## DCPI 1042/2019

[2021] HKDC 543

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1042 OF 2019

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BETWEEN

TANG SIU TUNG Plaintiff

and

SUNBASE INTERNATIONAL PROPERTIES

MANAGEMENT LIMITED Defendant

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Coram: His Honour Judge H. Au-Yeung in Court

Dates of Hearing: 12 March 2021 and 7 April 2021

Plaintiff’s further written final submissions: 23 April 2021

Defendant’s written submissions on law: 28 April 2021

Date of Judgment: 7 May 2021

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JUDGMENT

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*BACKGROUND*

1. This is the trial for assessment of damages in respect of the plaintiff’s claim herein arising from an accident which happened on 8 October 2015 (**“the Accident”**). The Writ of Summon was issued on 24 September 2018 and Interlocutory Judgment was entered by consent against the defendant on 1 November 2018.

*THE ACCIDENT*

1. It is undisputed that, at the material time, the plaintiff (who was nearly 27 years old) worked as a technician for the defendant. He was working on an A-ladder when it suddenly collapsed, causing him to lose balance and fall from the height of around 1.7 metre to the ground. As a result, the plaintiff suffered personal injuries.

*INJURIES AND TREATMENT*

1. After the Accident, the plaintiff sat on the floor and rested for 15 minutes before going to the Accident & Emergency Department (**“AED”**) of Prince of Wales Hospital (**“PWH”**) (by riding on his own motorcycle) for treatment.
2. The plaintiff complained of low back pain at the AED. Physical examination at the AED showed superficial wound over his left leg. The diagnosis was contusion. He was discharged on the same day and was given sick leave for 3 days.

1. The plaintiff stated in his evidence that he had consulted a traditional Chinese medicine practitioner 王世平醫師 after he was discharged from the PWH on the day of the Accident because he still felt difficult to breathe and that he was diagnosed to be suffering from 胸椎骨輕微移位. After some treatment by the said Chinese medicine practitioner, he could breathe much better, although he still felt the pain at his low back.
2. Ms Kwok challenged this part of the plaintiff’s evidence on the basis that the consultation with 王世平醫師on 8 October 2015 was totally unsupported by evidence: it was not mentioned in the plaintiff’s schedule for medical attendances; the chest x-ray which was done at the PWH on the day of the accident also showed that the plaintiff’s chest was normal. In reply, the plaintiff explained during cross-examination that this consultation was not referred to in the said schedule because he was not charged for this consultation session at all, and he was not given any sick leave by 王醫師.
3. I accept the plaintiff’s evidence that he did consult 王醫師 on 8 October 2015 because it was indeed shown by the medical report dated 19 April 2018 that the plaintiff did complain about “transient sense of breathlessness” at the AED of PWH on 8 October 2015. Even though the x-ray done on the day showed that his chest was normal, it may well be that the “胸椎骨輕微移位” was so minimal that could not be seen from the x-ray.
4. In the period between 20 November 2015 and 30 March 2016, the plaintiff had attended AED 9 times. On each and every occasion, he complained of low back pain.
5. The plaintiff was treated by Dr Peter Tio, an orthopaedic specialist, since 16 December 2015 until 4 May 2016, for the main complaint of back pain, more on his right side. He attended follow-up sessions once every month. It is noted that on every occasion, Dr Tio assessed the plaintiff to have full range of motion (except that the range of motion was just “almost full” on 4 May 2016). On 8 March 2016, Dr Tio considered that the plaintiff had reached maximum medical improvement, and that the plaintiff was fit to resume pre-injury duty starting from 10 March 2016. The plaintiff said he did try to resume working, but he was in such a pain while working that he could not continue. As a result, he had only gone back to work for 2 days on 10 March 2016 and 15 March 2016 respectively. On 13 April 2016 and 4 May 2016, he attended two further consultation sessions with Dr Tio, who gave him further sick leave until 20 May 2016.
6. According to the Physiotherapy Report of Mr Edwin Ng, a physiotherapist at the PWH, the plaintiff reported in the initial assessment done on 22 December 2015 of moderate stretching pain over the right side of his back. While the range of motion of his back was found to be reduced, his lower limb muscle power was full. After around 4 months of physiotherapy treatment, the plaintiff reported that there was 30% improvement and that the pain severity and range of motion of his back were similar. The treatment sessions were stopped on 20 April 2016. While the plaintiff was referred to PWH for physiotherapy again on 12 April 2017, he did not attend treatment.
7. The plaintiff had also received physiotherapy treatment in the private section once to twice every week from December 2015 to April 2016.
8. The plaintiff had also consulted some other orthopaedic experts in late 2016.
9. In addition, the plaintiff had sought treatment from 王醫師 and Yan Chai Hospital Tsang Churk-ming Traditional Chinese Medicine (TCM) Pain Treatment Centre from August 2016 to May 2020.
10. An MRI of the plaintiff’s lumbar spine was done on 23 April 2016. It was found that:

“Bilateral L5 spondylolysis and degeneration, narrowing and posterior prolapse of the L4/5 disc with mild inferior migration and posterior annulus tear and minimal anterior marginal osteophytes adjacent to the L4/5 disc are seen but no nerve impingement, cauda equine lesion or bony lesion is noted in the lumbar spine.”

