and right lateral upper arm pain;
6. the plaintiff reported persistent right wrist and right side low back pain was similar; and
7. ROM of his neck flexion, trunk flexion and wrist extension improved but that of his right shoulder remained similar.
8. The plaintiff received 20 sessions of occupational therapy from 16 November 2016 to 14 June 2017 at the Occupational Therapy Department (“OTD”) of TMH. Despite the sessions, he was ranked as not match with job demands and at discharge his progress was static.
9. As for the psychiatric aspect, the mood deteriorated about one month after injury. He had low mood that disturbed sleep and had increased irritability and social withdrawal. On 19 December 2016, the plaintiff first attended the clinic of Castle Peak Hospital (“CPH”) and continued regular follow-up thereafter. His mood was fluctuating so titration of anti-depressants was necessary to stablise his mood. His poor sleep was treated by hypnotics. His psychiatric condition had once been worsened to the extent that he was admitted to CPH in August 2018. He was diagnosed to have suffered from moderate depressive episode and hospitalised there for 8 days. The plaintiff was diagnosed with adjustment disorder. A summary of the development of his psychiatric symptom and the psychiatric consultations received can be found in the Joint Psychiatric Report.
10. Owing to exacerbation of pain at the injured sites, and the worsening of his ear problem, the plaintiff also attended A&E of TMH, Pok Oi Hospital (“POH”) and Tin Shui Wai Hospital (“TSWH”) on multiple occasions. They are summarized as follows:–

| **Date** | **Complaint** |
| --- | --- |
| 11 December 2016 | TMH – Increase of back pain for a few days |
| 2 January 2017 | TMH - Right ear bleeding with blood-stained ear discharge revealed on examination |
| 18 March 2017 | TMH - Right ear bleeding with yellowish exudate revealed on examination |
| 29 March 2017 | POH - An episode of exacerbation of back pain associated with weakness (for about 1 week) requiring in-patient treatment at POH (and was discharged on 30 March 2017). The plaintiff was wheelchair bound on physical examination, he could only walk slowly for a few steps. His truncal movement was reduced because of pain on examination. |
| 19 March 2018 | TSWH - Exacerbation of neck and back pain with tenderness over low back region on examination. Injection of Ketroralac Trometamol was done to relieve his acute pain. |
| 6 June 2018 | POH - Complaint of right shoulder pain (with A&E notes recording neck and back pain also). Similar Injection was done to relieve his acute pain. |
| 14 July 2018 | POH - Exacerbation of back and neck pain. Injection of Ketroralac Trometamol (with increased dosage) was done to relieve his acute pain. |

1. As a result of the accident, the plaintiff is no longer able to play his favourite sport of football and he is unable to lift heavy objects with his right hand.
2. The plaintiff was granted sick leave from 5 August 2016 until 25 August 2018 (a total of 24 months and 20 days) as certified by the Medical Assessment Board (“MAB”) to be necessary under the Form 7 issued on 2 October 2018. In the same Form 7, the MAB also certified the plaintiff has suffered multiple injuries resulting in:-
3. dizziness;
4. impaired memory;
5. right ear hearing impairment;
6. neck pain and stiffness;
7. right wrist pain and stiffness;
8. back pain and stiffness, left lower limb numbness; and
9. psychiatric impairment.

*Expert’s opinions*

1. The plaintiff has been jointly examined by experts appointed by the parties from 4 different medical disciplines.
2. The plaintiff was jointly examined by:–
3. neurological experts Dr Yu Yuk Ling (“Dr Yu”) and Dr Edmund K.W. Woo (“Dr Woo”) on 5 August 2019 and a joint neurological expert report (“JNR”) was compiled on 28 August 2019;
4. orthopaedic experts Dr Johnson Lam (“Dr Johnson Lam”) and Dr Lam Kwong Chin (“Dr KC Lam”) on 15 August 2019 and a joint orthopaedic expert report (“JOR”) was compiled on 26 May 2020;
5. otorhinolaryngology experts Dr Au Wing Wah (“Dr Au”) and Dr Lo Siu Sing (“Dr Lo”) on 26 June 2020 and a joint Ear, Nose and Throat (ENT) expert report (“JENTR”) was compiled on 20 July 2020;
6. psychiatric experts Dr Benjamin Lai (“Dr Lai”) and Dr Law Wun Tong (“Dr Law”) on 1 September 2020 and a joint psychiatric expert report (“JPR”) was compiled on 28 December 2020.
7. I am grateful to Mr Ho for the plaintiff who has very succinctly summed up the experts’ opinions in his opening submissions of which I shall adopt with appropriate modifications below.

