#### DCPI 118/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 118 OF 2012

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BETWEEN

DAYAWON FE BATIANCILA Plaintiff

and

TOEPKER CHIEN CHI Defendant

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#### DCEC 1272/2010

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## EMPLOYEES’ COMPENSATION CASE NO. 1272 OF 2010

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IN THE MATTER OF AN APPLICATION BETWEEN

DAYAWON FE BATIANCILA Applicant

and

CHIEN CHI TOEPKER Respondent

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##### Before: Deputy District Judge R Lai in court

Date of Hearing: 6 to 8 March 2013

Date of Judgment: 5 June 2013

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## JUDGMENT

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*Introduction*

1. This is a combined hearing for DCPI 118/2012 (the “PI Action”) and DCEC 1272/2010 (the “EC Action”).
2. The plaintiff/applicant (“DFB”) used to work as a domestic helper under the employment of the defendant/respondent (“TCC”) at TCC’s penthouse apartment at Tai Po (the “Premises”). It is common ground that there was an attic in the Premises where DFB would sleep at night. The attic was accessed by a staircase from the main floor. The staircase was made of wood. The attic was lit by a light at the ceiling of the attic with the switch located at the bottom of the staircase.
3. DFB pleaded that on 21 June 2010 when she was walking down the staircase in the course of her employment at about 5:30 am, she slipped and fell through the staircase and landed on her back. As a result she sustained personal injuries.
4. DFB alleged that the staircase was wet and slippery at the material times. She now claims against TCC for compensation pursuant to the Employees’ Compensation Ordinance, Cap 282 (the “ECO”) for alleged injuries sustained during work, ie the EC Action. She also brought a common law claim against TCC for breach of contract of employment, negligence, breach of statutory duty and breach of common duty of care, ie the PI Action.
5. On 6 November 2012, the court directed that the EC Action be heard together with the PI Action.
6. There were no disputes that DFB was employed by TCC since end of March or early April 2010. DFB left the Premises in the morning of 21 June 2010. She did not return to work for TCC again. The issues in these cases are:
7. whether DFB suffered her injuries as a result of an accident arising in and out of the course of her work inside the Premises as alleged;
8. if yes, whether TCC was in breach of the employment contract or statutory duty or common duty of care or was guilty of negligence (in the PI Action); and
9. what the quantum of compensation (in the EC Action) and damages (in the PI Action) should be.
10. Only DFB and TCC testified at the trial.

*The case and evidence of DFB*

1. DFB had made two witness statements dated 22 August 2011 and 27 August 2012 in the EC Action and the PI Action respectively. DFB adopted both statements as her evidence-in-chief at the trial.
2. Her case was that when she worked for TCC, she slept on a folding mattress in the attic at night. The mattress would be folded up and put away in the morning. She said that the light on the ceiling of the attic was the only light available at the attic and she was not provided with any lighting source such as a torch. She had to switch on or switch off the light at the bottom of the staircase before she went up to or after came down from the attic. She had complained the lighting problem to TCC to no avail. She said that there was an old style iced refrigerator in the attic.
3. She woke up at around 5:00 am every morning to prepare breakfast for the children of TCC. On 21 June 2010 which was a Monday, she woke up at around 5:30 am. As she was a bit late than usual, she immediately went down from the attic to the main floor to prepare breakfast and lunch boxes for the children. It was very dark when she walked down the staircase which had about nine stairs. She walked down the staircase barefooted as she was not allowed to wear any shoes or slippers inside the Premises. She felt wet on her foot. She slipped and fell down from the first step to the bottom of the staircase. She landed on her back and suffered injuries to her right shoulder and lower back.
4. Under cross-examination, DFB agreed that her fall had generated noise but said that no one in the Premises was woken up by the noise.
5. In her witness statement dated 22 August 2011 made in the EC Action, she said that she believed that there was water leaking out from the refrigerator where the door could not be closed tightly.
6. In her statement dated 27 August 2012 made in the PI Action, she said that she did not know why the staircase was wet and slippery as it was still very dark and she could not see properly. She stated that sometimes water leaked out from the refrigerator in the attic as the fridge door was sometimes not shut properly.
7. At the trial, FDB said that after making the breakfast, she went up to clean up the attic and saw the door of the refrigerator was not properly shut. It was opened for about an inch. She believed that the water came from the refrigerator. She agreed that the above facts were not mentioned in her two witness statements and explained that they did not come up to her mind when her witness statements were prepared.
8. She agreed that if the door of the refrigerator was opened, the light in the refrigerator would be put on but said that she did not see any light from the refrigerator when she woke up that morning.
9. At the trial she said that only the first step of the staircase was wet and there was no water at other places.
10. In para 14 of her witness statement dated 22 August 2011, DFB stated that:

“There was a refrigerator (it was an old style iced refrigerator) at the entrance of the Attic and a bed (where I slept on) was next to it.”

1. In para 8 of her witness statement dated 27 August 2012, DFB stated that: “there was a small fridge directly next to the staircase at the top of the staircase”.
2. At the trial DFB made a sketch (marked exhibit “P-1”) showing that the staircase was at the left of the attic with the refrigerator located at the immediate top end of the staircase, directly facing the staircase. Her bed which, as agreed by the parties, was in fact only a mattress was at the centre of the attic. There was some distance between her bed and the refrigerator in her sketch.
3. DFB said that after the accident, she was so painful that she could not stand up right after the fall and stayed on the floor for about 30 minutes. After she could stand up, she walked to TCC’s bedroom and told TCC about the fall. TCC told her to take the usual day off on that day after she finished preparing breakfast and lunch boxes for the children.
4. In her statement dated 27 August 2012 she said that the day of accident was her day off. After she told TCC of her fall, TCC asked her to prepare breakfast for the children first and to see the doctor herself during the day. She then prepared the breakfast as instructed and left the Premises at about 7:30 am.
5. In her statement dated 22 August 2011, DFB said that at about 8 am to 8:30 am, TCC gave her a warning letter in relation to an event happened a few days ago before she left the Premises. She asked TCC for money for medical treatment but TCC did not give any money to her. She left the Premises at about 8:30 am to look for assistance from her friends at To Kwa Wan.
6. At the trial DFB said that she had shown her injuries to TCC and told TCC that the refrigerator door was opened when TCC came out from her bedroom after DFB had prepared the breakfast. These facts were also not mentioned in her witness statements. DFB said that she had forgotten to tell her lawyers and her lawyers did not ask her.
7. DFB said that she had asked TCC for money for medical treatment in the living room before she was asked to sign the warning letter in TCC’s bedroom.
8. She attended the Top Medical Health Centre for medical treatment on 21 June 2010 and was granted sick leave from 21 to 27 June 2010.
9. DFB did not return to the Premises on 21 June 2010. In fact, she never returned. She testified at trial that she asked her friend to send a SMS message to TCC that night to tell TCC that she would not return to the Premises. She stayed with her friends until May 2011.
10. The message sent by DFB to TCC on 21 June 2010 read as follows:

“Dear madam Chien, i was injured today morning at your house whilst working. I injured my back and right shoulder. The Doctor granted me sick leave for 7 days. Kindly, be reminded that an employer cannot terminate employee if the employee is on sick leave under employee’s compensation ordinance of labour department. It is an offence to terminate employee during sick leave. I will return to work once i am recovered. tnx.”