1. The plaintiff was given a total of 1,199 days of sick leave intermittently from 8 October 2015 to 10 February 2019.

*EXPERT EVIDENCE*

1. The plaintiff had been examined by Dr Chun Siu Yeung (who was instructed by the defendant) on 20 May 2016. In his expert report dated 15 July 2016 (**“Dr Chun’s Report”**), Dr Chun opined, among other things, that:
   * 1. “The diagnoses for the injury are:
        1. Superficial abrasion wound and contusion of medial left knee;
        2. Contusion of the low back with no fracture, no neurological deficit.”[[1]](#footnote-1)
     2. “The MRI showing pars defect at L5 bilaterally should be pre-existing condition which might be asymptomatic or symptomatic intermittently.”[[2]](#footnote-2)
     3. “The MRI showing L4-5 disc desiccation, narrowing and shallow disc protrusion with annular tear most probably were pre-existing degenerative changes, which could be symptomatic intermittently or asymptomatic before the fall from ladder.”[[3]](#footnote-3)
     4. “If indeed he did not have prior low back pain before then the fall from the ladder could be said to have triggered the symptoms of the degenerative changes.”[[4]](#footnote-4)
     5. “Physical examination showed inappropriate features such as diffused tenderness of the whole low back, strongly positive Waddell’s simulation tests, inconsistency between the supine straight leg raising test and the flip test. There is no objective neurological deficit. There are residual abrasions scars at the left knee some old and one related to this injury.”[[5]](#footnote-5)
     6. “His condition had long reached maximal medical improvement. No further treatment is required.”[[6]](#footnote-6)
     7. “The prognosis is good from the contusion back injury. But he will have recurrent intermittent low back pain in relation to the pre-existing degenerative changes and the spondylolysis of the L5.”[[7]](#footnote-7)
     8. “With the degenerative lumbar spine as shown on the MRI and the plain x-ray examination, in the absence of the fall from the ladder, there is a strong possibility that either as a natural progression of the degenerative process or some other events in his life, the degeneration will become symptomatic as his presentation at this examination.”[[8]](#footnote-8)
     9. “He is independent with his activities of daily living. He is able to return to work as property repair and maintenance worker doing the jobs he described[[9]](#footnote-9). With reference to the USA Social Security Ruling on Work Restriction, his degenerated L4-5 disc and spondylosis of the L5, he is able to do occasional lifting of 50 lbs and frequent lifting of 25 lbs. He is able to climb ladders. He is able to go back to his sports.”[[10]](#footnote-10)
     10. “There is 5% whole person impairment. 4% is attributable to the alleged injury and the pre-existing degeneration is apportioned at 1%. The loss of earning capacity in relation to the alleged injury is 4%.”[[11]](#footnote-11)
     11. “He had adequate SL. Further SL is not warranted.”[[12]](#footnote-12)
2. The plaintiff was then examined and assessed by Dr Kong Kam Fu James (his own expert) together with Dr Chun on 19 June 2018. According to the joint expert report dated 9 August 2018 (**“the Joint Expert Report”**), Dr Chun opined, among other things, that:
   * 1. “The diagnoses for the said injury of 8/10/2015 should be contusion of left knee with superficial abrasion upon previous abrasion scar and possible minor contusion and sprain of the low back.”[[13]](#footnote-13)
     2. “At this examination Mr. Tang complained of continuous nonstop low back pain is inappropriate in the absence of cancer or injection. Any pain at the low back in relation to the spondylolysis/degenerative changes should be of mechanical in nature, namely, absence of rest pain but being triggered by factors such as movement, loading, exertion. His complaints of calf cramps, left posterior heel pain, arm pain, mid back pain and right knee pain should be totally unrelated to the alleged injury of 8/10/2015.”[[14]](#footnote-14)
     3. “On physical examination the widespread tenderness of the back from mid-thoracic down to coccyx is not consistent with the initially documented tenderness and such widespread tenderness is inappropriate. There is no nerve root tension sign, the distraction test and the Waddell’s simulation tests are positive…”[[15]](#footnote-15)
     4. “In short he had grossly exaggerated and expanded his symptoms and disability at this examination. His condition had long reached maximal medical improvement. No further treatment is required or will be effective in dealing with symptoms and signs that are exaggerated and inappropriate.”[[16]](#footnote-16)
     5. “…there is 5% whole person impairment which should be pre-existing. I apportion 3% whole person impairment to the fall on 8/10/2015 in triggering/aggravating the pre-existing condition. Likewise the loss of earning capacity for the parties’ reference is 3%.”[[17]](#footnote-17)
3. On the other hand, Dr Kong opined, among other things, that:
   * 1. “From review of medical records and documents, the medical diagnoses of Mr. Tang are:
        + 1. Left knee contusion; and
          2. Soft tissue back contusion.

He has pre-existing conditions of:

(i) Bilateral L5 pars defect;

(ii) Minimal lumbar spondylosis;

(iii) Mild PID L4/5 with annulus tear.

His pre-existing conditions may or may not be symptomatic. They are not related to the subject injury.

Mr. Tang is relatively young at age 30. He is asymptomatic before the subject injury. The subject accident has likely aggravated his pre-existing conditions, causing an increase in soft tissue residue of back pain and stiffness.”[[18]](#footnote-18)

* + 1. “The subject injury occurred more than 2.5 years ago. He complained of residual soft tissue back pain and bilateral thighs pulling sensation. Physical examination revealed that tenderness over midline and bilateral paralumbar muscles. Range of motion of lumbar spine was satisfactory. There was no neurological deficit. Waddell’s signs score 3/5, which suggest psychosocial factors may play a role in the aetiology of his low back symptoms. They are also part of the body language signs that Mr. Tang tries to convey to the examiners that he still suffers from modest soft tissue residue back pain.

XRs of lumbar spine confirm presence of pre-existing bilateral pars defect, with disc spaces preserved and minimal pre-existing lumbar spondylosis.

From the medical point of view, Mr. Tang has attained a relative satisfactory recovery with modest soft tissue residue back pain, back stiffness and thigh pulling sensation.”[[19]](#footnote-19)

* + 1. From the medical point of view, with passage of time and further work training and rehabilitation, Mr. Tang should be able to resume his previous occupation as a mechanic and maintenance worker with modest degree of reasonable deduction of working efficiency and endurance because of his soft tissue residue back pain. He may experience mild back discomfort in full squatting and prolonged standing and walking.”[[20]](#footnote-20)
    2. “For the subject injury, Dr Kong suggests 3-5% whole person impairment and 3-5% loss of earning capacity.”[[21]](#footnote-21)
    3. “Mr. Tang received lengthy courses of physiotherapy and occupational therapy for rehabilitation. He also sought treatments from a number of private orthopaedic surgeons as well as bone setters for his residual back pain. From the medical point of view, the intermittent sick leaves granted by his treating doctors up to 14.01.2018 are within reasonable limits.”[[22]](#footnote-22)

