## DCPI 1054/2016

[2019] HKDC 125

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1054 OF 2016

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BETWEEN

LAM MEI WAN Plaintiff

and

NGAI KEUNG JAMES 1st Defendant

NEW WORLD FIRST BUS SERVICES 2nd Defendant

LIMITED

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Before: Deputy District Judge K C Hui in Court

Dates of Hearing: 5 and 6 December 2018

Date of Judgment: 1 February 2019

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JUDGMENT

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1. This is an assessment of damages in an action for personal injuries suffered by the plaintiff arising from a traffic accident happened on a public bus on 24 July 2013. By a Consent Order dated 10 August 2016, interlocutory judgment on liability was entered against the 1st and 2nd defendants, leaving damages to be assessed.

# *Background*

1. The plaintiff was 56 years old at the time of the traffic accident and 61 years old at the time of the trial. At the time of the accident, she was working as a janitor with SKH Lam Kau Mow Secondary School (the “School”).
2. On 24 July 2013 at around 7:41pm, the plaintiff was a passenger on board a public bus bearing registration number HB5648. There is no dispute that the said bus was owned by the 2nd defendant and driven by the 1st defendant as the employee and/or agent of the 2nd defendant. The 1st defendant stopped the bus near Lamppost No. 33149, eastbound on King’s Road, North Point for alighting passengers. At the time of the accident, the plaintiff was getting off the bus through the exit door. At this point, the 1st defendant started to drive off the bus, causing the plaintiff to loss balance. She fell off the bus to the ground and sustained lower back injuries (the “Accident”).
3. The plaintiff was then taken by ambulance to the Accident and Emergency Department of Ruttonjee Hospital for treatment. She was diagnosed to have tenderness at her coccyx, but no bruising or wound. Her lower limb power and sensation were found to be normal. She was given intramuscular analgesic and admitted to the Orthopaedic Department of Pamela Youde Nethersole Eastern Hospital (“PYH”) for further examination.
4. On examination in PYH, it was found that there was tenderness over the plaintiff’s coccyx. There was no neurological deficit. Radiograph showed fracture of the coccyx. The plaintiff was fit for discharge on 25 July 2013.
5. Medical records for the period between 25 July 2013 and 5 August 2016 in relation to the plaintiff’s medical consultations and treatments were produced to the Court.
6. The plaintiff was jointly examined on 7 March 2017 by Dr Tio Man Kwun, Peter (the plaintiff’s expert) and Dr Tsoi Chi Wah, Danny (the defendants’ expert). The doctors set out their findings and opinion in the joint medical report dated 3 April 2017 (the “Joint Expert Report”).

# *PRE-ACCIDENT INJURIES*

1. There is no dispute that before the Accident, the plaintiff suffered workplace injuries on 23 December 2011 during the course of her employment with the School (the “Previous Accident”).
2. Although there is no issue of apportionment of damages by reason of the plaintiff’s pre-existing injuries, the defendants contend that the plaintiff’s Previous Accident and injuries are relevant to various issues in the present case, including whether the period of sick leave claimed is reasonable, and whether the plaintiff’s loss of earnings was caused by the Accident. I shall deal with these issues in the later part of this judgment.