1. She further said that her friend did not return her mobile phone to her immediately after her friend had sent out the above message for her. She said that she only asked her friend to inform TCC that she would not return to the Premises during sick leave. She did not know the actual content of the message sent as she trusted her friend and did not read the message sent. She said that she had not read the messages sent by TCC or the employment agent, Ms Hon, to her as she did not always keep her mobile phone with her and she might have put it in her bag. She said that she first read those messages at the trial.
2. DFB submitted a “Notification of Accident” dated 28 June 2010 to the Labour Department on 30 June 2010 (pp 305-307 of the Trial Bundle).
3. She attended the Accident and Emergency Department (A&E) of the Queen Elizabeth Hospital (“QEH”) on 23 June 2010 for further treatment and was granted sick leave from 23 to 27 June 2010. She attended QEH again on 26 June 2010 and was referred to its Orthopaedics & Traumatology Department. She was hospitalized from 26 to 30 June 2010 and was granted sick leave from 26 June to 13 July 2010.
4. She attended QEH for several follow-up sessions and was granted further sick leave from 13 July to 16 October 2010 and from 18 October 2010 to 17 January 2011. She also attended the Physiotherapy Department of QEH for two sessions.
5. She complained that she still had low back pain and numbness on right shoulder radiated to her neck. The pain increased with squatting and during cold weather. Changing position in bed and getting up from bed were difficult. She had difficulties in prolonged walking and standing. She could not walk fast or sit still for long time. She also had difficulty in holding pen or pencil to write.

*TCC’s case and evidence*

1. TCC also made two witness statements. One dated 6 September 2011 in the EC Action and the other dated 28 September 2012 in the PI Action. TCC also adopted both statements as her evidence-in-chief at the trial.
2. TCC also produced a sketch of the attic as exhibit and marked “D-1”. The sketch produced by TCC showed the same position for DFB’s bed mattress but the location of the refrigerator was shown to be slightly away from the landing area at the top of the staircase toward the inside of the attic and next to DFB’s bed. TCC’s sketch also showed a lamp on the desk in the attic.
3. TCC said at the trial that as DFB’s mattress was next to the refrigerator, water leaked from the refrigerator would be absorbed by the mattress and blanket used by DFB.
4. TCC said that she got up at about 7 am on 21 June 2010 and saw DFB preparing breakfast in the kitchen for her children. DFB sent TCC’s children on the school bus at about 7:25 am.
5. At about 7:35 am, TCC asked DFB about a warning letter which TCC had asked DFD to prepare two days ago in respect of an incident occurred on 18 June 2010 when DFB forgot to bring the home key with her when she went out. DFB had not prepared the warning letter. TCC and DFB had a conversation on this subject in TCC’s bedroom for about 40 minutes before DFB left the Premises at about 8:40 am. TCC had recorded her conversation with DFB in that morning and had produced transcripts of the said conversation to the court (pp 344-373 of the Trial Bundle). TCC said that DFB never told her that she had fallen from the staircase that morning and she did not see any external wound on DFB.
6. As DFB did not return at about 9:20 pm that night, TCC called DFB’s mobile but no one answered. TCC received DFB’s aforesaid SMS message at about 10 pm. TCC called DFB again and also through Ms Hon of the employment agent. All attempts failed. TCC then sent a SMS message to DFB at about 10:51 pm and reported the matter to police at about 11 pm.
7. TCC produced SMS messages sent by Ms Hon and TCC to DFB both on 21 June 2010 at about 10:25 pm and 10:51 pm respectively.
8. Ms Hon’s message read as follows:

“u need to contact me or ur employer now, if u not show up or no call, i will go to police station to report ur are disappera” [sic]

1. TCC’s message read as follows:

“afe today is your off day. you are alright when you leave my home. Therefore you were not injured at work. You’ll need to come back inmediatly today. i need to take you to the hospital to get second opinion or i’ll go to police report you missing… your employer Toepker” [sic]

1. TCC went to the Labour Department on 23 June 2010 to inquire on how to deal with the missing of DFB. She showed DFB’s SMS message to the staff of the Labour Department and was advised to report the alleged work injuries to the Labour Department. She was also advised to report the matter to the insurance company underwriting the employees’ compensation insurance for DFB which she did. TCC said that she had taken out employees’ compensation and accident insurance for DFB and she had no incentive to conceal any work injuries suffered by DFB.
2. At the trial TCC said that she reported DFB’s alleged accident to the Labour Department on 24 June 2010 by way of Form 2. She said that as she had no knowledge of the injuries alleged to have been suffered by DFB, she did not know how to fill in the particulars of the alleged accident and injuries in the Form 2 and was told by the staff of the Labour Department to guess.
3. At about 5:07 pm on 30 June 2010, she received another SMS message from DFB which read as follows:

“mam’ ive been admited from the hospital ‘june 26’ and im just discharge today’ my sickleave til july 13’ im go back to work if im ok already’ thanks mam” [sic]

1. In her witness statement dated 28 September 2012, TCC stated that there was a table lamp on the working table at the attic which DFB could turn on for lighting. She also stated that she kept two torches at home which DFB could freely use. She denied that DFB had complained to her about lighting arrangement at the attic.
2. TCC denied that the door of the refrigerator kept at the attic could not be closed tightly. She said that her family was still using that refrigerator without problem with the door or water leakage. She said that there was a bottom container beneath the freezer compartment of the refrigerator to catch water when the ice in the freezer compartment defrosted. TCC annexed a copy of photograph of the refrigerator to her witness statement dated 28 September 2012 (p 186 of the Trial Bundle). At the trial, TCC denied that DFB had told her in the morning of 21 June 2010 that the door of the refrigerator was opened.
3. At the trial, TCC denied that DFB had told her about her injuries or asked her for money to go to see a doctor in the morning of 21 June 2010. She learned about the alleged accident only when she received DFB’s SMS message of 21 June 2010. She said that the employees’ insurance policy taken out for DFB by her covered DFB’s expenses for out-patient consultation.