1. On prognosis, Dr Chun opined that even in the absence of the accident on 8 October 2015, there is a strong possibility that the plaintiff would have mechanical type of low back pain at any time in any event. Dr Kong did not say that he disagreed. He commented that the plaintiff’s medical prognosis should be good.[[23]](#footnote-23)
2. It can be seen that as far as the aforesaid quoted opinions are concerned, the experts are more or less in agreement: the plaintiff suffered from left knee contusion and soft tissue back contusion in the accident. He had pre-existing conditions which were asymptomatic and which became symptomatic by reason of the accident. His prognosis is good.
3. The only material difference between the experts is on the issue of whether the plaintiff had exaggerated his symptoms. Dr Chun opined that the plaintiff did grossly exaggerate his symptoms and disability. On the other hand, while Dr Kong recognised that there were positive Waddell’s signs, he took the view that it suggests that psychosocial factors may play a role in the aetiology of the plaintiff’s low back problems, and that these are body language signs that the plaintiff was trying to convey to the experts that he still suffered from modest soft tissue residue back pain.
4. With respect, I cannot accept Dr Kong’s opinion that there is any “psychosocial factor” as such in the plaintiff’s case. If there is really such a factor, Dr Kong would have advised the plaintiff to be examined further by, for example, a psychologist. However, he did not do so. To the contrary, he opined that “examination by other specialist is not required”[[24]](#footnote-24).
5. Mr Lam very boldly suggested that since Dr Kong did not state that he did not have the expertise to comment, then it should be implied that his opinion on “psychosocial factor” must be something which is given within his expertise. I reject this argument. Dr Kong clearly signed off the Joint Expert Report as a specialist in Orthopaedics & Traumatology only.
6. Hence, there is no admissible expert evidence in support of the alleged “psychosocial factor”. Dr Kong’s opinion in this regard does not count, because he is not an expert in this area at all.
7. Further, even Dr Kong himself accepted that the plaintiff had a relatively satisfactory recovery with, among other things, only modest soft tissue residue back pain. This does not support the plaintiff’s alleged non-stop low back pain.
8. It is my finding that the plaintiff did grossly exaggerate his symptoms and disability. Apart from Dr Chun’s expert evidence quoted above, there are also other pieces of evidence which support this finding and the finding that the plaintiff has tried to give an impression that he is in a pain which is much more severe than the real situation:
   * 1. When the plaintiff described the accident in paragraph 9 of his witness statement, he stated that his “頭部及膝蓋撞倒牆壁，然後被牆身彈回”, however, during cross-examination, he admitted that his head did not come into contact with the wall at all. He said he was wearing a cap at the time and it was only the bill of the cap which “touched” the wall.
     2. In his witness statement, the plaintiff referred to an incident which happened in around March/April 2017 to show that he was unable to carry objects of some weight. He stated that on that occasion, he assisted his mother to buy a chair (which weighed around 6.5 kg) from the Shop IKEA. He said as he wanted to test his own ability in lifting heavy objects, he tried to carry the chair all the way from the shop to his mother’s home. However, he found that it was very difficult to do so, and as a result, he did not dare carry heavy objects again since then. At the trial, he clarified that that trip to IKEA was a planned one, and that he went there with his mother for the specific purpose of buying a chair. He also stated that his mother was living in an old Chinese-style building (唐樓) at the time and there was no lift installed in the building. Yet, upon this court’s enquiry, he confirmed that he did not assess his ability to carry before purchasing the chair at all. This conduct on the part of the plaintiff is inconsistent with his alleged severe and persistent pain. As he said his mother was unable to carry the chair, he would be the only person who could carry the chair back to his mother’s home without taking advantage of the delivery service of IKEA. He should have known that his mother’s home was without lift service and he had to walk up the staircase with the chair. If he was really always under great pain as he alleged, it would be most surprising that he did not think about and assess his ability to carry the chair himself before he made the purchase. It must be borne in mind that at the material time, he had been allegedly troubled by the pain for over a year. If he was telling the truth that he had had such great pain for such a long time non-stop, it is beyond imagination that he would not assess his own ability to carry the chair himself before deciding to do what he did. I am of the view that it shows that he did not have any pain that troubled him at the material time.
     3. According to Dr Tio’s report in relation to the consultation session which the plaintiff attended on 27 January 2016, Dr Tio recorded, among other things, “overall improvement of 50%”. The plaintiff disagreed in court and stated that the figure of “50%” did not come from him and that that was an assessment made by Dr Tio. I agree with Ms Kwok that the percentage must be something which the plaintiff told the doctor in the consultation. It should be noted that the only complaint of the plaintiff was pain which is subjective. I do not believe that the doctor could assess the extent of relief of pain as such. In my view, the reason why the plaintiff denied that he had given such a figure is that he would like to “neutralise” his own assessment of the extent of recovery at the material time.
     4. The same reasoning applies to the plaintiff’s evidence that he could not recall whether he had told his physiotherapist on 15 February 2016 that he had had an improvement of 70% even though it was recorded in the Rehabilitation Follow-up Report made by Canadian Asian Neck & Back Institute (**“CANBI”**). I should add here that I do not accept Mr Lam’s argument that it does not serve much purpose in cross-examining the plaintiff in relation to medical reports and documents which were made more than 5 years ago. While I agree that it is not a “memory test” (as Mr Lam put it) as such, I have no doubt that the court can and should take the plaintiff’s answers in cross-examination into account and assess how truthful he is.
     5. An even more obvious example is in relation to the medical consultation which took place on 8 March 2016. In Dr Tio’s report, he recorded “overall improvement of 70-80%”. Again, in cross-examination, the plaintiff disagreed and claimed that he had never given such a figure to Dr Tio on that occasion. As I mentioned above, pain is subjective, and I do not think Dr Tio could put down such a figure himself. More importantly, this figure “70-80%” was as same as that given in CANBI’s report dated 4 March 2016 (i.e. 4 days earlier) which stated “Overall, he **reported** an improvement of 70-80%” (emphasis added). I hold the view that it was not a coincidence that the same range of recovery was given in those 2 documents, and it must have been the plaintiff’s own assessment given at the material time. Indeed, as high-lighted in the quotation, according to the said CANBI’s report, it was the plaintiff who reported his extent of recovery. In my view, during cross-examination, the plaintiff was trying to cover up what he expressed to be the extent of his recovery at the material time.
     6. I accept Ms Kwok’s analysis that the plaintiff must have exaggerated his symptoms during the joint examination by the experts because while he could walk on tip toes, walk on heels and stand steadily unilaterally when he was examined by Dr Chun on 20 May 2016, he was unable to do the same 2 years later on 19 June 2018 when he attended the joint examination. Given the plaintiff’s confirmation that he had not further injured himself during those 2 years, there is no reason why his performance had become worse during the joint examination. When the comparison of his performance was put to him, the plaintiff did not give any explanation. Neither was there any expert evidence which could explain why the plaintiff’s condition would become worse.
     7. It can be seen from surveillance evidence gathered on 6 January 2016 that the plaintiff could walk up the stairs smoothly, naturally and without any difficulty. He could even skip steps (walking up 2 steps at a time) and ran up the stairs.
     8. It can also be seen from surveillance evidence taken on 20 May 2016 that the plaintiff could walk up the stairs smoothly, naturally and without any difficulty. Again, he could skip steps (walking up 2 steps at a time). He could bend down and pick up an umbrella quickly and normally. He could also walk down a set of stairs without any sign of having any difficulty.
     9. The video clips shown in court are inconsistent with the plaintiff’s allegation that he was having pain all the time. I reject the plaintiff’s evidence that he was at the material time only testing himself. In my view, the giving of such evidence was only the plaintiff’s desperate attempt to explain away the inconsistencies discovered.
     10. Mr Lam said that the plaintiff had tried to return to work in October 2015 and in March 2016, and submitted that this shows that the plaintiff was not the sort of person who would exaggerate his symptoms. While I accept that the plaintiff did try to go back to work as alleged, I do not accept that he could not go back to his pre-accident job after 20 May 2016 (see further below). In my view, the court should take into account as much evidence into account when deciding on whether the plaintiff had exaggerated his symptoms and should not rely on just one or two incidents which can be misleading.
9. Mr Lam emphasized time and again that there is no evidence that the plaintiff had exaggerated his symptoms while he was attending consultations in front of his treating doctors. That may be so. However, I do not think I should disregard the possibility that the plaintiff had so exaggerated his symptoms when he saw the treating doctors. This is an approach expressly permitted. In *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210 it was held by Le Pichon JA in paragraph 17 that:

“[…] Mr Lam [for the plaintiff] also prayed in aid the fact that the doctors in issuing the certificates are subject to the code of conduct governing the medical profession and it has to be assumed that when issuing the certificates, the treating doctors were acting in accordance with the requisite standard required of them.  There are difficulties with the submission.  First, it is the patient who makes the request for a certificate from the doctor.  Second, a doctor treating his patient may, consistently with the code of practice, issue the certificate without carrying out any detailed examination since such an examination is not always practicable or necessary.  What is quite clear in the present case is that the plaintiff has been found to have grossly exaggerated his complaints.  Although the exaggeration took place during the joint examination, plainly it would be open to the judge not to disregard the possibility of the plaintiff also having exaggerated his symptoms when he saw the treating doctors responsible for issuing the sick leave certificates.”