# *Extent of the plaintiff’s injuries*

1. The plaintiff complained that she suffered orthopaedic and psychiatric illness as a result of the Accident.

## *Orthopaedic medical evidence – the Joint Medical Report*

1. During the joint medical examination, the plaintiff complained of right buttock pain, right lower limb pain and poor mood. During general examination, the doctors found that she was able to walk with normal gait and with tip toes, although she complained of right lower limb pain. She sat comfortably through the interview for 20 minutes. She had no problem in changing posture and getting on and out of the couch. She was able to walk on heels and had good balance when standing with either single leg. Her range of neck motion for lateral flexion for either side was 30 degrees. It was also observed that the plaintiff had pre-existing spondylosis of the cervical and lumbar spine, and reduced C5/6 disc space with narrowing of intervertebral foramina.
2. On examination of the lower back, midline tender spot over the sacrococcygeal region was observed. There was also bilateral paraspinal muscles tenderness and left side gluteal tenderness. There was no muscle spasm. As for the range of motion, flexion was 60 degrees, extension was 10 degrees, while lateral flexion on both sides were 20 degrees.
3. The neurological examination of the lower limbs found the muscle power to be 5-/5 and generalised weakness over both lower limbs. Sensation of reflexes were found to be normal. Range of movement of both hips were full. There was no wasting of muscle.
4. Radiological examination of the coccyx showed anatomical healing of the fracture.
5. Both doctors agreed to the following in the Joint Medical Report:-
   1. The plaintiff sustained coccygeal fracture in the Accident, which was compatible and consistent with the mechanism of injury given by the plaintiff that her fracture was solely attributable to the Accident.
   2. The plaintiff’s psychiatric condition may also be attributable to the Accident, but they would invite psychiatrists for detailed examination of her psychiatric condition.
   3. The plaintiff’s fracture was managed conservatively with analgesics. The plaintiff was thereafter referred to physiotherapy and occupational therapy. Such treatment was standard and appropriate.
   4. The examination was conducted about 3 years and 8 months after the Accident, but the plaintiff was still complaining about right buttock pain and poor mood.
   5. The plaintiff was found to have positive Waddell’s simulation tests, an indication of presence of nonorganic causes of her back pain.
   6. The plaintiff’s neck and upper limb problems were caused by degenerative cervical spine unrelated to the Accident.
   7. The plaintiff is independent with activities of daily living. She is able to handle chores in a manner comparable to most people of her age group.
6. The difference in opinion of the doctors primarily rest on the extent of the injuries caused by the Accident. I set out their differences below:-

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|  | **Dr Tio (for the plaintiff)** | **Dr Tsoi (for the defendants)** |
| **Extent of the plaintiff’s injuries, whether exaggerated by the plaintiff** | §III(4): The residual coccygeal pain is compatible with post fracture status. The presence of positive Waddell’s simulation tests could only signify the presence of non-organic causes of her lower back pain rather than any exaggeration. | §II(3): The slow progress and poor response to lengthy period of conservative treatment could not be explained by the buttock injury the plaintiff sustained during the Accident.  §III(5): The plaintiff was exaggerating her disability during the assessment. The positive simulation tests and generalised weakness of both lower limbs are typical of symptom magnification. Any residual buttock pain should be much less than the plaintiff claimed and demonstrated. |
| **Prognosis** | §IV(1): the plaintiff was expected to have residual coccygeal pain and reduced endurance especially on prolonged walking, standing, climbing or squatting | §IV(2): Residual buttock discomfort on prolonged sitting is possible but should be of mild degree. |
| **Working capacity** | §VI(2): The plaintiff should be able to resume her pre-injury work as a school janitor. She is expected to have reduced efficiency due to the residual coccygeal pain. She should be given intermittent breaks of 15 minutes after each 2 hours of work. | §VI(3): The coccygeal residue will not affect the plaintiff to resume her job as school janitor. The only inconvenience will be coccygeal discomfort on prolonged sitting (say > 120minutes). Her future employability will unlike be affected. |
| **Whole person impairment** | §V(1): 3.5% | §V(2): 2% |
| **Loss of earning capacity** | §V(1): 3.5% | §V(2): 2% |
| **Period of sick leave** | §VIII(1): in view of the plaintiff’s pre-injury work nature and the severity of her injury, the sick leave should be endorsed. | §VIII(2): sick leave should be limited to 6 months. The prolonged sick leave issued to the plaintiff is considered excessive. |