*Discussion*

1. The main issue in dispute in the EC Action is whether the accident as alleged by DFB occurred. If so, TCC will be liable to DFB’s claim in the EC Action. The court will then go further to look into whether TCC is also liable to DFB’s common law claim in the PI Action.
2. According to DFB’s case, there was no witness on the spot witnessing the accident said to have been occurred in the early morning of 21 June 2010. She said that she had informed TCC of the accident immediately and shown TCC of her injuries. She even asked TCC for money for medical treatment but was refused. TCC denied all of the above. At the end of the day, it is one’s mouth against another’s mouth.
3. After considering all the evidence, I prefer TCC’s evidence to DFB’s evidence and find that DFB fails to prove that there was an accident as alleged by her occurred in the early morning of 21 June 2010 in the Premises.
4. To reach the above finding, I have carefully consider the conflicting evidence between the parties on the location of the refrigerator in the attic; whether water was leaked from the refrigerator; whether DFB had told TCC about the alleged accident and other issues raised by the parties.

*Location of the refrigerator*

1. DFB said at the trial that the refrigerator was at the entrance of the staircase at the left hand corner of the wall facing the staircase. There was some distance between the refrigerator and her mattress bed. She made a sketch showing the location of the refrigerator (see exhibit “P-1”).
2. TCC said that the refrigerator was at the midway of the same wall next to DFB’s mattress bed. There was some distance between the refrigerator and the staircase. She produced a sketch showing the location of the refrigerator (see exhibit “D-1”).
3. In DFB’s witness statement dated 22 August 2011, she stated in para 14 that:

“There was a refrigerator (it was an old style iced refrigerator) at the entrance of the Attic and a bed (which I slept on) was next to it.”

1. In her witness statement dated 27 August 2012, DFB stated in para 8 that:

“However, there was a small fridge directly next to the staircase at the top of the staircase which was used for extra storage for food for the family.”

1. If the refrigerator was located at the position as shown in exhibit “P-1”, DFB would not have described that as next to her bed in her first witness statement made in 2011. Her explanation under cross-examination that she considered such location as next to her bed is far from convincing. I find that DFB’s version of the location of the refrigerator is not supported by her own witness statement. I prefer the version of TCC which showed that the refrigerator was next to DFB’s mattress bed.

*Water leakage from the refrigerator*

1. DFB’s case was that water was leaked from the refrigerator because its door had not been properly closed and such water caused her slipped. In paras 20-21 of her witness statement dated 22 August 2011 she stated that:

“20. On 21 June 2010, I woke up around 5:30am. As I was a bit late than usual, I then immediately went down from the attic to the main floor of the Premises to prepare breakfast and lunch boxes for the Children. The light switch was at the bottom of the staircase and it was very dark even if there was some light penetrating between the windows and the curtains. When I walked down the staircase with bare foot, I felt wet on my foot. However, it was too late to realize that the staircase was wet, I suddenly slipped and fell down from the first step of the staircase to the platform and landed on my back. Consequently, I suffered serious injuries on my right shoulder and lower back.

21. I believe that there was water leaking out from the refrigerator where the door could not be closed tightly.”

1. In her witness statement dated 27 August 2012, DFB stated in paras 7-8 as follows:

“7. On or about 21st June 2010, at or about 5:30 a.m., I woke up and was about to walk down the staircase from the where which I slept. As it was very early in the morning and the switch to the lights was at the bottom of the staircase between the attic and the ground level, and the inside of the Premises was still very dark and I could not see properly. I walked slowly towards the staircase, and when I took the first tread down the staircase, I slipped on something wet and fell through the staircase, and landed on my back on the ground floor at the bottom of the staircase, and fell unconscious for some time.

8. I do not know why the staircase was wet and slippery, as it was still very dark and I could not see properly. However, there was a small fridge directly next to the staircase at the top of the staircase which was used for extra storage for food for the family. Sometimes water leaked out from the fridge as the fridge door was sometimes not shut properly.”

1. There is no dispute that before DFB left the Premises on 21 June 2010, she had gone up to the attic to put away her mattress bed.
2. At the trial DFB testified that when she went up to put away her mattress bed, she saw the door of the refrigerator was opened for about an inch and she cleaned up the water. DFB said that she had told TCC about the door of the refrigerator being opened in that morning before she left the Premises. This was denied by TCC. The aforesaid evidence was not mentioned in the two witness statements of DFB. DFB said that she had forgotten to tell these facts to her solicitors when they prepared her witness statements.
3. If DFB had found on 21 June 2010 that the door of the refrigerator had not been closed, it is inconceivable that she would have forgotten to mention such crucial matter, which was the whole foundation of her claim, in her two witness statements which were prepared at different times. It is worth noting that DFB made her witness statement dated 22 August 2011 in the EC Action when she was represented by Messrs M.C.A. Lai & Co and she made her witness statement dated 27 August 2012 in the PI Action when she was represented by Messrs Or & Partners. It is incredible that two solicitors firms preparing the two witness statements at different times would both overlook to take instructions from DFB on such crucial matter or fail to include such crucial information in her witness statements but instead only stated the “belief” of DFB or even affirmatively stated that DFB did not know why the staircase was wet.
4. Furthermore, if what DFB said at the trial was true, she know that the water came from the refrigerator. She would not have used the word “believe” in her 2011 statement and she would not have said “I do not know why the staircase was wet and slippery” in her 2012 statement.
5. In section D of her Notification of Accident dated 28 June 2010 submitted to the Labour Department, DFB referred to a Summary of Facts (p 305 of the Trial Bundle) which gave accident details as follows:

“While I was walking on the stairs, suddenly, I slipped due to the darkness and due to water left by someone.”

1. DFB said that this Summary of Facts was prepared by her friends. Her friends could only prepare the summary from information provided by her and she must have read the summary before she signed the notification. If she knew that the water was from the refrigerator, she would not have said that it was “left by someone” in a document prepared just a few days after the alleged accident.
2. At the trial DFB confirmed that she did not see any light from the refrigerator when she woke up on 21 June 2010. The photo submitted by TCC showed that a light would switch on in the refrigerator when its door was opened (see p186 of the Trial Bundle).
3. The case of DFB was that the alleged accident occurred at about 5:30 am. She reiterated in her witness statements that it was very dark at that time. If the door of the refrigerator was not closed, the light in the refrigerator would switch on and such light, albeit dim light, would not have escaped her attention in such darkness. If the opening of the door of the refrigerator was so narrow that it did not even activate the light in the refrigerator, it is doubtful whether such narrow opening will lead to defrosting of ice in the refrigerator to such extent as resulting in accumulating such amount of water sufficient to cause slip of DFB.
4. TCC in her statement dated 28 September 2012 stated in para 13 that:

“I also want to point out that there is a bottom container beneath the freezer compartment of that refrigerator. Its purpose is to catch the water when the ice in the freezer compartment is defrosted so that water will not go to the refrigerator.”