*Joint orthopaedic expert report*

1. The orthopaedic experts Dr Johnson Lam and Dr KC Lam agree that the accident resulted in multiple injuries to the plaintiff.
2. They also agree that the injuries include:–
3. a neck sprain with soft tissue injury;
4. right wrist soft tissue injury (though Dr Johnson Lam further observed that there are positive ulna variance in both wrists, the left wrist is totally asymptomatic and Dr KC Lam did not quarrel with this); and
5. soft tissue injury to back; and
6. a mild elbow contusion/sprain which was recovered by January 2017.
7. Dr Johnson Lam opines that the soft tissue injuries to the neck, back and right wrist are considerable and residue pain and impairment is expected.
8. These injuries as caused by the accident also rendered the pre-accident asymptomatic conditions at these injured sites symptomatic.
9. The physical examination by both experts revealed, among other things, that:-
10. Neck – mild tenderness at the midline of mid cervical spine, and over bilateral paraspinal and upper trapezius muscles, with paraspinal muscle guarding. The right upper limb is generally weaker;
11. Right wrist – tenderness over ulnar aspect of wrist, weaker right hand grip; and
12. Back – tenderness at midline and bilateral paraspinal areas (more on left) at lower lumbar and lumbo-sacral junction; increase of back pain on left shoulder elevation.
13. Both orthopaedic experts consider the treatment received by the plaintiff, including medication and physiotherapy, was appropriate.
14. The orthopaedics experts differ in their opinions as to whether the plaintiff can return to his pre-accident job:-
15. Dr Johnson Lam notes that the soft tissue injuries to his neck, back and right wrist were considerable with residue pain and impairment caused or contributed by the neck and back injuries estimated to be mild whereas that of his right wrist injury is estimated to be mild-to-moderate;
16. Dr Johnson Lam also observes that the physical and MRI findings suggest it is likely the Accident caused significant soft tissue injury to the right wrist, probably causing injury to or at least significantly aggravating the triangular fibrocartilage complex (TFCC), causing persistent residue pain and impairment, such as weakness and likely reduced endurance in manual work;
17. Regarding the significance to injury probably caused to TFCC (or at least significantly aggravated) by the accident, Dr Johnson Lam explained (which is again not disputed by Dr KC Lam) that TFCC is *“a soft tissue structure situated on the ulnar side of the wrist which is important in weight-sharing - injury would cause pain and reduction in hand grip”*;
18. Having carefully considered the nature and duties of the plaintiff’s previous work, Dr Johnson Lam opines that as the plaintiff still suffers combined residue pain and/or impairment in neck, back, and right wrist caused or triggered by the accident, the plaintiff should not be able to return to his pre-accident job as a construction site worker or rigger.
19. This assessment is in line with the view of Dr Wyman Wong, occupational therapist who treated the plaintiff at TMH.
20. On the other hand, Dr KC Lam states at §160 of JOR that the plaintiff should “*still be able to return to his pre-injury work as a sales promoter (though he subsequently corrected this as ‘rigger’[[2]](#footnote-2)), in a manner comparable to others of his age and general physical health*”.
21. Such view of Dr KC Lam nonetheless does not sit well with his later gloss (at §161 of JOR) suggesting that the plaintiff should consider changing lighter manual work (given his age and multiple degenerative changes), such as cleaning worker, carpark attendant, etc.
22. It is worth noting that Dr KC Lam attributes the plaintiff’s complaints in respect of his neck, right wrist, and back problems be largely related to the degenerative status of the cervical spine and right wrist and the lumbar spine.
23. However, Dr KC Lam could not really dispute with Dr Johnson Lam’s view that the plaintiff’s pre-existing neck/right wrist/back conditions were all asymptomatic, which were however rendered symptomatic by the Accident.
24. Significantly, Dr Johnson Lam explained that the plaintiff’s functional capability to cope with the work demand of a rigger before the accident indicates that, clinically and functionally, it is likely he enjoyed painless and satisfactory function in his neck, right wrist and low back before the accident. Likewise, Dr KC Lam did not dispute Dr Johnson Lam’s opinion on this matter.
25. Dr Johnson Lam pointed out (which again is not disputed by Dr KC Lam) the following objective parameters:–
26. the distribution of the handgrip Jamar Dynomometer yielded a bell-shaped curve, consistent with the use of genuine effort, and that is consistent with persistent pain and weakness as a residue of the accident; and
27. most of the Waddell’s signs were negative suggesting absence of symptom exaggeration.
28. Dr Johnson Lam considers that the plaintiff’s pre-existing condition is between scenarios 1 and 2 as identified in *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958 at 963E-G and further estimated that the Accident should contribute about 80% to the residue pain/impairment in the plaintiff’s neck, back and right wrist, and the pre-existing degeneration should contribute about 20%.
29. Overall, I prefer Dr Johnson Lam’s opinions than that of Dr KC Lam’s opinions in this case as it seems to me that they are more consistent with the plaintiff’s medical history and treatments received by him at the public hospitals and clinics. They are also consistent with the clinical picture presented by the plaintiff throughout the pre-trial period.
30. I accept Mr Ho’s submission that it would be appropriate to make a 15% discount (not 20% as opined by Dr Johnson Lam) as attributable to his pre-existing condition to the PSLA award by taking into account of the plaintiff’s overall condition.