## *Findings on the extent of the plaintiff’s orthopaedic injuries*

1. The defendants doubted the true extent of the plaintiff’s lower back injuries, and contended that the plaintiff has been exaggerating the extent thereof.
2. Considering the undisputed evidence that the plaintiff suffered from a fracture at the coccyx after the Accident, I find that she suffered from lower back pain as a result of the Accident. This indeed is not disputed by the defendants. The question is the extent of such injuries caused by the Accident, and whether (as the defendants’ complained) the plaintiff is now exaggerating her current injuries.
3. The plaintiff claimed in her Witness Statement that she is currently still suffering from serious residual symptoms such as coccygeal pain, right lower limb numbness and pain. She claimed that she would feel painful when she sits, such that she needs to lean forward when sitting down. She also cannot sit for a prolonged period. She also needs to cater her walking posture to the pain that she is suffering. She claims that she cannot sleep on the back but needs to do so laterally, causing numbness to her arms and affecting the quality of her sleep. The question is whether there is evidence to support the plaintiff’s various allegations regarding her injuries summarised above.
4. It should be noted that immediately following the Accident, the plaintiff was able to get up by herself. She was prescribed analgesics for her lower back pain at PYH – a form of conservative treatment. No surgery was required.
5. During the plaintiff’s giving of oral evidence, she tried to explain that her continued pain in the coccyx (which she alleged radiated to the lower limbs) was caused by a small gap (罅) that was still present at her coccyx. When the defendants put to her that the radiograph taken on 30 January 2014 showed that her coccygeal fracture healed anatomically, she maintained that while the fracture was healed, the gap was still there, causing pain to her coccyx and lower limbs.
6. This is the first time that the plaintiff alleged that there is an unhealed gap at her coccyx. She did not mention this in her witness statement. She said that it was the doctors in the PRC, but not her doctors in Hong Kong, who told her about this gap. As the plaintiff did not adduce medical evidence to support her allegations, I do not accept that there is currently a gap at her coccyx which causes her coccygeal pain. I find that the plaintiff’s coccyx fracture has healed on 24 October 2013 (as recorded in the medical report of the Department of Orthopaedics of the TKOH dated 23 May 2016), or at the latest by the time when a radiograph was taken on 30 January 2014.
7. I have also taken into account the fact that the plaintiff was found to have positive Waddell’s simulation test. Dr Tsoi opined that this is suggestive of symptom magnification. While Dr Tio said that the results of the simulation test could only signify the presence of nonorganic causes rather than any exaggeration, there is no suggestion or evidence as to what could be such nonorganic causes.
8. Taking the evidence above into account, I find on the balance of probabilities that the plaintiff’s coccygeal pain had largely subsided since end of April 2014, 3-4 months after the coccyx fracture was found to have healed (or 8-9 months after the Accident). Any residual tenderness or discomfort in the lower back, sacrococcygeal, or buttock area is possible but I agree with Dr Tsoi that that should be of a mild degree. This is consistent with the evidence that (i) various medical examination of the plaintiff in January to April 2014 found that the plaintiff had no or at most mild tenderness at the coccygeal region, and (ii) the consultation notes of the doctors from Tseung Kwan O Hospital (“TKOH”) examining the plaintiff from 4 June 2014 to 2 December 2015 state consistently that the plaintiff’s overall condition was static, and that upon physical examination, there was no tenderness or mild tenderness at the plaintiff’s lower back or coccygeal region.
9. As regards the plaintiff’s alleged lower limb numbness and pain, the defendants make the point that the plaintiff has not made this complaint to the doctors treating her. In response, the plaintiff argued that it was recorded in the medical report of Dr Leung Yuen Kin Kenneth at the TKOH Mona Fong GOPC dated 25 April 2016 that the plaintiff complained about right lower limb numbness. A similar complaint of numbness was also recorded in a medical report issued by the same clinic dated 16 April 2016 and a work rehabilitation assessment report dated 28 January 2014 issued by the United Christian Hospital Occupational Therapy Department. I note here that the plaintiff has never complained to the doctors and therapists about lower limb pain.
10. However, by the time when the plaintiff was examined by Dr Tio and Dr Tsoi, there was no complaint of right lower limb numbness and pain. The Joint Medical Report states that apart from mild weakness of both lower limbs, lower limb neurological examination revealed no abnormality. In other words, on 7 March 2017 the doctors did not find that the plaintiff is suffering from lower limb numbness and pain. Furthermore, during cross-examination, the plaintiff agreed that she did not do so, and she only complained about right lower limb pain to the doctors in the PRC.
11. Based on the above evidence, I find that the plaintiff has not suffered from lower limb pain as a result of the Accident. Even if the plaintiff has suffered from right lower limb numbness after the Accident, such numbness was no longer present by the time of the joint medical examination on 7 March 2017. The evidence shows that at worst, the plaintiff is currently suffering from mild lower limb weakness.
12. I would also note that based on the above evidence, insofar as there is a difference between Dr Tio and Dr Tsoi, I prefer the expert evidence on Dr Tsoi for the reason that his evidence is more consistent with the plaintiff’s contemporaneous medical records and consultation notes.