1. To conclude, I accept Dr Chun’s opinion that the plaintiff had exaggerated his symptoms and injuries. While I would accept that the plaintiff is still suffering from residual back pain, such pain is only modest and is mechanical in nature. In other words, he is not suffering from such pain all the time as alleged.

*PRE-TRIAL LOSS OF EARNINGS AND MPF*

*Nature of pre-accident job*

1. Mr Lam has relied on the report of CANBI dated 4 January 2016 in support of the plaintiff’s case that his pre-accident job required him to, among other things, lift and carry heavy objects frequently, and that he is now unable to do this anymore by reason of his low back pain. With respect, such reliance is misplaced, because it is clear that the information on his pre-accident job demand as stated in the CANBI report came from the plaintiff himself. As a result, it is self-serving.
2. In relation to the job demand of the plaintiff’s pre-accident job, I prefer the evidence given by the defendant’s witness, Mr. Law Yiu Hung (the Assistant Director (Technical) of the defendant), who told the court during cross-examination that the plaintiff’s job was not mainly about repairing air-conditioner as alleged. This was just one of the job duties. Rather, the plaintiff main job was painting. He also had to repair doors, windows and pipes. He was also required to replace fluorescent tubes.

*Sick leave period*

1. Mr Lam for the plaintiff had referred this court to a number of authorities[[25]](#footnote-25) and submitted that there are “a number of considerations or principles adopted by the Court”. With greatest respect, rulings were made in those cases on the facts and I do not think any legal principles had been laid down therein as such.
2. It is now trite that the applicable legal principles have been set out in *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* (*supra*):

“Since the plaintiff’s pre-trial loss of earnings is ascertained by reference to the period during which the plaintiff was prevented by the injuries sustained from returning to work, what has to be ascertained and identified is the length of that period. In my view, that is an exercise that would not require evidence to suggest or imply that those who had granted sick leave to the plaintiff did so improperly. Logically, if the finding is that the plaintiff could have gone back to work after three months, that is the period that is relevant to the assessment and award of pre-trial loss of earnings and no other. Sick leave certificates are no more than a piece of evidence that has to be evaluated in the light of all the available evidence including medical evidence before the court. As Rogers V-P observed in: *Choy Wai Chung v Chun Wo Construction & Engineering Co Ltd* (unrep., CACV 172/2004, [2005] HKEC 1077) at para.9, the judge cannot be bound by the mere issue of sick leave certificates: the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiff.” (at paragraph 18)

1. With the above in mind, I turn to the materials placed before this court.
2. In Dr Chun’s Report (which was done after an examination conducted on 20 May 2016), Dr Chun opined that the plaintiff “had adequate SL”, and “further SL is not warranted”[[26]](#footnote-26).
3. In the Joint Expert Report, Dr Chun opined that “reasonable sick leave should be up to 9/3/2016”[[27]](#footnote-27).
4. On the other hand, Dr Kong opined that: “Mr. Tang received lengthy courses of physiotherapy and occupational therapy for rehabilitation. He also sought treatments from a number of private orthopaedic surgeons as well as bone setters for his residual back pain. From the medical point of view, the intermittent sick leaves granted by his treating doctors up to 14.01.2018 are within reasonable limits”[[28]](#footnote-28).
5. On the basis of Dr Kong’s opinion, Mr Lam submitted that the plaintiff should be awarded damages for loss of earnings “covering the full sick leave period plus a few more months for him to look for another job”[[29]](#footnote-29). In his opening submissions, he stated that 6 months should be allowed for the plaintiff to have further recovery after the sick leave expired in January 2019.[[30]](#footnote-30)
6. When Mr Lam was making his opening submissions, this court had enquired with him as to whether his fall-back position is that sick leave should be granted up to 20 May 2016 pursuant to Dr Chun’s Report. The enquiry was raised because Mr Lam, in his oral opening submissions, had laid emphasis on Dr Chun’s Report in this aspect. He even belatedly requested to have an instruction letter issued by United Adjusters (HK) Ltd dated 4 May 2016 inserted into the trial bundle. In reply, Mr Lam clearly gave the court a positive answer there and then.[[31]](#footnote-31) However, during the stage of closing submissions, he denied ever putting forward such a fall-back position as such, and he would withdraw from such a position even if he had really adopted such a position. I do not think it matters at all whether Mr Lam should be allowed to withdraw from such a position or not, because, as accepted by Mr Lam, the court can come to its decision on sick leave as it thinks fit anyway.
7. On the other hand, Ms Kwok, by reason of Dr Chun’s opinion contained in the Joint Expert Report, submitted that the plaintiff’s loss of pre-trial earnings should only be calculated up to 9 March 2016.
8. In my judgment, sick leave should be granted up to 20 May 2016. Matters which I have taken into account are set out below.
9. **Firstly**, it is evident (from the various medical reports and physiotherapy reports and the plaintiff’s oral evidence) that the plaintiff had all along been recovering gradually:
   * + 1. On 30 December 2015, after 2 physiotherapy sessions at PWH, the plaintiff’s back pain had reduced;
       2. On 11 January 2016, the plaintiff’s range of movement had become full;
       3. On 27 January 2016, there was an overall improvement of 50%;
       4. On 2 February 2016, there was reduced back pain but pain would be increased if the plaintiff sat for a long time;
       5. On 15 February 2016, there was reduced back pain and there was an overall improvement of 70%;
       6. On 4 March 2016, there was reduced back pain, and there was an improvement of 70-80%;
       7. On 8 March 2016, there was an overall improvement of 70-80%.
10. I have not lost sight of the fact that the extent of recovery had become more fluctuating since April 2016. However, I would not give much weight to those figures because those figures cannot be explained by common sense. For example, while the records stated that the plaintiff had an improvement of 60-70% on 15 April 2016, the figure went down to 30% 5 days later on 20 April 2016. The plaintiff could not give any reasonable explanation, apart from referring to the fact that he was attending lectures which were 3 hours’ long at the material time. However, when he was cross-examined further on this, he admitted that he had all along been attending lectures. Hence, attending such lectures cannot be the reason for the alleged deterioration of his condition.
11. **Secondly**, while it was initially opined by Dr Tio on 27 January 2016 and 16 February 2016 that the plaintiff could resume light duties, Dr Tio recommended on 8 March 2016 that the plaintiff was “fit for pre-injury duty starting from 10/3/2016”.
12. Before I say more on Dr Tio’s opinion, I should first of all set out the middle part of his template Consultation Form so as to make my reasoning easier to understand. It looks like this:

|  |  |
| --- | --- |
| Yes No | Fit for pre-injury duty starting from \_\_\_\_\_\_\_\_\_ |
| Yes No | Fit for light duties from \_\_\_\_\_\_\_\_ to \_\_\_\_\_\_\_\_\_ |
| Light duty nature | \_\_ hours of work per day, \_\_ days of work per week.  Lifting up to \_\_ kg, Walking up to \_\_ hours,  Sitting up to \_\_ hours, Standing up to \_\_ hours,  Travelling up to \_\_ hours, Stair climbing up to \_\_ flights  Working \_\_ hours/day, \_\_ days/week  aa Advise to change job |