*Joint neurological expert report*

1. The neurological experts commented that the plaintiff was cooperative and forthcoming and gave a detailed account of the events, his symptoms and his disabilities.
2. It was common ground that:-
3. The plaintiff sustained a head injury with bleeding in the right ear and no loss of consciousness or post-traumatic amnesia.
4. There was soft tissue injury to the neck and low back/lumbar spine region.
5. Dr Yu instructed by the plaintiff considers that the plaintiff has post-concussional syndrome as supported by the neurological symptoms of headache, dizziness, subjective impairment of memory, withdrawal and sleep disturbance as related to the two experts (and both of them did not doubt the genuineness of these symptoms).
6. On the other hand, Dr Woo who examined the plaintiff on behalf of the defendant notes that the plaintiff’s neurological examination is normal and there is no cognitive, emotional, vestibular or physical deficit. And yet, Dr Woo did not seem to have disputed with Dr Yu that the neurological symptoms experienced by the plaintiff are indeed indicative of post-concussional syndrome.
7. Oddly, Dr Woo nonetheless remarked that the plaintiff only suffered superficial scalp injury at the head while conveniently ignoring or downplaying the head injury also brought about bleeding in his right ear and hearing loss and the soft tissue injury to the neck which Dr Woo had earlier acknowledged in the JNR.
8. Finally, whereas Dr Yu considers an appropriate period of 6 months to achieve maximum recovery for mild head injury with post-concussional syndrome and further minor improvement may take place in another 6 months, Dr Woo considers these 2 recovery periods for a superficial scalp injury are 1 month and 3 months respectively.
9. I consider Dr Yu’s opinions to be more objective and balanced while Dr Woo’s opinions seem to be a little bit more bias. I prefer Dr Yu’s opinions as set out above.

*Joint ENT expert report*

1. The otorhinolaryngology experts Dr Au Wing Wah (for the plaintiff) and Dr Lo Siu Sing (for the defendant) agree in their joint ENT expert report on the following:–
2. the plaintiff had no history of ear problem before the Accident;
3. the plaintiff suffered from moderate right sensorineural hearing loss and tinnitus as a result of the head injury he sustained in the Accident;
4. the plaintiff has 10.3% binaural hearing impairment, which equates to 4% impairment of the whole person; and
5. the appropriate period of sick leave from ENT perspective is 2 weeks.
6. There is no difference in the opinions of the ENT experts. I accept their opinions as stated in the Joint ENT Report.

*Joint psychiatric expert report*

1. The psychiatric experts agree that the plaintiff suffers from an adjustment disorder caused by the Accident.
2. There is also consensus between the experts that in addition to physical symptoms, the plaintiff has other ongoing stressors, likely including the impaired ability at work, the associated financial issue and strain, and the present litigation and compensation issues.
3. Dr Lai further explains that a person with anxiety and/or depression has heightened awareness and attention to somatic symptoms and increased sensitivity to the sensation caused by an underlying physical pathology, which is compatible with the plaintiff’s anxiety and/or depressed mood accentuating his sensation of pain and attention to somatic symptoms and contributing to the degree of pain when he was worse in his psychiatric symptoms.
4. Dr Lai opines the plaintiff currently is likely suffering from minor psychiatric symptoms, whereas Dr Lai considers the plaintiff probably suffered mild to moderate degree of mental symptoms.
5. The experts disagree on the reasonable duration of sick leave, further treatment and the estimations of the mental impairment.
6. Dr Lai considers the treatments received by the plaintiff in the past three and half years of psychiatric treatment is appropriate with some improvement and fluctuation of his symptoms having been reported.
7. He is of the view that the plaintiff should continue further treatment in the public psychiatric clinic at an average frequency of once in six to eight weeks for the later of (i) another six to nine months; or (ii) six months after conclusion of the present litigation.
8. On the other hand, despite Dr Law’s comments that P’s “*stressors are the residual physical problems, out of work, financial strain and the compensation issues*”, he considers that treatment can and should be terminated with medications tapered off.
9. On the question of medication, Dr Lai highlighted the fact that when the plaintiff was seen at CPH on 13 August 2020, he was still prescribed 7.5 mg of the sleep medicine Zopiclone (which is at the top end of the usual dosage), 45 mg of the antidepressant Mirtazapine (which is at the top end of usual dosage), 50 mg of the antidepressant Desvenlafaxine, 50 mg of the antihistamine used for treating insomnia Promethazine, (which is a mild to moderate dose) and 0.25 mg of the anti-anxiety medicine Alprazolam, the latter two on an “if necessary” basis.
10. As to prognosis, both Dr Law and Dr Lai noted that the symptoms of adjustment disorder depend on the development or resolution of its stressors. Dr Lai is of the view that it is likely the plaintiff will have minor residual psychiatric symptoms after completion of further treatment and conclusion of the present litigation, whereas Dr Law consider the prognosis of the adjustment disorder to be “good”.
11. Regarding the sick leave from psychiatric perspective, Dr Lai considers a period of 6 to 9 months should be given when he was in worse psychiatric condition whereas Dr Law considers 3 months after the first consultation to be reasonable, noting that it is an adequate period to establish a treatment plan and for medications to take action.
12. Despite Dr Law’s view on this matter, the medical report prepared by Dr Siu Chiu Ming (“Dr Siu”) of CPH dated 24 March 2017 mentions that the plaintiff’s mood was fluctuating during the regular clinic follow-ups such that titration of antidepressants was necessary to stabilise his mood.
13. The difference between the 2 psychiatric experts are not that significant. However, having considered both of their opinions, I prefer Dr Lai’s opinion as they seem to me to be more consistent with the psychiatric history, complaints, symptoms and treatments of the plaintiff.