1. The aforesaid evidence of TCC was not challenged at the trial. I accept TCC’s evidence and find that the refrigerator had a container beneath the freezer compartment to hold water from defrosted ice. Even if the door of the refrigerator was not properly closed, especially if the opening was so narrow that even the light in the refrigerator might not have been activated, the water from the defrosted ice would have been caught by the container and would not be leaked out from the refrigerator.
2. Furthermore, with my above finding of the location of the refrigerator, any water leaked from the refrigerator would have been absorbed by the mattress bed which was just next to the refrigerator and would not reach the staircase.
3. In her witness statement dated 28 September 2012, TCC stated that she had carried out an experiment by opening the door of the refrigerator by about two inches for 12 hours to check whether the ice in the freezer compartment would melt. Mr Szeto, representing DFB, rightly pointed out that such experiment was unreliable as the number of items stored, the room temperature and humidity were all different. I agree with Mr Szeto that the said experiment of TCC had no probative value and I give no weight to her evidence in this respect.
4. In the premise, I do not accept DFB’s version of water leaked from the refrigerator causing her to fall from the staircase.

*Did DFB tell TCC of her fall and injuries before she left*

1. DFB said that she had told TCC the alleged accident immediately after she got up from the floor. She said that before she went into TCC’s bedroom to discuss the warning letter, she had shown her injuries to TCC and asked for money to see a doctor which TCC refused to give. However, in her two witness statements she only mentioned that she went to TCC’s bedroom and told her about her fall. There was no mention that she had told TCC of the accident and showed TCC her injuries after TCC came out from her bedroom. DFB said at trial that she had forgotten to include these facts when she prepared her witness statements.

1. In her witness statements, DFB only gave a brief account to what happened in the crucial hours after her fall until she left the Premises.
2. In her witness statement dated 22 August 2011, she stated in paras 22 to 24 that:

“22. I was so painful that I could not stand up right after the fall. After about 30 minutes, I could stand up and I walked very slowly to the Respondent’s bedroom. I then told the Respondent about the fall and she told me to take the usual day off on that day but I needed to finish preparing breakfast and lunch boxes for the Children.

23. At about 8 am – 8:30 am, the Respondent gave me a warning letter in relation to an event that was happened few days ago, and she asked me to sign the warning letter before I left the Premises.

24. I asked the Respondent to provide me funding for medical treatment as I did not have money for that. However, I was not provided any. As I was not familiar in Tai Po area, I looked for my friends’ assistance that they lived in To Kwa Wan and I left the Premises at about 8:30 am.”

1. In paras 10 and 11 of her witness statement dated 27 August 2012, she stated as follows:

“10. When I finally managed to get up from the floor, I sat on the floor to rest for a short while, and I went to Ms. Toepker’s room to tell her that I fell down the staircase and that my back and right shoulder was very painful. Ms. Toepker told me to prepare breakfast for the children first, and as it was my day off that day, she told me to see a doctor myself during the day.

11. I then went to prepare breakfast as she instructed, and left the Premises at or about 7:30 am.”

1. It was clearly pleaded in the Answer in the EC Action and in the Defence in the PI Action that TCC denied the alleged accident had occurred. The solicitors acting for DFB should have taken detailed instructions from DFB on what had happened in these few crucial hours between her fall and her leaving the Premises. If DFB had told TCC about the accident again and had showed her injuries to TCC after TCC came out from the bedroom, DFB would have told these facts to her solicitors and there were no reasons why these facts were not included in DFB’s witness statements.
2. TCC had recorded the conversation in her bedroom between TCC and DFB in the morning of 21 June 2010 just before DFB left the Premises. The parties have no disputes on the transcripts of the conversation produced by TCC.
3. From the transcripts, it can be seen that not a single word about the alleged accident had been said by either TCC or DFB. There were moments of laughing and moments of arguing but the parties never mentioned the accident which caused DFB remained “unconscious for some time” (as stated in para 7 of DFB’s witness statement dated 27 August 2012). This is incredible.
4. Furthermore, there was also no mention of TCC refusing to give money to DFB for medical treatment for her injuries although the parties did discuss money matter when TCC required DFB to pay for the rotten meat caused by DFB’s mistake. I shall think that it will only be natural for DFB to raise the required medical expenses as an attempt to set off TCC’s claim for meat compensation. However, nothing at all had been mentioned.
5. DFB agreed that the alleged accident and her alleged request for medical expenses which occurred just minutes ago were never mentioned in the said conversation.
6. The SMS message sent by DFB to TCC in the evening of 21 June 2010 also did not support DFB’s version that she had already told TCC about her fall and injuries in that morning. If DFB had already told TCC about the alleged accident and her injuries before she left the Premises that morning, she would not in her message write: “i was injured today morning at your house whilst working. I injured my back and right shoulder.” I agree with TCC’s counsel’s submission that there was no reference made in the said SMS message that TCC had been informed of the accident earlier by DFB and looking at the content and wordings of this SMS message objectively, one would think that it was intended to be a formal notice given by the sender to TCC for the first time ever that DFB had suffered an accident in the morning of 21 June 2010 at the Premises. Such message is inconsistent with DFB’s version of story.
7. I do not accept DFB’s explanation that the message was prepared by her friend and that she had not read the message. This was inconsistent with para 26 of her witness statement dated 22 August 2011 when DFB stated that: “I sent a SMS message to the Respondent at night time.” There was no mention that the message was sent by her friend for her. Even if she had asked her friend to send the message for her, she would have told her friend what she wanted to write in the message and she would have checked the content of the message to make sure that it contained what she wanted to say before the message was sent out.
8. The message sent by TCC to DFB on the same day was also inconsistent with DFB’s version but support the version of TCC that DFB had not told her anything about the alleged accident or injuries before DFB left the Premises. TCC stated in her message that DFB were alright when she left the Premises and TCC said that she needed to take DFB to the hospital. This is also inconsistent with DFB’s allegation that TCC refused to give her money for medical treatment.
9. Mr Szeto criticized TCC of using the word “waist” (腰) instead of “back” (背) in section D of the Form 2 (pp 279-281 of the Trial Bundle). Mr Szeto submitted that TCC was not credible or reliable. TCC explained that it was a matter of translation.
10. As the information stated in the Form 2 had some significance, I set out below the original text of sections D, I and J of the Form 2 submitted by TCC together with the translation provided in the Trial Bundle. I note that the translation was not certified translation and Mr Szeto had taken issue on the Chinese words used by TCC.