1. On the Consultation Form dated 27 January 2016, Dr Tio did not tick the box for “Fit for pre-injury duty starting from \_\_\_\_\_\_\_”. Instead, he ticked the box for the row “Fit for light duties from \_\_\_\_\_\_ to \_\_\_\_\_\_”, and filled in the first blank with “feb 2016”. Dr Tio then filled in some of the blanks in the row “Light duty nature” as follows: “Lifting up to 10 kg, Walking up to 1 hours, Standing up to 1 hours, Travelling up to 1 hours, Stair climbing up to 2 flights”. It is noted that there is no box for Dr Tio to tick for this row. I therefore assume that this row would be applicable if Dr Tio has ticked the “Fit for light duties” box.
2. On the Consultation Form dated 16 February 2016, Dr Tio’s opinion on the plaintiff’s resumption of job duty remained the same, save that the blank after the words “Fit for light duties from” had been replaced by “March 2016”.
3. On the Consultation Form dated 8 March 2016, Dr Tio had ticked the box in the row “Fit for pre-injury duty starting from \_\_\_\_\_\_\_\_” and filled in the blank that followed with “10/3/2016”. There was no longer any tick in the “Yes” box in the row “Fit for light duties from\_\_\_\_\_\_\_\_ to \_\_\_\_\_\_\_\_”, and the blanks which followed (on the date) were not filled in. However, the figures in the blanks appearing in the row “Light duty nature” remained. In other words, the “light duty nature” was still stated in this form to be “Lifting up to 10 kg, Walking up to 1 hours, Standing up to 1 hours, Travelling up to 1 hours, Stair climbing up to 2 flights”.
4. Mr Lam submitted that Dr Tio recommended on 8 March 2016 that the plaintiff was only fit for light duties. To be fair to Mr Lam, both experts also had the same interpretation of Dr Tio’s opinion.[[32]](#footnote-32) However, with respect to Mr Lam and the experts, I do not agree with their interpretation. I think Mr Lam and the experts have probably been confused by Dr Tio because Dr Tio had not deleted the figures in the “Light duty nature” row. However, it is clear that in his Consultation Form dated 8 March 2016, Dr Tio no longer selected the option “Fit for light duties”. In my view, his intention is clear: he had updated his opinion in that the plaintiff should be fit for pre-injury duty rather than light duties as from 10 March 2016. I think it was more probable than not that Dr Tio had only inadvertently left the figures in the row of “light duty nature” behind. As I stated above, this row would be applicable if Dr Tio has ticked the “Fit for light duties” box. By the same token, this row would not be applicable if the “Fit for light duties” box was not ticked. When I pointed this out to Mr Lam, he also accepted that it was possible that Dr Tio had forgotten to delete the aforesaid figures in the row of “light duty nature”.
5. Furthermore, I do not accept the plaintiff’s argument that Dr Tio had made his recommendation on 8 March 2016 only because the plaintiff had expressed his wish to return to work at the consultation session. I have no doubt that Dr Tio had exercised his independent judgement as to whether the plaintiff was suitable to resume his pre-accident job. Taking into account the plaintiff’s recovery progress referred to above, I am not surprised that Dr Tio took the view that the plaintiff could go back to his pre-injury work. I should further add that if Dr Tio really based his recommendation on the plaintiff’s wish to return to work, then he would not have maintained his recommendation on 13 April 2016 and 4 May 2016 after the plaintiff had allegedly tried to do the pre-accident work but in vain.
6. **Thirdly**, I would give due weight to Dr Chun’s assessment which was done on 20 May 2016 because at that time he did not only have the chance to read the plaintiff’s medical documents but he also got the opportunity to assess the plaintiff himself.
7. As aforesaid, in his report, Dr Chun opined that the plaintiff had had adequate sick leave, and further sick leave was not warranted. I bear in mind that this examination on 20 May 2016 was conducted for a number of specific purposes set out in a letter issued by United Adjusters (HK) Ltd dated 4 May 2016 to Dr Chun, and one of those purposes was for Dr Chun to give his comments on the reasonable sick leave period in light of the plaintiff’s condition. Hence, Dr Chun would not have given his comment on sick leave lightly.
8. This brings me to the **fourth** point: Dr Chun’s opinion as expressed in the Joint Expert Report, in which he stated that reasonable sick leave should only be up to 9 March 2016 because further sick leave was not warranted. This opinion is different from that given in his earlier report. However, Dr Chun did not explain why he considered it appropriate to revise his opinion.
9. I do not accept Ms Kwok’s argument that when Dr Chun gave his opinion on sick leave in May 2016, he had overlooked the bottom half of Dr Tio’s consultation notes dated 8 March 2016. This is pure speculation. If that was really the case, I would expect Dr Chun to mention it specifically in the Joint Expert Report when he revised his opinion on sick leave.
10. **Fifthly**, I would not accept Dr Kong’s opinion on sick leave because the basis of his opinion was that the plaintiff had received lengthy physiotherapy and occupational treatment, as well as treatment from private orthopaedic surgeons and bone setters. Apparently, such an opinion was given on the assumption that the plaintiff’s complaints of persistent pain were genuine, in respect of which I have already rejected.
11. Accordingly, the plaintiff’s pre-trial loss would be assessed on the basis that the reasonable and appropriate sick leave period should be from the date of the accident (8 October 2015) up to 20 May 2016. No further period should be allowed for the plaintiff to look for a job as advocated by Mr Lam, because the plaintiff could have resumed his job with the defendant at any time back in May 2016.
12. Parties agreed that, when calculating the plaintiff’s pre-trial loss of earning, the court should adopt the monthly salary of $11,000 for 2015 and $12,250 for 2016.
13. Damages under this head should therefore be assessed at:

$11,000 x 85/365 x 12 months x 1.05 + $12,250 x 141/366 x 12 months x 1.05 = **$91,739.42**

*MEDICAL EXPENSES*

1. The plaintiff claims $141,003.40 under this head.
2. I accept Dr Chun’s opinion (as expressed in Dr Chun’s Report) that the plaintiff should not need further treatment beyond 20 May 2016[[33]](#footnote-33).
3. I would therefore only allow **$3,993.40**[[34]](#footnote-34) as damages under this head.

*TRANSPORTATION EXPENSES*

1. The plaintiff claims $6,000 under this head.
2. According to the plaintiff’s evidence (as per his witness statement dated 26 September 2019), he had normally taken MTR, buses or vans to attend medical consultations, and he had only travelled by taxi on 1 or 2 occasions.
3. It can be seen from Schedule 3 (medical attendance) that he had attended 413 consultation sessions up to 26 September 2019.
4. In my view, the plaintiff would not need treatment beyond 20 May 2016. According to the said Schedule 3, the plaintiff would only be required to attend around 40 consultation sessions (in other words, less than 10% of the number of medical attendance claimed).
5. I will award the amount of **$600** (10% of the claimed amount) under this head.