*Percentage of whole person impairment*

1. For the orthopaedic injuries, Dr Johnson Lam for the plaintiff assessed the percentage of the whole person impairment (“WPI”) at 10.5% and Dr KC Lam for the defendant assessed it at 6%.
2. For his neurological injuries, Dr Yu for the plaintiff assessed the WPI at 2% while Dr Woo for the defendant assessed it at 0%.
3. Both ENT experts agreed the WPI at 4%.
4. In terms of his psychiatric injuries, Dr Lai for the plaintiff assessed the WPI at 5-7% while Dr Law for the defendant assessed it at 1%.
5. No matter how one looks at it, in my judgment, the combined level of WPI of 4 different medical disciplines is significant. It varied from a combined total of 11% assessed by the defendant’s experts to as much as 23.5% assessed by the plaintiff’s experts.
6. Given the fact that I prefer the plaintiff’s experts in the 3 disciplines where there are significant differences in their opinions and accept the agreed opinions agreed by the ENT experts, the overall WPI in my view is high and should not be ignored.

*Pre-existing condition*

1. There is no dispute that the plaintiff as someone who had been working at various manual labouring jobs prior to the Accident did suffer from pre-existing degenerative changes at his neck and back. He also suffered from pre-existing degenerative changes at his right wrist. However, what cannot be disputed is the fact that they were either asymptomatic or minimally symptomatic.
2. In this regard, I prefer Dr Johnson Lam’s opinion on the reason as to why even if the plaintiff develops symptoms as a matter of natural progression, the pain or impairment is likely to be mild and occasional. Dr Johnson Lam’s opinion has been summarized at p 45 §162 of the JOR and I shall not repeat them here.
3. In my view, Dr Johnson Lam provided his well-reasoned expert opinion why the pre-existing degenerative changes at the plaintiff’s neck, back and right wrist were asymptomatic or minimally symptomatic. He gave further expert opinion that even if the plaintiff develops symptoms as a matter of natural progression, the pain or impairment is likely to be mild and occasional:-

“Besides, as also mentioned by Dr KC Lam, there were also evidences of degenerative changes in the neck / back / wrist - however Dr Johnson Lam needs to point out that such changes are common in manual laborers of Mr Lai’s age; *in many cases, these were asymptomatic or minimally symptomatic; with episodic pain only; most of the workers could continue to work till retirement, say, at 60 to 65.* (There is a trend of increasing age of the worker in the construction industry in Hong Kong). The contribution of these rather asymptomatic (based on evidences as available to us) degeneration in neck/ back/ wrist *is small* compared with the subject accident and is not the major reason for need to change of job.”

In Mr Lai’s case, but for the subject accident causing/ triggering pain in the injured areas, it is likely that Mr Lai should be able to continue working till, say, about 60-65 years old.” (emphasis supplied)

1. Based on the above reasoning, Dr Johnson Lam opined that the plaintiff’s degenerative changes fell between scenarios 1 and 2 of the 3 scenarios in *Chan Kam Hoi*, *supra* and the pre-existing degeneration should contribute about 20% to the residue pain or impairment in the neck, back and right wrist.
2. On the other hand, Dr KC Lam pointed out that there was evidence of degeneration in the neck/back/right wrist although he could not explain satisfactorily why the plaintiff would still develop similar pain before he reaches 60 (even without the Accident) and why the Accident has contributed to half (50%) of the present disability according to his estimate. As said, I would allow a 15% discount in this case.
3. I accept that the view of Dr Johnson Lam on this matter as it seems to be more well-reasoned and balanced. I prefer his opinion on the percentage of discount than that of Dr KC Lam’s.

*Sick leave period*

1. The plaintiff submits that a reasonable sick leave period for this case should be from the date of the Accident ie on 5 August 2016 to 25 August 2018, a total period of 24.7 months which was endorsed by the Medical Assessment Board in the Form 7.
2. Dr Johnson Lam opines that the duration of the sick leave issued by the plaintiff’s treating specialists / doctors who assessed him from time to time is appropriate and should be endorsed.
3. Dr KC Lam on the other hand considers sick leave of 12 months should be given only.
4. In my view, the sick leave given by the treating doctors which was endorsed by the medical assessment board is reasonable in light of the fact that the plaintiff has sustained multiple injuries in this case which required treatments from doctors from different specialties in the public hospitals, including psychiatric and psychological treatments.
5. With respect to Dr KC Lam for the defendant, his estimate of 12 months of sick leave has not taken into account of the fact that the plaintiff was still undergoing regular physiotherapy and occupational therapy treatments respectively until August 2017 and May 2018. It also failed to take into account of his sudden onset of severe low back and neck pain which required a couple of visits to the A&E in TSWH and POH. On those occasions, injection of pain killers were required in order to relief his pain. Besides, significant back pain (which affected his sleep) during the period of April 2017 and May 2018 had been recorded in the JOR.
6. Given the above, I consider a reasonable sick leave in this case should be as those given by the treating doctors at the public hospital, ie from the date of Accident up on 5 August 2016 to 25 August 2018.
7. On top of that, I would allow an extra 3 months as a reasonable period for the plaintiff to find a job, given his age and very limited education.
8. I therefore would allow a total sick leave of 27.7 months in this case.