## *Psychiatric injury*

1. The plaintiff’s Revised Statement of Damages dated 9 June 2017 did not plead that the plaintiff suffered from psychiatric injury as a result of the Accident. That Revised Statement of Damages also did not refer to any psychiatric illness that the plaintiff may have suffered.
2. Furthermore, as the defendants pointed out, the plaintiff has not adduced any expert evidence as to the extent of the plaintiff’s psychiatric injuries. Both Dr Tio and Dr Tsoi have made clear in the Joint Medical Report that they were not to opine on the plaintiff’s psychiatric health.
3. Moreover, in the plaintiff’s psychiatric report issued by the United Christian Hospital dated 4 May 2016, it was stated that the plaintiff was distressed by “ongoing medical assessment board and legal compensation issues”. It appears that the plaintiff’s psychiatric issues were caused by the plaintiff’s Previous Accident in December 2011 and the legal battle that ensued. There is no evidence to suggest any causal connection between the Accident and the plaintiff’s psychiatric problems.
4. For the above reasons, I cannot accept the plaintiff’s assertions at §16 and 18 of her Witness Statement that she suffered from psychiatric illness as a result of the Accident.

# *PAIN, SUFFERING AND LOSS OF AMENITIES (“PSLA”)*

1. The plaintiff submitted that an award of HK$250,000 should be made under this head of damages. The following authorities were cited:-
   1. *Wong Wai Man v Yi Wo Yuen Aged Sanitorium Centre Limited* HCPI 77/2007: PSLA award HK$250,000;
   2. *Choi Siau Bon v Chevalier Construction (Hong Kong) Limited & Anor* HCPI 913/: PSLA award HK$250,000;
   3. *Ho Wing Sai v Startlong Development Limited t/a Lai Ying Hair Salon & Anor* HCPI 787/2000: PSLA award HK$300,000;
   4. *Wu Choi Lan v Tonge (Hong Kong) Limited & Anor* DCPI 634/2003: PSLA award HK$300,000;
   5. *Chan Chung Sau v Macrae Duncan James* HCPI 288/2003: PSLA award HK$300,000;
   6. *Lauw Ka Fong v Best City Limited* HCPI 436/2004: PSLA award HK$300,000;
   7. *Li Fat Tsang v Aquality Engineering Co Ltd* HCPI 558/2000: PSLA award HK$300,000;
   8. *Lai Kam Wah v Wing & Kwong Co Ltd* HCPI 1131/2002: PSLA award HK$350,000;
   9. *Leung Lee Jasmine v Go Fresh (Hong Kong) Co Ltd* DCPI 2425/2014: PSLA award HK$350,000;
   10. *Yeung Lok Sze v Hong Yip Services Co Ltd* HCPI 12/2007: PLSA award HK$350,000;
   11. *Iau Kau Ih v Wan Kei Geotechnical Engineering Co Ltd & Ors* [2002] 2 HKC 76: PSLA award HK$400,000; and
   12. *Li Sai Keung v Maxcredit Engineering Limited & Anor* CACV 16/2003: PSLA Award HK$400,000.
2. On the other hand, the defendants cited the following authorities in support of its contention that a sum of HK$150,000 should be awarded for PSLA:-
   1. *Chan Kwei Duen v East Country Co Ltd* DCPI 665/2005: PSLA award HK$200,000;
   2. *Wo Chun Wah v Chau Kwei Yin & Ors* HCPI 903/2014: PSLA award HK$280,000;
   3. *Chan Yuk King v Tung Chun* DCPI 2289/2008: PSLA award HK$140,000;
3. I do not find the authorities cited by the plaintiff to have much reference value to the present case. This is because these authorities are all related to injuries of a different nature, degree and area, eg disc protrusion or fracture of a different segment of the vertebrae. The plaintiff in *Leung Lee Jasmine* did suffer from the fracture of the coccyx, but she also suffered from a displacement of the coccyx. As there is no coccyx displacement in the present case, this case is not helpful to the analysis.
4. Of the three cases cited by the defendant, *Chan Kwei Duen* concerns a displaced fracture of the coccygeal spur and a partial posterior dislocation of the coccyx. Such injuries are more serious than the injuries in the present case. In *Wo Chun Wah*, the plaintiff there suffered fracture injuries to his lumbar spine at L1 and coccyx. He was left with persistent low back pain. In the present case, there was fracture at the coccyx but not the lumbar spine. In my view, an award of PSLA in the present case should not be higher than that in *Wo Chun Wah*, which was HK$280,000.
5. Having considered the above authorities, I consider that the plaintiff’s conditions in this case are similar to the claimant in *Chan Yuk King*. In that case, the plaintiff was hit on her right arm by a taxi and fell to the ground landing on her buttocks. X-ray showed that she suffered from a fracture of her coccyx. She was anaesthetised at the Queen Mary Hospital and discharged after 2 to 3 days. She also suffered from a S4 fracture. The medical experts agreed that if the plaintiff had back pain, it should be of a minor nature. The Court awarded a sum of HK$140,000 for PSLA. I am of the view that the plaintiff in *Chan Yuk King* suffered largely similar but slightly more serious injuries than the plaintiff in the present case. It is appropriate to use the award of that case as a starting point.
6. Taking into account the award for PSLA in *Chan Yuk King* and the inflation of prices, I consider that that an award of HK$150,000 is appropriate under this head of damages.