“D. 意外的敍述

請敍述意外如何發生，並說明僱員當時正在進行的工作

10年6月21日是家傭假期，她離開我家時都還好好的，有說有笑地道別。一般她要9:00 pm回家。一直到10:00 pm她SMS我說：她同天早上在我家工作受傷及腰和右肩，医生準她7天假。之後我找她，並SMS回她必須馬上回來並我帶她去看医生get second opinion。之後她就消失不見了。已經報警。

意外發生地點的地址

據SMS她說是我家。”

English translation

“D. Description of accident

Describe how the accident happened and state what the employee was doing at the time

21/6/2010 was a holiday for (my) domestic helper. When she left home, she was fine, chatted and joked and said goodbye. Normally, she has to be back at 9:00 pm. Until 10:01 pm, she (sent) me a SMS saying that on the same day, she worked at home, hurt her back and right shoulder. The doctor recommended her to have 7 days sick leave. Then, I called her and replied her SMS saying that she has to be back immediately and I will take her to another doctor for second opinion. Afterwards, (she) disappeared and has already called the police.

Address of the place of accident

As alleged by her in SMS, my home.”

“I. 意外地點

在意外發生時現場進行的活動

不清楚，懷疑她受傷真实性。

當天她放假，休息日。”

English translation

“I. Place of accident

Activity carried out on the site at the time of accident

Unknown, (I am) suspicious about the authenticity of her injury. On that day, she was off, holiday.”

“J. 損傷性質

敍述損傷性質

提拿重物，腰扭傷，右肩嚴重受傷，據SMS，她說嚴重到要休息7天，〔但沒看到她提供的医生報告〕當天她放假。”

English translation

“J. Nature of injury

Describe the nature of injury

Lifting heavy things, sprained back, right shoulder is seriously injured. According to her SMS, she was serious (injured) and needed to take rest for 7 days, (but (I) haven’t read any medical report provided by her). She was off on that day.”

1. The above information was provided by TCC to the Labour Department shortly after the alleged accident. It showed that she was not aware of any accident or injuries to DFB before DFB left the Premises on 21 June 2010. It showed that she relied on the SMS message received from DFB to provide the above information to the Labour Department. It also confirmed that she had sent the SMS message to DFB on 21 June 2010 which message also showed that TCC was not aware of any accident or injuries to DFB before DFB left the Premises on 21 June 2010. TCC’s SMS message also rebutted DFB’s allegation that TCC would refuse to give her money to see a doctor when TCC would ask DFB to return home for TCC to take her to hospital.
2. TCC described DFB’s nature of injury in the Form 2 as: “Lifting heavy things, sprained back, right shoulder is seriously injured.” This is consistent with TCC’s evidence that she had no knowledge of the alleged accident and injuries to DFB and was told by staff of the Labour Department to make a guess. If DFB had told TCC the alleged accident in the morning of 21 June 2010, there was no reason why TCC would have described the nature of injury in the Form 2 in such a wrong way. It was clearly a piece of guesswork of TCC. TCC needed to guess only because she had no knowledge of the matter.
3. As TCC guessed DFB’s alleged injuries was caused by lifting heavy things, she might have taken the word “back” in DFB’s SMS message to mean 腰 (waist) in Chinese and she used the word 腰 in both sections D and J of the Form 2. I accept TCC’s explanation that she translated the word “back” to Chinese word “腰” in completing the Form 2. I do not see this as evidence showing that TCC was not credible or reliable. Instead, I am of the view that the Form 2 submitted by TCC to the Labour Department supported her case that DFB had not told her about the alleged accident and her alleged injuries before DFB left the Premises.
4. In the Trial Bundle, there was another copy of Form 2 (pp 294-298 with English translation at pp 299-304). This Form 2 was dated 30 July 2010. There were two chops on the first page of the Form suggested that it had been received by the Labour Department twice on 30 July 2010 and 19 August 2010. TCC denied that this Form was submitted by her. TCC’s solicitors confirmed that it was a document obtained from the Labour Department. This document was completed in Chinese. There was no suggestion that it was submitted by DFB or on her behalf.
5. In section D of this Form it was stated that the name of hospital/clinic where the employee received treatment were: “(1) 怡康医務中心 (2) 伊利沙伯医院” (English translation provided: 1. Top Medical Health Centre 2. Queen Elizabeth Hospital).
6. In section J of this Form it stated that: “女傭提供的医生証明上寫是: LIGHT SHOULDER AND BACK INJURY” (English translation provided: “Light Shoulder and Back Injury” as stated on the doctor’s certification provided by the maid.).
7. In section L of this Form it stated that: “因女傭發生意外當時未有通知僱主及之后一直有露面，僱主多番联絡未能成功故此僱主完全不清楚女傭是在家中那裡，怎样受傷及情況如何。” (English translation provided: “As the maid did not inform the employer when the accident happened, and thereafter the maid had not shown up all along. The employer had on many times been trying to make contact, but in vain. Therefore, the employer knew nothing as to how and which area inside the house the maid had got injured as well as the situations.”)
8. It is common ground that DFB had not returned to the Premises or met TCC after 21 June 2010. It was TCC’s case that she was unable to contact DFB since 21 June 2010. In para 10 of her statement dated 28 September 2012, TCC stated that:

“Since 21st June 2010 up till now, I have received only 2 sms messages from the Plaintiff. She did not answer my calls when I telephoned her.”

1. In such case, TCC would not be able to provide the information as stated in sections D and J of the said Form as TCC did not have the medical certificates of DFB as at 30 July 2010 or 19 August 2010. Who submitted this Form 2 to the Labour Department remains a mystery but I accept TCC’s evidence that it was not submitted by her and I attach no weights to this document.
2. Except the own words of DFB, all evidence placed before me including the SMS message sent by DFB to TCC showed that DFB had not told TCC the alleged accident and her injuries before she left the Premises in the morning of 21 June 2010.