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

1. On PSLA, Mr Ho for the plaintiff has invited me to pay particular regard to the following factors in this case:-
   1. The soft tissue injuries suffered by the plaintiff are considerable, the relevant injuries are multiple, and residual pain and impairment are expected. Though, there was no bone fracture or neurological deficits.
   2. According to Dr Johnson Lam, such considerable injuries sustained at the time of Accident, if not directly causing the subject residual pain/impairment, did trigger/aggravate the earlier asymptomatic pre-existing conditions at his neck, back, and right wrist and rendering them symptomatic giving rise to persistent pain so much so that he had to attend A&E on different occasions during his recovery period given their severity.
   3. The neck and back pain has also been fluctuating, and at the worst episodes P had to attend A&E for injection to relieve the acute pain. The back pain has also adversely affected his sleep: (see P’s WS at §33 [1/A/89]). The injury at the wrist also, according to Dr Johnson Lam, caused injury to (or at least significantly aggravating) the TFCC (which is important for weight sharing – injury would cause pain and reduction in hand grip), giving rise to persistent residue pain and impairment.
   4. After carefully assessing the plaintiff’s case, Dr Johnson Lam’s expert opinion is that the residual pain and impairment suffered by the plaintiff at his neck, right wrist, and low back would be persistent.
   5. The head injury was also significant in the sense that there was bleeding at his right ear immediately after the Accident, and eventually bringing him moderate hearing loss at that ear and tinnitus, and he has to wear hearing aid as a result. He also suffered from post-concussional syndrome as consistent with the plaintiff’s symptoms of recurrent intermittent headache and dizziness, subjective impairment of memory, withdrawal and sleep disturbance according to Dr Yu. The head injury also necessitated a series of minor operations done at his right ear drum between 29 August 2016 and 8 September 2016 by injecting dexamethasone (steroid) at his right tympanum. Months after the Accident, there were still 2 occurrences of blood-stain discharge at his right ear on 2 January 2017 and 18 March 2017.
   6. Apart from the physical symptoms at different body sites, the plaintiff also suffered psychiatric symptoms. Both psychiatric experts agreed the plaintiff has suffered adjustment disorder caused by the Accident. His psychiatric symptoms were particularly serious at the early stage of his recovery, as reflected from the dosage and titration of anti-depressant as prescribed to him: (See CPH’s consultation notes at [4/F/734, 737]).
   7. The sick leave granted by the treating doctors is also substantial.
   8. The plaintiff has received extensive treatments of physiotherapy and occupational therapy which, according to both parties’ orthopaedic experts are appropriate.
   9. The combined percentages of impairment as given rise by the residual disabilities of his different bodily sites are substantial, and that contributed by the orthopaedic disabilities alone is also very significant.
   10. The plaintiff’s dominant hand is his right hand, and he enjoyed playing football which he can no longer do after the Accident.
2. Mr Ho drew the court’s attention to the following authorities in support of his claim of PSLA in the sum of HK$400,000:-
   1. *Tang Chi Keung v. Mung Ka Wai* [2018] HKCFI 1685. The plaintiff sustained injuries of soft tissue of his right shoulder, neck and low back in the incident. The injuries to his right shoulder and low back had recovered satisfactorily with only mild and occasional residual symptoms. The injury to his neck had accelerated the degeneration of his cervical spine which necessitated the performance of C6/7 operation. PSLA assessed at HK$400,000 with 25% reduction for P’s pre-existing condition. PSLA of HK$300,000 was awarded.
   2. *Wong Kai Fun* *v* *Sun On Logistics Ltd & Anor*(unrep., HCPI 196/2015, 26 May 2017). The plaintiff was found to have suffered, as a result of the Accident, a severe head injury with mild adjustment disorder, which is comparatively mild and has significantly improved with no further psychiatric treatment is necessary. There was bilateral post injury haemotympanum causing bilateral mild conductive hearing loss was diagnosed which was completely resolved three months after. The Court also accepted the plaintiff’s complaints of occasionally suffering from dizziness, headache, loss of concentration and memory, insomnia, blurred eyesight, auditory hallucination. PSLA of HK$480,000 was awarded.
3. By July 2017 when *David John Slater v Commissioner of Police*(unrep, HCPI 646/2012, 7 July 2017) was decided, the starting point for lower range for serious injuries category was adjusted by Bharwaney J to HK$530,000.
4. Later, in *Ng Tat Kuen v Tam Che Fu & Ors* [2019] 4 HKC 533 (at §§91 to 96), the learned judge also reviewed the appropriate inflationary adjustments made at different stages since 1996 (when *Chan Pui Ki* was decided) up to 2017 (when the learned judge gave the judgment of *David John Slater v Commissioner of Police*).
5. In *Yu Chun Kit v Wong Wing Yau (formerly trading as Viewbond Cargo Service Co)* [2021] 3 HKLRD 938, DHCJ Raymond Leung SC followed *David John Slater* but further took into account the increases in Consumer Price Index (“CPI”) from June 2018 to April 2021, and held the present starting point of PSLA award for the “Serious Injury” category should be HK$569,000 (see §34).
6. By way of comparison, the learned Deputy High Court Judge also made reference to Chan’s Tables 2019 (at p 65) which gives the range of awards for PSLA under the “Serious Injury” category from HK$548,000 to HK$740,000.
7. Therefore, by making similar adjustment to the PSLA awarded granted in the case of *Tang Chi Keung*, *supra*, Mr Ho submits that the adjusted PSLA award (before taking into discount for pre-existing conditions) in that case should now be adjusted to around HK$430,000. Likewise, the PSLA award in *Wong Kai Fun* should be adjusted from HK$480,000 to around HK$520,000.
8. In light of the similarities of the injuries suffered by the plaintiff in this case as compared with the plaintiff in *Tang Chi Keung* (though the plaintiff in this case suffered additionally the partial hearing loss and significant psychiatric symptoms (which features were absent in *Tang Chi Keung*)), Mr Ho submits that PSLA in the plaintiff’s case should fairly and reasonably fall within the range between HK$430,000 and HK$520,000. Taking the mean between these two figures, the plaintiff submits that it will yield a sum of HK$475,000.
9. Applying the discount of 15% attributed for his pre-existing condition to HK$475,000, the plaintiff submits the resultant appropriate PSLA should be about HK$403,750, which Mr Ho has rounded off to HK$400,000.
10. Mr Wong for the defendant on the other hand submits that, based on the medical records and the surveillance evidence, the plaintiff’s injuries fall below “Serious Injury” category as set out in the case of *Lee Ting-lam v Leung Shu-wing* [1980] HKLR 657.
11. Mr Wong referred the court to the following decided cases where awards for PSLA between HK$80,000 to HK$250,000 have been made between 1999 and 2019:-
12. *Fong Kam Chi v* *Wong Wai Shing* (unreported, HCPI 910/1997, 13 December 1999);
13. *Wong Fung Nui v Leung Yat H*o (unreported, DCPI 455/2006, 2 November 2007);
14. *Mok Kam Ping v Yip Ka Kai & Another* (unreported, HCPI 546/2014, 05 October 2016);
15. *Ng Yuek Lang Sophia v Chin King Wa* [2019] HKDC 29; and
16. *Limbu Ramesh v Chu Fung Man* (HCPI 192/2005, 28/4/2006).
17. Having compared the multiple disabilities of the plaintiff suffered in the Accident and the decided cases, Mr Wong submits that, if not for the degeneration, the award for PSLA will be around HK$400,000.
18. The defendant further submits that if the court accepts the opinion of Dr KC Lam, the discount should be around 25%. Hence, the defendant submits that a reasonable award will be around HK$300,000.
19. However, if Dr Johnson Lam’s evidence is accepted, the defendant agrees with the plaintiff’s counsel that a reduction of 15% may be adopted, making an award of around HK$340,000.
20. In my judgment, the plaintiff’s injuries fall short of the “serious injuries” category. By applying a 15% discount for his pre-existing condition (as agreed between the parties if Dr Johnson Lam’s opinion on this matter is to be preferred), I would allow an award of PSLA at HK$400,000 in this case.