# *PRE-TRIAL LOSS OF EARNINGS*

1. §3.1 of the Revised Statement of Damages pleads that after the Accident, the plaintiff was granted intermittent sick leave for a total of 816 days. However, as 295 days thereof were already claimed in legal proceedings relating to the plaintiff’s Previous Accident, the plaintiff presently adopts only 521 days of sick leave (ie from 14 May 2014 to 17 January 2016) as part of the basis of her pre-trial loss of earnings.
2. At §3.2 of the Revised Statement of Damages, the plaintiff also claimed post-sick leave period loss of earnings from 18January 2016 to 31 August 2016. However, this part of the claim was no longer pursued in the plaintiff’s closing submissions. Instead, the plaintiff submitted that upon the expiry of the sick leave, the plaintiff should be allowed a period of 3 months to look for alternative employment (relying on *Iau Kau Ih* at §39).
3. On the other hand, the defendants contended that as the plaintiff has already recovered from the injuries resulting from the Accident by the end of April 2014, she is not entitled to claim damages under this head for sick leave period that went beyond end of April 2014. As the plaintiff’s claimed sick leave period only starts from 14 May 2014, no pre-trial loss of earnings should be awarded to the plaintiff.
4. The plaintiff argued that the doctors treating the plaintiff would have been in a better position to assess her condition, such that the sick leave certificates granted by those doctors should be endorsed (citing *Chan Fu Man v Lam Fook Loi* HCPI 962/2004 at §38). I would however point out that the sick leave certificates are not binding on the Court (see *Iau Kau Ih* at §37). The Court will look at the evidence (especially the expert medical evidence) to determine what is an appropriate period of sick leave.
5. On the evidence before me, I find that there is no real difference between the opinion of Dr Tio and Dr Tsoi as to the plaintiff’s working capacity, ie she is able to return to her pre-Accident job as a school janitor, subject perhaps only to the caveat that she should be given some rest or break every 2 hours to ease any residual buttock discomfort. The question is when the plaintiff should be able to return to her previous job as stated by the experts. Given the evidence referred to above that there are medical records from June 2014 onwards stating that the plaintiff’s condition had become static, I find that by 4 June 2014 at the latest, the plaintiff should be able to return to her previous work as a school janitor.
6. I am also mindful of the plaintiff’s argument that time is needed for the plaintiff to find a job. In *Iau Kau Ih* at §39, the Court was prepared to be “generous” in light of the poor economic conditions in Hong Kong in the early 2000s. I consider that in view of Hong Kong’s economic conditions in 2014, allowing a period of 1 month is appropriate.
7. I therefore would allow a period of sick leave from 14 May 2014 to 4 July 2014, ie a total of 52 days.
8. The next issue relates to the plaintiff’s pre-trial earnings. The plaintiff contended that she was earning HK$9,715 per month from her job as a janitor at the School. There is a letter from the School dated 12 January 2016 supporting the plaintiff’s assertions, and I so find.
9. What is more contentious is the plaintiff’s allegation that before the Accident, she was also earning an average of HK$7,131.61 per month on a part-time basis with different engineering companies as a general cleaning worker. Her oral evidence is that for this part-time job, she would attend construction sites after work at the School in the evening on weekdays to work as a general cleaning worker, and she would work through the night till the next morning. Sometimes during weekends and public holidays (when she need not attend her job at the School) she would work at the construction sites during day time. In support of her case, the plaintiff adduced statements from 建利公司 and 德堅工程公司, which she said were the employers of her part-time job.
10. 建利公司’s statement states that during the period from 1 April 2010 to 31 March 2011, the plaintiff was paid (in November 2010 to March 2011) a total of HK$20,000 as a casual worker (雜工). 德堅工程公司’s statement states that during the period from 1 April 2011 to 31 March 2012, the plaintiff was paid (from April to November 2011) a total of HK$72,750 as a casual worker (散工). The plaintiff also adduced a letter from the IRD dated 9 September 2013 evidencing the above income from 建利公司 and 德堅工程公司.