*Other matters*

1. The alleged accident occurred in the early morning. It must be very quite at that time. There is no dispute that the staircase was made of wood and uncarpeted. DFB said that the staircase had about nine stairs and she fell from the top step to the bottom. DFB was a person of about 56 kg in weight (see p 243 of the Trial Bundle). The sound generated by a person of such weight falling for eight steps on a wooden staircase together with the natural scream of a person falling from such height must be enormous and frightening in the quiet early morning. However, according to DFB no one in TCC’s family was woken up by such noise. This is unusual and I will say incredible.
2. TCC stated that she had taken out employees’ compensation insurance for DFB. She had provided particulars of the insurance policy to the Labour Department in the Form 2. TCC testified that the insurance also covered DFB’s medical expenses for out-patient. The evidence of TCC in this respect was not challenged. I accept that TCC had taken out employees’ compensation insurance for DFB. In such case, TCC was covered by insurance for DFB’s claim under the EC Action. I accept TCC’s evidence that in such circumstances, she had no incentive to conceal the accident if it did happen. Furthermore, any accusation of concealment is inconsistent with the MSM message sent by TCC to DFB on 21 June 2010, the reporting of the alleged accident to the insurance company on 23 June 2010 and the submission of the Form 2 to the Labour Department on 24 June 2010.
3. The parties had spent considerable time at the trial in cross-examination on whether DFB usually had her rest day on Monday. I do not see this issue as having any relevancy on the issues in dispute in these Actions. It is common ground of the parties that DFB did take her rest day on 21 June 2010 but only after she had prepared the breakfast and sent TCC’s children onto the school bus. The alleged accident occurred before DFB took her rest day on 21 June 2010. If DFB worked before she took her day off and suffered injuries in the course of her work, I do not see how arguing on this issue will assist TCC.

*Conclusion*

1. I find that DFB fails to discharge her burden to prove that there was an accident at work in the course of her employment with TCC that resulted in her injuries as alleged. As such, liability is not established and compensation is not payable under the EC Action.
2. In making the above finding, I am not saying that DFB did not suffered injuries on 21 June 2010. The medical report issued by Top Medical Health Center dated 23 October 2010 (p 226 of the Trial Bundle) did confirm that DFB had attended their center on 21 June 2010 for medical treatment for right shoulder and black injuries. Redness and tenderness, plain and limitation on motion of her shoulder and back were observed. What I am saying is that DFB did not suffer the aforesaid injuries from the accident as alleged by her. How did DFB sustain her injuries is a matter which can only be answered by DFB herself. As DFB’s version of the accident is not accepted by me, it follows that DFB also fails to prove that TCC has breached any of her common law duties.
3. In my judgment, DFB has failed to prove that TCC is liable to her in both the EC Action and the PI Action. I dismiss DFB’s claims in both Actions.

*Quantum*

1. For completeness, I also consider the question of quantum should TCC be held liable to DFB’s claims.

*Medical evidence*

1. DFB attended the Top Medical Health Center on 21 June 2010, ie the date of the alleged accident, for treatment.
2. Physical examination noted redness and tenderness, pain and limitation on motion of her shoulder and back. There was no sensory deficit. Results of neurological examination were within normal limits. The diagnosis was right shoulder and back injuries. She was treated with analgesics. No permanent disability was expected.
3. DFB attended A&E of QEH on 23 and 26 June 2010. She was admitted to the Orthopaedics Department of QEH on 26 June 2010 and discharged on 30 June 2010.
4. Medical examinations at A&E revealed tenderness over the right shoulder with decrease in range of movement. There was bruise over the lower back and the right upper back, both with tenderness. X-rays on right shoulder, chest and lumbar spine were unremarkable. The clinical diagnosis was right shoulder and back injury.
5. Physical examination at the Orthopaedics Department showed diminished power over right leg due to back pain. Sphincter function was intact. Right shoulder range of motion was full except a mild limitation in active flexion and extension due to pain. X-ray on lumbar spine showed normal alignment. No fracture of lumbar spine or right shoulder was detected. Diagnosis was shoulder and back contusion. She was able to walk with a frame in ward.
6. DFB also attended the A&E of QEH on 24 and 31 August 2010 and 16 October 2010 for persistent right shoulder and back pain.
7. DFB was reassessed by the Specialist Clinic of QEH on 13 July 2010 and 7 September 2010. It was found that shoulder pain still limited her active elevation of arm. Repeated physical examinations showed evidence of non-organic origin of her back pain signifying symptom exaggeration. It was noted that she required a frame for walking support. Physiotherapy was offered to DFB by QEH.
8. DFB was offered physiotherapy treatments by QEH. She cancelled the first appointment scheduled for 16 July 2010 as well as the re-scheduled first appointment for 30 July 2010.
9. She was initially assessed by the Physiotherapy Department of QEH on 7 September 2010. She complained of right shoulder pain and lower back pain. Objective examination revealed that she could walk stably with the aid of a walking stick support on level ground. Walking exercises and walking stick prescription were given to her.
10. DFB attended another session of physiotherapy treatment on 30 September 2010. She complained of right side neck pain and lower back pain which was aggravated by raising right arm and trunk backward bending respectively. Objective examination revealed diffuse tenderness upon palpation over her neck and back. No significant tenderness was palpable over her right shoulder region. Neurological examination revealed 50% sensation deficit over her right upper and lower limbs. Biceps, triceps, knee and ankle jerks of both upper and lower limbs revealed no significant deficit. Right upper and lower limbs’ muscle power was grade 4 in general while grade 5 was normal. Active range of motion of her right shoulder was functional while that for her back and neck were limited by pain. Straight Leg Raise test was 90 degrees on both lower limbs. She was given Interferential Therapy and Hot Pack to relieve back and neck symptoms. Back and neck exercises were prescribed with back and neck care advice. She had defaulted further physiotherapy treatment after 30 September 2010.
11. DFB attended QEH for treatment on 29 November 2010. She was attended by Dr Ho Chin Hung who noted that DFB walked with a stick. However, Dr Ho observed Waddell signs during his examination on DFB. He made the following remarks on his consultation note (p11 of the Bundle of Medical Records and Notes):

“Waddell +

Power full

I remined [sic] that we could not identify any obvious neurological problem that could explain the current disability

If the condition remain static in the next visit, medical assessment board will be arrange”

1. She was granted sick leave from 21 June to 16 October 2010 and from 18 October 2010 to 17 January 2011. She was advised to resume her duty during her visit to QEH on 17 January 2011.