*Loss of Pre-trial earnings*

1. The plaintiff’s pre-accident monthly income of HK$26,655 has been agreed between the parties.
2. However, the defendant disputes the inflationary adjustments made by the plaintiff to such income by reference to CPI in Hong Kong.
3. Mr Ho submits that by the time of trial there has been substantial passage of time since the Accident happened in 2016, it would be fair and reasonable to apply the inflationary adjustments to such monthly income to more accurately reflect the relevant loss of earnings suffered by the plaintiff these years given the purchasing power of money has been dropping.
4. For instance, in *Yu Chun Kit v Wong Wing Yau (formerly trading as Viewbond Cargo Service Co)* [2021] 3 HKLRD 938, DHCJ Raymond Leung SC also took judicial notice that according to the Composite Consumer Price Index, the year-on-year inflationary increase in June 2018, June 2019, June 2020 and April 2021 (the June 2021 figure is not yet available) has been +2.4%, +3.3%, +0.7% and +0.8% respectively.[[3]](#footnote-3)
5. In *雲淑莉 訴 力根有限公司* (22 February 2002; HCPI 1142/1996), DHCJ J Lam J (as he then was) actually made annual adjustment to the plaintiff’s pre-accident monthly income (at the notional annual wage increase of 8% apparently as given rise by the inflation between years 1993 and 1997) in quantifying the loss of earnings: (see §§62-63).
6. On such basis, with reference to the Monthly Report on the CPI published by the Census and Statistics Department, the plaintiff submits that there have been the following year-on-year increase in CPI(A): +2.4% in August 2017, +2.8% in August 2018, +4.2% in August 2019, +0.1% in August 2020 and +1.5% in August 2021.
7. Adopting such rates, Mr Ho submits that the plaintiff’s monthly earnings by the time of the trial should be about HK$29,705 (ie HK$26,655 x 1.024 x 1.028 x 1.042 x 1.001 x 1.015) but for the Accident.
8. I accept Mr Ho’s calculations on the annual increase and would accept the plaintiff’s income by the time of the trial would be at HK$29,705 per month.
9. Taking the above into account, I accept that a median figure of HK$28,180(HK$29,705.70 + HK$26,655.01)/2) should be adopted as the plaintiff’s monthly earnings for the purpose of quantifying his pre-trial loss of earnings and MPF.
10. In this regard, I would reject the submission of the defendant that there should only be a 5% upward adjustment of the pre-trial income of the plaintiff for the entire period of almost 4.5 years. With respect, there is no sound evidential basis for such submission. The defendant, who was the direct employer of the plaintiff at the time of the Accident, was in the best position to produce income of what a comparable rigger would earn during the pre-trial period. Yet it had failed to produce such vital evidence at the trial. The only inference I can make is that it must know that a rigger must be able to earn much more than the 5% increase submitted by the defendant’s closing submissions.
11. I also do not accept the defendant’s submissions that a general worker could only work an average of 24 days a month. That certainly was not the plaintiff’s experience when he was working for the defendant.
12. I would further reject the defendant’s submission that there should be no further loss of earnings after 5 November 2017 when the defendant says that the plaintiff “can either return to be a rigger as suggested by the seven experts in their expert reports or to return to be a crane operator on board of barges as he tried to find jobs in that trade”.
13. As discussed above, I find an appropriate sick leave in this case should be 27.7 months (24.7 + 3).