*EXPENSES FOR TONIC FOOD*

1. The plaintiff claims $10,000 for tonic food.
2. In *King Light Industrial Ltd. v. Lo Wai Keung* [1994] 3 HKC 54, the Court of Appeal found that there was insufficient evidence to prove that the expenditure incurred on tonic food had been for the purpose of medical treatment of the plaintiff therein. However, the Court considered it proper to follow the case of *Yu Ki v. Chin Kit Lam* [1981] HKLR 419 and allow a nominal sum under this head where relatives of the plaintiff had spent money on food which the injured person or the relatives reasonably believed to be helpful in the recovery process even though there was no evidence to support the advisability or suitability of the food.
3. The same approach had been adopted in *To Wei Kei v. Vickcore Engineering Ltd. and Another* (HCPI 290/2000, unreported, 11 November 2002), in which a sum of $10,000 was awarded where the deceased suffered from prolapsed C3/C4 disc with residual spinal cord compression and had been hospitalised for 3 months.
4. In the present case, there is no proof that any tonic food had been taken upon medical advice. I would follow the aforesaid approach and allow a nominal sum under this head. I would adopt a figure of **$3,000**.

*LOSS OF OPPORTUNITY*

1. This claim was abandoned by the plaintiff at the trial.

*LOSS OF EARNING CAPACITY*

1. In *Moeliker v. A Reyrolle and Co Ltd* [1977] 1 WLR 132 at 140A – B (which was approved in *Kings Light Industrial Limited v Lo Wai Keung* [1994] 3 HKC 54 at 62 B – G), it was held that:

“This head of damage generally only arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.”

1. In *Moeliker*, Browne L.J. further explained that:

“I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages. 1. Is there a ‘substantial’ or ‘real’ risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialise, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff’s chances of getting a job at all, or an equally well paid job.” (see *Moeliker v. Reyrolle* [1977] 1 WLR 132 at 142A – C)

1. The plaintiff will have residual intermittent pain even though such pain should be modest.
2. The plaintiff is currently only 32 years old. It is expected that he will still have a long working life ahead of him.
3. Parties agreed that the damages under this head should be assessed by using the base figure of $20,000. Mr Lam suggested that **$150,000** (which is around 7.5 months’ salary) should be awarded. This is a reasonable amount, and I will therefore award this sum accordingly.

*PSLA*

1. Mr Lam has referred this court to *Ali Shoukat v Hang Seng Bank Limited* (HCPI 3/2003, unreported, 23 June 2004) and *Altaf Ahmed v Innovative Network Engineering Company Limited & Another* (HCPI 237/2008, unreported, 21 December 2010) and submitted that the appropriate amount for the damages for PSLA is $400,000.
2. On the other hand, Ms Kwok submitted that the court should take into account the authorities of *Chu Sio Iong v Cheung Ho Yin & Another* (DCPI 580/2011, unreported, 7 May 2013), *Hussain Basharat v 曾慶裕 & Another* (DCPI 508/2012, unreported, 1 June 2015), *Li Cheuk Lam v Cheung Sun Tai & Others* (HCPI 1102/2015, unreported, 13 October 2017) and *Cheung Sau Lin v Tsui Wah Efford Management Limited* [2019] HKCFI 1960 and submitted that only $100,000 should be awarded as damages for PSLA.
3. I have already set out my findings on the plaintiff’s injuries, treatments and medical conditions above and I am not going to repeat them here.
4. In my view, subject to my ruling below on discount, the appropriate amount of damages is **$250,000**.

*PRE-EXISTING CONDITION*

1. MRI done on 23 April 2016 revealed that the plaintiff had the following pre-existing conditions:
   * 1. Bilateral L5 pars defect;
     2. Minimal lumbar spondylosis;
     3. Mild PID L4/5 with annulus tear.
2. The plaintiff was only around 27 years old at the time of the accident. I accept that the pre-existing conditions were asymptomatic before the accident.
3. Dr Chun stated that “for the pre-existing degeneration of the lumber spine, there is 5% whole person impairment which should be pre-existing”[[35]](#footnote-35). He apportioned 3% whole person impairment to the accident on 8 October 2015 in triggering or aggravating the pre-existing condition. The figure of 3% was smaller than that given by him in his report dated 15 July 2016 in which he said 4% out of the total of 5% was attributable to the injury.[[36]](#footnote-36)
4. Dr Chun further opined in the Joint Expert Report that, in the absence of the accident in question, there is a strong possibility that the plaintiff would/will have mechanical type of low back pain at any time in any event:

“With the pre-existing degenerative changes in the lumber spine, with the spondylolysis, with the common occurrence of low back pain without traumatic incidence in the general population being very common, in the absence of the 8/10/2015 injury, there is a strong possibility that he would/will have mechanical type of low back pain at any time in any event.”[[37]](#footnote-37)

1. Dr Kong did not express his view on the above matters in the Joint Expert Report.
2. Mr Lam argued that Dr Chun has not put forward any “literature” in support of his opinion on the possibility of the degeneration turning symptomatic. That may be so. However, this is a matter which is within the expertise of Dr Chun, who had to give his opinion on the basis of his experience as well as the plaintiff’s condition. More importantly, his opinion was not queried by Dr Kong, who would have expressed his own view on the matter if he disagreed with Dr Chun.
3. Mr Lam went on to submit that Dr Chun’s opinion does not sit well with that expressed in Dr Chun’s Report in which he stated that:

“There are many MRI studies [Dr Chun quoted the authorities relied on] on asymptomatic volunteers, showing features such as disc dehydration, disc bulging, disc protrusion, annular tear in a high percentage of these volunteers but they are without low back pain at all. Further, the prevalence of degenerative changes, bulges, and herniations increases with advancing age but not necessarily presented with symptoms.”[[38]](#footnote-38)

1. I do not understand how it can be said that Dr Chun was contradicting himself. In the quoted paragraph, he was explaining that degenerations could well be asymptomatic as in the case of the plaintiff. However, that does not mean that the degenerations will be asymptomatic forever. Whether the pre-existing condition is likely to lead to disability and loss in the absence of the injury concerned would of course have to be assessed on a case-by-case basis. Furthermore, I note that, again, Dr Kong did not express any opinion contrary to that held by Dr Chun.
2. I would therefore accept Dr Chun’s opinion.
3. In the case of *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958, it was held that:

“Where a pre-existing condition is likely to lead to disability and loss in the absence of the injury for which the plaintiff is entitled to recover, the usual method of assessing the recoverable loss is to take account of the risks by an appropriate assessment of general damages. The pre-trial loss of earnings may also be reduced if the risks during the years concerned are sufficiently high...” (at 965E – F)

1. Mr Lam drew the attention of this court to the case of *Iau Kau Ih v Wan Kei Geotechnical Engineering Company Limited & Others* [2002] 4 HKC 76 and submitted that in the absence of any evidence as to whether the plaintiff’s pre-existing condition would, in the absence of the accident, have given rise to the **same** disability now suffered by the plaintiff, and as to the number of years that the accident had accelerated the appearance of the symptoms, the damages which the plaintiff is entitled should not be discounted. He relied on paragraph 22 of the Judgment in *Iau Kau Ih* as follows:

“There is, in the present case, no evidence before me as to whether the plaintiff’s pre-existing condition would, in the absence of the accident, have given rise to the same disability now suffered by the plaintiff. I cannot speculate in the absence of such evidence, and accordingly do not find the case of *Chan Kam Hoi* to assist the defendants in their attempt to reduce the damages on account of the plaintiff’s pre-existing condition.”