*Expert evidence*

1. DFB was examined by the medical experts of the parties, Dr Cheung Ho Man for DFB and Dr Tio Man Kwun Peter for TCC, on 17 July 2012.
2. DFB complained of on and off back pain occurred everyday and occasionally associated with numbness in the back. She also complained of on and off right shoulder pain associated with numbness of whole right upper limb. She told the experts that about one month after the alleged accident, she started to have right elbow pain associated with burning sensation and on and off headache.
3. Both experts agreed that DFB had a right shoulder and back contusion with soft tissue involvement. There was no evidence of more serious damage such as bony fracture or neurological deficit.
4. The experts found that DFB had normal lumbar lordosis. Back movement was noted to be normal. She had increased in back pain on vertex pressure, right shoulder pressure, trunk rotation to both sides and arm elevation, which was compatible with Waddell signs of back pain. Her gait was normal with mild discomfort after sitting for 60 minutes. There was limitation of right shoulder forward flexion to 140 degrees and also “Hand behind back” test at T12 level, which is limited. Positive impingement test was also present. There was no laxity and muscle power was normal. There was full range motion in right elbow. Pain was over the lateral epicondyle and pain was exacerbated when wrist was extended. There was no neurological deficit in her cranial nerves examination.
5. Dr Cheung opined that DFB had significant and persistent back pain and right shoulder pain in the initial period after the injury. He noted that on 26 June and 13 July 2010, DFB needed to walk with a frame. He was of the view that this should be a transient phenomenon as low back contusion normally should not cause any long-term weakness or neurological deficit. He stated that for diagnosis of soft tissue contusion of back, the pain and discomfort will usually heal in three months time although occasionally patient might require longer time for the pain to subside. Dr Cheung agreed that DFB showed possible exaggeration in the back symptoms as there were Waddell’s signs during back examination. He said that a normal gait pattern would be compatible with recovery of back contusion.
6. Dr Cheung said that shoulder contusion should bear a favourable prognosis in DFB’s age. At her age, rotator cuff injury had a high chance of healing without significant residual dysfunction. He was of the view that the progress note of QEH indicated that DFB’s shoulder pain was not persistent after the initial period of pain. Dr Cheung assessed both the impairment of whole person and loss of earning capacity of DFB at 3%.
7. Dr Tio agreed that it was possible that DFB sustained simple contusion of her right shoulder and back as a result of the alleged injury. However, he was of the view that the presentation of persistent pain was out of the normal expected course of soft tissue injury. He stated that most of the patients with similar injuries could have a very satisfactory recovery within one or two months. Dr Tio took the view that the presence of unexplainable diffuse shoulder and back pain together with the presence of positive simulation tests suggested symptom magnification.
8. Dr Tio opined that the shoulder impingement test should be considered as negative as positive impingement will produced focal pain over the anterior shoulder rather than a diffuse pain over the shoulder which was medically inexplicable. Dr Tio assessed both the impairment of whole person and loss of earning capacity of DFB at 0.5%.
9. Both experts agreed that DFB could have a faster functional recovery if she could have a complete course of physiotherapy in the early months. However, the long-term prognosis should not be affected. Both also agreed that her right elbow pain and headache were not related to the alleged injury.
10. Both experts also agreed that DFB should be able to resume her duty as a domestic helper and the injury would have minimal adverse effect on her activities of daily living.

*The EC Action*

1. She was assessed by the Employees’ Compensation (Ordinary Assessment) Board (the “Boards”) on 20 April 2011. As per Form 7 dated 4 May 2011, for right shoulder and back injury resulting in right shoulder and back pain, DFB was assessed to have suffered 1% permanent loss of earning capacity. The sick leave allowed by the Board was from 21 June to 16 October 2010 and from 18 October 2010 to 17 January 2011.
2. DFB also appeals against the Form 7 pursuant to section 18 of the ECO by a notice dated 7 July 2011. TCC has not appealed against the Form 7.
3. Both experts were of the view that the back and right shoulder pain of DFB should remain minimal. She should be able to return to work as a domestic helper. The injury would only have minimal adverse effect on her activities. The experts’ assessment on her loss of earning capacity was ranged between 0.5% and 3%. It is noted that both doctors of QEH and the experts (including DFB’s expert) observed symptom magnification on the part of DFB. I am of the view that an assessment of loss of earning capacity at 1 % by the Board is appropriate.
4. Mr Szeto did not seek to overturn the periodical payments assessment of the Board.
5. In the premise, I dismiss DFB’s appeal against the Form 7.
6. There is no dispute that the pre-accident monthly earnings of DFB were $3,580.

*Section 9 compensation*

1. DFB was born in 1973 and was 37 years old at the time of the alleged accident. Pursuant to section 9, the compensation for loss of earning capacity will be $3,580 x 96 x 1% = $3,436.80.

*Section 10 compensation*

1. Mr Szeto submitted that DFB’s claim under section 10 of the ECO was $20,143.47. Miss Lau, representing TCC, did not contend the otherwise. This amount will be allowed.

*Section 10A compensation*

1. DFB’s medical expenses claim was for $1,388 which was supported by receipts and not disputed by Miss Lau. This amount will be allowed.

*Total*

1. The total amount of compensation under the EC Action, if payable, will be $24,968.27

*Interest*

1. Interest on compensation, if payable, shall run from the date of accident (ie 21 June 2010) to the date of judgment at half of the judgment rate and thereafter at judgment rate.

*The PI Action*

Pain, Suffering and Loss of Amenities (PSLA)