## *Pre-trial loss of earnings and MPF*

1. For the purpose of quantifying the plaintiff’s pre-trial loss of earnings, Mr Ho invited the court:-
   1. to adopt the median monthly income for assessing the pre-trial period (but for the accident) at HK$28,180;
   2. to allow a reasonable period of the sick leave period of 24.7 months;
   3. to allow an extra 4 months for the plaintiff to locate a new job; and
   4. to adopt a figure of, say, HK$11,000 per month (being the level of alternative employment which he would be assumed to be capable of earning given his residual disability taking also into account his present age and personal background) for quantifying his partial loss of earnings during the remaining pre-trial period.
2. In this regard, Mr Ho submits that the plaintiff’s personal background is rather special in that he had received no proper education and had only spent about one or two weeks studying at a school for children of fishermen in Tuen Mun when he was young. His Chinese language ability is also rather limited (and basically illiterate) and he has no command of English. It is also recorded in the JPR that he only understands 30% of the words in a newspaper and he cannot write.
3. While I do not consider that given the multiple injuries sustained by him in the Accident and current physical and mental condition the plaintiff would be able to return to work as a rigger or a crane operator (as both jobs would require a high level of physical fitness which the plaintiff clearly does not possess anymore), I also do not think he could only earn as little as HK$11,000 per month as submitted by Mr Ho.
4. I accept the plaintiff has taken reasonable steps to mitigate his loss by looking for alternative employment with the assistance of the Labour Department over the years and that he had never been invited for an interview, most probably due to his lack of education and any special skills. I however consider that the plaintiff would at least able to earn an average income of HK$15,000 as a general labourer in any notional job he would able to find.
5. Based on the above, I would assess the plaintiff’s pre-trial loss of earnings and MPF as follows:–
   * 1. Total loss during his sick leave period (from 5 August 2016 to 25 August 2018)

HK$28,180 per month x 1.05 x 24.7 months

**=** HK$730,848

* + 1. Total loss during a 3 months’ period to locate a new job (from 26 August 2018 to 25 November 2018)

HK$28,180 per month x 1.05 x 3 months

=HK$88,767

* + 1. Partial loss during the remaining pre-trial period (from 26 November 2018 to 25 April 2022, say 41 months):

HK$(28,180 - 15,000) per month x 1.05 x 41 months

= HK$567,399

1. Thus, I would allow the plaintiff’s total pre-trial loss of earnings and MPF at:–

HK$ (730,848 + 88,767 + 567,399)