1. After the hearing for final submissions, this court discovered that Mr Lam was the junior counsel acting for the plaintiff in *Li Sau Keung v Maxcredit Eengineering Limited & Another* (CACV 16/2003, unreported, 25 November 2003), in which case he, together with Mr Warren Chan SC, initially also relied on the case of *Iau Kau Ih*, but it seems that they had conceded at the hearing before the Court of Appeal that the approach in *Chan Kam Hoi* should be followed instead. In the Judgment of the Court of Appeal, it was stated that:

“Initially Mr Chan SC had invited this court to follow the approach of Deputy Judge B Yu SC in *Iau Kau Ih v Wan Kei Geotechnical Engineering Co Ltd & Ors* [2002] 4 HKC 76 at 82I that the tortfeasor must take the victim as he finds him.[[39]](#footnote-39) After considering *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958 to which his attention had been drawn, Mr Chan SC agreed that the approach set out in *Chan Kam Hoi* should be adopted. As explained in that case, the conventional approach is to make a deduction from the multiplier to take into account the risks associated with the plaintiff’s pre-existing condition...” (at paragraph 42)

1. It is important to note that the experts in the case of *Li Sau Keung* diverged on their opinions in relation to the plaintiff’s pre-existing condition. On one hand, the defendant’s expert opined that it was possible that the pre-existing degenerative spine might have remained in asymptomatic stage and the plaintiff therein would have been able to continue to work for a few more years, and that, judging from the degree of degeneration and his pre-injury job nature, it was more likely than not that had he not met both the accidents, back pain would have developed around the age of forty-five; on the other hand, the plaintiff’s expert disagreed, and opined that the prognosis of the plaintiff therein was too uncertain for any firm view to be formed as to the likely number of working years the plaintiff could reasonably expect to have. However, despite the disagreement, the trial judge did not make any finding on the conflicting medical expert evidence. In other words, the evidence that “back pain would have developed around the age of forty-five anyway even without the accidents” was not accepted by the trial judge. Two crucial points must be made here:
   * 1. Even in the case of *Li Sau Keung*, the expert evidence adduced was not the type of evidence allegedly required, namely, when the plaintiff’s pre-existing condition would, in the absence of the accident, have given rise to the **same disability** suffered by the plaintiff;
     2. Because the trial judge’s judgment was overturned for some other reason, the Court of Appeal had to assess the plaintiff’s loss of future earnings and decide on the reduction necessary to reflect the risks associated with the plaintiff’s pre-existing condition of degeneration. In the course of working out the appropriate multiplier, the court had not taken into account the plaintiff’s expert evidence referred to above at all (see paragraph 43 and 44 of the Judgment).
2. An argument similar to that made by Mr Lam had also been made before the Court of Appeal in *Liu Chun Kow Joe v Lee Sau Wing* (CACV 304/2007, unreported, 16 April 2008) and was rejected. It is adequate for me to quote Cheung JA’s Judgment as follows:

“37. Mr. Sakhrani’s (counsel for the plaintiff) argument against the apportionment is that **there was no evidence which could indicate when the preconditions would manifest themselves into disability and loss**. He referred to the evidence in *Chan Kam Hoi* which showed that the precondition would have affected the plaintiff’s working life from his mid-50’s and the medical evidence in *Cheung Fat Tim v. Wong Siu Ming and Another* (H. C. Action No. A5079 of 1991) which showed that the plaintiff could have been able, without the accident, used his diseased elbow relatively normally for another three to five years before the pain would become noticeable and drive him to seek treatment.

38. **It is true that there was no such evidence in the present case. However, I do not regard such evidence to be the pre-requisite for an apportionment.** Ultimately the issue has to be decided by the overall evidence that is available in a case. In this case the two orthopaedic specialists had stated that the degenerative back of the plaintiff was already symptomatic prior to the accident and that in the course of time is likely to deteriorate on its own right to cause symptoms even if the accident did not take place. By apportioning 70% of the plaintiff’s impairment to the pre-existing condition and 30% to the accident, the doctors clearly recognized the seriousness of the pre-accident condition. Dr. Singer likewise observed that ‘at least without the pre-existing back pain the likelihood of triggering of the Adjustment Disorder would have been much reduced say by 70%’ and that ‘his pre-existing psychiatric condition also partly caused his Adjustment Disorder’. In my view the Judge was clearly entitled to make an apportionment in this case in the light of such evidence.

39. Judges are not actuaries but their tasks frequently require them to make assessments of probabilities in quantitative terms based on available evidence. This is not done by way of a clinical, mathematical approach nor by intuition but in a way which more or less reflects the condition of the plaintiff based on the available evidence. In this case while a different judge may have given a different figure, I am not convinced that the Judge’s assessment that the plaintiff’s preconditions accounted for 60% of his impairment is so perverse that an appellate court should intervene. This is in the realm of a finding of fact. **In any event it is to be noted that the discount was only applied by the Judge to the PSLA and not to loss of wage or other items. Hence the question of when in the future the preconditions would begin to affect the plaintiff’s work and his earning would not arise.**” (emphasis added)

1. As will be seen below, given the relatively young age of the plaintiff at the time of the accident, I am of the view that, should there be any reduction, it should only be applicable to the damages for PSLA.
2. To be fair to the plaintiff, this court informed the parties in writing about the discovery of the above authorities and gave them (especially the plaintiff) a chance to address the court on those authorities.
3. In his further written submissions, Mr Lam argued that the Court of Appeal in *Li Sau Keung* had actually preferred the opinion of the defendant’s expert that it was more likely than not that had the plaintiff therein not met both the accidents, back pain would have developed around the age of forty-five. With greatest respect, this submission is totally without basis.
4. Mr Lam further attempted to distinguish the facts in *Liu Chun Kow Joe* from those of the present case, and submitted that the pre-existing condition of the plaintiff therein was already symptomatic before the accident. I do not think such a distinction is important for our purpose. What is important is the approach which has to be adopted by the court.
5. For reasons of the aforesaid, I reject Mr Lam’s argument.
6. Ms Kwok initially suggested that the discount should be applied across the board. However, she eventually accepted that that is not appropriate in the light of *Chan Kam Hoi*. Given the plaintiff’s young age, I take the view that the pre-trial loss of earnings should not be reduced, as I do not think the pre-existing degeneration would have affected the plaintiff at such an early stage without the accident. Hence, I hold that only damages for PSLA should be deducted by the discount.
7. As far as the percentage of the discount is concerned, Ms Kwok suggested 10%. I note that it was Dr Chun’s opinion (which Dr Kong did not disagree) that out of the 5% whole person impairment caused by the pre-existing degeneration of the lumber spine, 3% of which should be attributed to accident. For unknown reason, the percentage of impairment attributed to the accident was less than that stated in Dr Chun’s Report, in which he gave a figure of 4%. Even if Dr Chun’s Report is adopted in this aspect, the amount of reduction proposed by Ms Kwok is still a fair one, and I have no hesitation in accepting it.
8. The amount of damages for PSLA should therefore be assessed at **$225,000** ($250,000 x 90%).