1. In the Revised Statement of Damages, DFB claimed $250,000 under this head. Mr Szeto submitted that the reasonable range is between $120,000 and $150,000. He relied on the following cases to support his contention:
2. *Wong Kin Hing v Chan Wai Ming* (DCPI 1223/2006, unrep, 16 February 2007, Deputy District Judge A. B. bin Wahab) : the claimant suffered injuries to his head, neck and right leg in a traffic accident. He was discharged after observation. The court found that the injury to his right leg was a simple contusion and his neck pain and related headache ceased after 2 months. A sum of $70,000 was awarded under PSLA.
3. *Limbu Dharamaraj v ISS Adams Secuforce Ltd & Anor* (DCPI 1568/2011, unrep, 19 December 2012, Deputy District Judge Tracy Chan): the claimant suffered soft tissue injury to his right shoulder, back and ankle. He was treated conservatively and with physiotherapy. One year sick leave was granted. The court found that the injury would have minimal adverse effect on his activities. The court awarded $120,000 under PSLA.
4. *Ahmed Masood v Chung Kau Engineering Company Ltd* (DCPI 517/2003, unrep, 28 January 2005, HH Judge Marlene Ng): the claimant sustained mild back sprain as a result of slip and fall. He was treated conservatively and received physiotherapy treatment. He was granted sick leave for about 5 months. He still suffered from residual pain and stiffness to his back and right leg and from attacks of numbness to his right leg. He was unable to return to his pre-accident job and could only do light duty work due to residual symptoms of back pain and discomfort. The court awarded $130,000 under PSLA.
5. *Ng Lai Fan Fanny v The Hong Kong Golf Club* (HCPI 511/2005, unrep., 4 April 2007, Saunders J): the claimant slipped and fell while descending a staircase. She suffered tenderness over the thoracic and low back regions with no neurological deficits. X-rays of her spine revealed a scoliosis of the thoracic spin with no fracture or dislocation. She was hospitalized for 8 days. She complained of persistent back pain extended into multiple areas including head, neck, shoulders, legs and feet. She also suffered depression consequent upon the accident. The court found that she suffered a soft tissue injury in the accident and had exaggerated her mental problems. The court awarded $250,000 under PSLA.
6. Miss Lau submitted that the award of PSLA should not exceed $80,000. She relied on the following cases to support her view:
7. *Chan Sau Lan v Chesterton Petty Ltd* (HCPI 1123/2002, unrep., 3 November 2004, Deputy Judge Saunders (as he then was)): the claimant was struck on the neck and back by a machine and sustain back injury. Examination showed localized tenderness over the lumbar spine and right occiput but without any wound or swelling. The injury sustained was a minor soft tissue injury. She suffered no residual disability arising from the accident. The court awarded $30,000 under PSLA.
8. *Li Kam Wah v Ng Ying Tuen and Anor* (DCPI 386/2001, unrep., 9 August 2002, Deputy Judge Shum (as he then was)): the claimant sustained minor injury to his neck, back and waist in a traffic accident. He suffered stiffness after sitting for 5 to 15 minutes. There was no fracture. The court found that he had exaggerated his symptoms. He was awarded $50,000 under PSLA.
9. The injuries suffered by DFB are similar to the claimants in the cases of *Limbu Dharamaraj* and *Ahmed Masood* but with less serious residual symptoms. She was able to return to his pre-accident job. If an amount is to be awarded to DFB as PSLA, $100,000 is appropriate.

*Pre-trial loss of earning*

1. In the Revised Statement of Damages, DFB claimed $81,445 (inclusive of loss of MPF) under this head. DFB claimed that she remained unemployed after her sick leave until April 2012. She claimed loss of earning until end of March 2012 together with 5% thereon as loss of MPF contribution.
2. Mr Szeto agreed that according to the Mandatory Provident Fund Schemes Ordinance Cap 485, domestic helpers were not required to participate in any MPF Scheme.
3. Mr Szeto submitted that DFB was entitled to claim loss of earning during her sick leave for the period from 21 June 2010 to 17 January 2011. Mr Szeto further submitted that DFB should be allowed another three months for her to seek employment after her sick leave expired. He submitted that the total claim for DFB under this head should be $35,919.33.
4. Miss Lau submitted that the view of Dr Cheung on sick leave should be adopted and proposed that sick leave of 6 months and 27 days for DFB would be appropriate. She calculated the amount of this head at $24,702.
5. DFB left the Premises on 21 June 2010 and did not return to work for TCC after her sick leave expired. TCC did not dismiss DFB. I see no reasons why TCC shall be required to pay DFB another 3 months wages after her sick leave for DFB to seek another employment when DFB could return to work for TCC after her sick leave. I accept Miss Lau’s submission and assess the pre-trial loss of earning of DFB at $24,702.

*Loss of earning capacity*

1. In the Revised Statement of Damages, DFB claimed $22,440 (being 6 months of her current monthly earnings at $3,740 per month) under this head. Mr Szeto submitted that DFB was disadvantaged by the injury suffered albeit the degree was not significant. He submitted that a sum representing three to six months’ salary would be reasonable.
2. Miss Lau submitted that DFB was not entitled to claim any damages under this head as she had resumed work already and neither expert considered that she would have any difficulty in performing her duties as a domestic helper.
3. Both experts were of the view that DFB should be able to return to her pre-accident job as a domestic helper. In fact she had subsequently secured employment as domestic helper at an increased monthly earnings. She had been in that job since April 2012, ie almost one year at the time of the trial. There was no suggestion that she had any difficulties in discharging her duties in her new job. I agree with Miss Lau that DFB had no claim under this head.

*Special damages*

1. In the Revised Statement of Damages, DFB claimed $1,388 for medical expenses; $800 for travelling expenses and $200 for tonic food. She also claimed $1,560 as post-trial medical expenses.
2. Both experts were of the view that DFB did not need regular medical consultation. Mr Szeto sensibly did not pursue the claim for post-trial medical expenses.

1. Miss Lau agreed to the claims for medical expenses and tonic food but submitted that $300 was reasonable for travelling expenses.
2. In view of the number of attendance of DFB to QEH for medical treatments including physiotherapy treatments, I am of the view that a claim for $800 as travelling expenses is reasonable. I assessed the special damages of DFB at $2,388.

*Post-Trial loss of earnings*

1. In the Revised Statement of Damages, DFB claimed post-trial loss of earnings to be assessed. Mr Szeto also did not pursue this head at the trial.

*Total*

1. The total amount of damages (if payable) assessed under the PI Action is $127,090 which is greater than the compensation payable under the EC Action. If TCC is liable to both claims of DFB, TCC shall pay $127,090 to DFB together with interest set out below.

*Interest*

1. For damages on PSLA, interest shall run from the date of service of the writ (ie 18 January 2012) at 2% per annum to the date of judgment. Interest on pre-trial losses including special damages shall run from the date of accident (ie 21 June 2010) to the date of judgment at half of the judgment rate. Further interest shall run at judgment rate after the date of judgment on the whole of the damages assessed, if payable, until payment.

*Order*

1. Failing on liability, DFB’s application for compensation under the EC Action and claim for damages under the PI Action must be dismissed. I so order.
2. As I have dismissed DFB’s claim for compensation under the EC Action, it is not necessary for me to deal with her appeal against the Form 7. Should I have to deal with her said appeal, I will also dismiss her appeal for reasons set out above in this my judgment.
3. I see no reasons why costs should not follow the event. I make a nisi order that DFB shall pay the costs of both the EC Action and the PI Action to TCC, including all costs previously reserved. Costs shall be taxed, if not agreed, with certificate for counsel. The own costs of DFB be taxed in accordance with the Legal Aid Regulations. In the absence of application within 14 days to vary the aforesaid order nisi, the costs order shall become absolute.

# ( R Lai )

# Deputy District Judge

Mr Patrick Szeto instructed by Or & Partners for the plaintiff/applicant

Miss Julia Lau instructed by Leo Cheng & Co for the defendant/respondent