= HK$1,387,014

*Loss of future earnings*

1. The plaintiff was born on 21 February 1963 and is now 59 years old.
2. The court has recognised that a rigger could reasonably be expected to continue to work until he is 65 years old: see *Wong Po Lin & Anor v Dragages Et Travaux Publics and Penta-Ocean Construction Co. Ltd.* (unrep, HCPI 593/1999, 20 September 2000) *per* Master Cannon at p 21.
3. In this case, there is medical expert evidence from Dr Johnson Lam explaining that degenerative changes in neck/back/right wrist as experienced by the plaintiff are in fact common in manual labourers of the plaintiff’s age. In many cases these were asymptomatic or minimally symptomatic degenerative changes with only episodic pain and most workers would continue to work until retirement, say, at 60-65 years old. In other words, the plaintiff submits that such degenerative changes, according to Dr Johnson Lam’s expert evidence, should not affect the usual retirement age of most workers regardless of whether this was at 60 or 65 years old. As pointed out above, Dr Johnson Lam also gave clear expert opinion that it is likely that the plaintiff should be able to continue working till about 60-65 years old.
4. The plaintiff submits that, on the strength of *Wong Po Lin,**supra* and Dr Johnson Lam’s view, it is reasonable for the plaintiff to claim his future loss of earnings and MPF up to the age of 65 years old. In that case, the plaintiff would still have 6 years of remaining working life (but for the Accident).
5. The applicable discount rate for plaintiffs with needs not exceeding 10 years is 2.5%: *Chan Pak Ting v Chan Chi Kuen (No. 2)* [2013] HKLRD 1 *per* Bharwaney J at §132.
6. According to Table 9 of the Personal Injuries Tables Hong Kong 2019 (for males with pension age at 65), Mr Ho submits that the appropriate multiplier is at 5.47.
7. With respect, I do not accept Mr Ho’s submission that the plaintiff would be able to work as a rigger until 65 even without the Accident. Given the degenerative changes in his neck and back and the very demanding nature of such work, I consider that at most he would only be able to work for 2-3 more years as a rigger without the Accident.
8. I would consider a multiplier of 2 would be reasonable in the circumstances of this case.
9. Based on the above discussions on his would be earnings today had it not been for the Accident, I would adopt a sum of HK$29,705 per month as the appropriate multiplicand for quantifying the plaintiff’s future loss.
10. In the premises, I find the future loss of earnings and MPF as follows:–

HK$(29,705 - 15,000) x 1.05 x 12 x 2

= HK$370,566

*Loss of earning capacity*

1. The plaintiff claims HK$50,000 under this head. In its Answer to RSOD, the defendant has indicated that it agreed to pay not more than HK$50,000 for settlement purpose.
2. It is well settled that loss of earning capacity is, in gist, a claim covering the risk that at some future date during the claimant’s working life he will lose employment and will then suffer financial loss because of his disadvantage in the labour market: *Yuk Kok Wing v Lee Tim Loi* [2001] 3 HKC 314 *per* Keith JA at p 319D to 320A.
3. In *Wong Yun Chiu v Union Printing Company Limited* (unrep, HCPI 282/2009, 29 July 2011) Bharwaney J (at §38) held that an award under this head is appropriate where a plaintiff clearly suffers from a handicap in the labour market, such as the likely periodical recurrence of pain symptoms requiring sick leave and medical intervention and reduced working efficiency, which may also make him vulnerable to losing any such employment that he managed to secure.
4. In our present case, Mr Ho submits that, objectively speaking, the combined percentages of impairment of whole person of the Plaintiff (as given rise by the multiple injuries) are quite substantial, which would doubtless put him under real risk vulnerable to losing his alternative employment, especially considering his current age and low educational background.
5. I agree with his submission and would award a sum of HK$50,000 to present the loss of earning capacity in this case.

*Future medical expenses*

1. This has been agreed at HK$1,000. I so make such an award.

*Special damages*

1. This has been agreed by the parties at HK$27,500. I so make such an award.

*Employees’ compensation received*

1. The plaintiff has agreed to give credit to the employees’ compensation previously received by him in the sum of HK$805,552.97 in the related proceedings under DCEC 1586 of 2018.

*Interest*

1. I would allow the claim for interest as follows:–
2. 2% per annum on general damages from the date of service of writ until judgment and thereafter at judgment rate; and
3. half-judgment rate on the balance of the pre-trial loss of earnings and special damages after deducting employee’s compensation payment already received from the date of the Accident to the date of judgment and thereafter at judgment rate.

*Summary of Calculations*

1. In summary, I would award the following sums as damages to the plaintiff in this case:-

(1) PSLA HK$400,000

(2) Pre-trial loss of earnings & MPF HK$1,387,014

(3) Future loss of earning and MPF HK$370,566

(4) Loss of earning capacity HK$50,000

(5) Future medical expenses HK$1,000

(6) Special damages HK$27,500

Sub-total HK$2,236,080

(7) Less 10% contributory negligence HK$223,608

(6) Less EC payment HK$805,553

Net total HK$ 1,206,919

1. I therefore would order judgment to be entered against the defendant in the sum of HK$1,206,919 plus interest in this case.

*Costs*

1. Costs will follow the event. I will make a costs order nisi that the defendant shall pay the costs of this action (including all reserved costs order made, in any) in favour of the plaintiff with certificate for counsel. The plaintiff’s own costs will be taxed in accordance with the Legal Aid Regulations. In the absence of any application to vary the same within 14 days after the handing down of the judgment, the order *nisi* will become absolute.
2. Lastly, I would like to thank counsel on both sides for their very helpful assistance throughout the trial of this case.

( Andrew SY Li )

District Judge

Mr Simon Ho, instructed by ONC Lawyers, assigned by the Director of Legal Aid, for the plaintiff

Mr Wong Chi Kwong, appearing with Ms Alison Kao, instructed by Clyde & Co, for the defendant

1. There appears a typo for the year ‘2017’ under the heading at the top of page 2 of the report, it should be ‘2016’ instead. [↑](#footnote-ref-1)
2. [2/D/267] [↑](#footnote-ref-2)
3. At 949, footnote 5 [↑](#footnote-ref-3)