*SUMMARY OF DAMAGES AWARDED*

1. In summary, the plaintiff shall be awarded the following damages:

|  |  |
| --- | --- |
| **Heads of damages** | **Amount** |
| PSLA ( after deducting 10% discount for pre-existing conditions) | $225,000.00 |
| Pre-trial loss of earnings and MPF | $91,739.42 |
| Loss of earning capacity | $150,000.00 |
| Medical expenses | $3,993.40 |
| Transportation expenses | $600.00 |
| Tonic food | $3,000.00 |
| Sub-total: | $474,332.82 |
| Less Employees’ Compensation | ($450,000.00) |
| Total: | $24,332.82 |

1. I make the following orders on interest:
   * 1. interest on special damages at half judgment rate from the date of the Accident up to the date of payment of employees’ compensation;
     2. interest on PSLA at 2% per annum from the date of service of the writ of summons up to the date of this Judgment.
2. For the avoidance of any doubt, no interest is awarded on damages for loss of earning capacity which is an award of damages in respect of future loss.

*COSTS*

1. I make a cost order *nisi* that the defendant shall bear the costs of the plaintiff (including all costs reserved, if any), with certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations. The above order *nisi* shall become absolute in the absence of application to vary (which shall be made by letter, if any) within 14 days hereof. Any application to vary the costs order *nisi* shall, with the consent of the parties[[40]](#footnote-40), be dealt with on papers.

( H. Au-Yeung )

District Judge

Mr Simon H. W. Lam, instructed by S. H. Chou & Co, for the plaintiff

Ms Vanessa Kwok, instructed by Zhong Lun Law Firm, for the defendant

1. Paragraph 59 of Dr Chun’s Report [↑](#footnote-ref-1)
2. Paragraph 60 of Dr Chun’s Report [↑](#footnote-ref-2)
3. Paragraph 65 of Dr Chun’s Report [↑](#footnote-ref-3)
4. Paragraph 68 of Dr Chun’s Report [↑](#footnote-ref-4)
5. Paragraph 70 of Dr Chun’s Report [↑](#footnote-ref-5)
6. Paragraph 71 of Dr Chun’s Report [↑](#footnote-ref-6)
7. Paragraph 72 of Dr Chun’s Report [↑](#footnote-ref-7)
8. Paragraph 73 of Dr Chun’s Report [↑](#footnote-ref-8)
9. It was recorded in paragraph 30 of Dr Chun’s Report that the plaintiff “had been working in property repair and maintenance technician job doing exterior and interior work…For the job he had to climb ladders, doing water work, ditch work, painting, electric work, installation work, changing of light bulbs, renovation of air conditioners.” [↑](#footnote-ref-9)
10. Paragraph 74 of Dr Chun’s Report [↑](#footnote-ref-10)
11. Paragraph 75 of Dr Chun’s Report [↑](#footnote-ref-11)
12. Paragraph 76 of Dr Chun’s Report [↑](#footnote-ref-12)
13. Paragraph 80 of the Joint Expert Report [↑](#footnote-ref-13)
14. Paragraph 85 of the Joint Expert Report [↑](#footnote-ref-14)
15. Paragraph 89 of the Joint Expert Report [↑](#footnote-ref-15)
16. Paragraph 90 of the Joint Expert Report [↑](#footnote-ref-16)
17. Paragraph 95 of the Joint Expert Report [↑](#footnote-ref-17)
18. Paragraph 84 of the Joint Expert Report [↑](#footnote-ref-18)
19. Paragraph 91 of the Joint Expert Report [↑](#footnote-ref-19)
20. Paragraph 96 of the Joint Expert Report [↑](#footnote-ref-20)
21. Paragraph 96 of the Joint Expert Report [↑](#footnote-ref-21)
22. Paragraph 98 of the Joint Expert Report [↑](#footnote-ref-22)
23. Paragraphs 92 and 93 of the Joint Expert Report [↑](#footnote-ref-23)
24. Paragraph 99 of the Joint Expert Report [↑](#footnote-ref-24)
25. *Wong Woon Hei v Dickson Construction Co Ltd & Another* (HCPI 521/2000, unreported, 3 July 2001), *Cheung Bing Kai v Tsui Kam Hung* (HCPI 116/2000, unreported, 11 April 2001), *Yu Pun Yuen v Ng Kwok Man trading as East Mountain Engineering Company & Others* (HCPI 293/2002, unreported, 9 May 2003) and *Tsang Chung Wan v Li Ming & Others* [1998] 2 HKLRD 354 [↑](#footnote-ref-25)
26. Paragraph 76 of Dr. Chun’s Report [↑](#footnote-ref-26)
27. Paragraph 97 of the Joint Expert Report [↑](#footnote-ref-27)
28. Paragraph 98 of the Joint Expert Report [↑](#footnote-ref-28)
29. Paragraph 119 of the plaintiff’s written final submissions [↑](#footnote-ref-29)
30. Paragraph 13 of the plaintiff’s opening submissions [↑](#footnote-ref-30)
31. According to the audio recording, when this court asked Mr Lam whether it was his fall-back position that reasonable sick leave should be granted up to 20 May 2016, he answered, “Yeah”. [↑](#footnote-ref-31)
32. Paragraph 71 of the Joint Expert Report reads: “Dr. Tio recommended light duty from 10/3/2016.” [↑](#footnote-ref-32)
33. Paragraph 71 of Dr Chun’s Report [↑](#footnote-ref-33)
34. Sum of items 1 – 41 of Schedule 2 (Medical Expenses in table form setting out the particulars) included in the trial bundle [↑](#footnote-ref-34)
35. Paragraph 95 of the Joint Expert Report [↑](#footnote-ref-35)
36. Paragraph 75 of Dr Chun’s Report [↑](#footnote-ref-36)
37. Paragraph 92 of the Joint Expert Report [↑](#footnote-ref-37)
38. Paragraph 67 of Dr Chun’s Report [↑](#footnote-ref-38)
39. The same argument is made by Mr Lam herein. At paragraph 63 of his final submissions, he stated: “Applying *Iau Kau Ih*, the Defendant is liable as ‘The tortfeasor must of course take the victim as he finds him.’ ” [↑](#footnote-ref-39)
40. Consent of the parties has been given at the trial [↑](#footnote-ref-40)