11. The defendants challenged the plaintiff’s entitlement to include the income from the part-time job under this head of damages. They contended that it is the plaintiff’s own case that after and as a result of her Previous Accident, she had to abandon her part-time job at construction sites. The defendants referred me to a Statement of Damages dated 27 May 2015 filed by the plaintiff in HCPI 1273/2014 (an action commenced by the plaintiff against the School in relation to the Previous Accident). At Part D thereof (dealing with loss of pre-trial earning), the plaintiff mentioned her job at the School as a janitor with the monthly income of HK$9,715. There was no mention of any income from the part-time job prior to the Previous Accident. More importantly, at Part E of the Statement of Damages (dealing with loss of future earnings), the plaintiff said that after the Previous Accident, she had to abandon work as a construction site cleaner as a part-time job. The defendant thus contended that prior to the Accident, the plaintiff had already lost the part-time job, and this was not caused by the Accident, but by the Previous Accident.
12. The plaintiff’s position as stated in her Statement of Damages in HCPI 1273/2014 is consistent with 德堅工程公司’s statement, which shows that the plaintiff received payments from her part-time job only up to November 2011 (ie the month before the Previous Accident). It appears that after November 2011, the plaintiff no longer received any money from being a cleaner at construction sites.
13. Based on 德堅工程公司’s statement, the defendants also argued that as at December 2011 (ie the month of the Previous Accident), the plaintiff has already lost the part-time job, and this is the reason why there is no record of earnings from that part-time job for December 2011. Given that the Previous Accident happened on 23 December 2011, if the plaintiff still had the part-time job during December before the Previous Accident, 德堅工程公司’s statement would have recorded that the plaintiff received at least some money from that part-time job in December 2011. The defendants thus asked the Court to infer that the loss of the part-time job was not even caused by the Previous Accident (not to mention the Accident in the present case).
14. The plaintiff argued that after November 2011 and before the Previous Accident, if she had no job at 德堅工程公司, she would work at other construction sites. Thus, she maintained that she still had the part-time job up till the date of the Previous Accident. She also said that while she alleged that the Previous Accident caused her to abandon her part-time job, she felt that she would be able to return to her part-time job if she fully recovered from the Previous Accident.
15. On the available evidence before this Court, I find that after November 2011, the plaintiff no longer had any income from the part-time job. Although the plaintiff argued that 德堅工程公司’s statement stated that the plaintiff worked as a casual worker from 1 April 2011 to 31 March 2012, it is more likely that this period does not actually referred to the period that the plaintiff was employed by 德堅工程公司. It is noteworthy that 德堅工程公司’s statement referred to the period from 1 April 2011 to 31 March 2012, which is a tax year, and 建利公司’s statement referred to the period from 1 April 2010 to 31 March 2011, which is the previous tax year. On balance, I find that it is more likely that both statements purported to state the amount actually received by the plaintiff (with monthly breakdown) for these two tax years for the plaintiff’s tax declaration purposes. Indeed, it would be odd if, for example, the plaintiff was still employed by 德堅工程公司 in February 2012, but there was no payment by 德堅工程公司 to the plaintiff for the work done by the plaintiff in that month. As 德堅工程公司’s statement showed that the plaintiff was not paid any sums in December 2011, I find that the plaintiff no longer had the part-time job after the end of November 2011.
16. As to the plaintiff’s allegation that after November 2011 when she no longer had any work from 德堅工程公司, she worked at other construction sites, apart from saying that the construction site was located at North Point, the plaintiff was unable to inform the Court the details about her income from that construction site. Furthermore, there is no documentary evidence to show that the plaintiff did have income from part-time work after November 2011. The letter from IRD dated 9 September 2013 only mentioned the plaintiff’s income from 建利公司 and 德堅工程公司, but not any other construction companies. It would be odd if the plaintiff indeed received income from the alleged construction site in North Point but did not similarly declare her income therefrom to the IRD for tax purposes.
17. For the above reasons, I find that the plaintiff has not suffered any loss of earnings from the part-time work as a result of the Accident.
18. To conclude on this head of damages, I would assess the pre-trial loss of earnings as follows:-

HK$9,715/30 × 52 days × 1.15 = HK$19,365.23

# *FUTURE LOSS OF EARNINGS*

1. The plaintiff abandoned her claim under this head of damages at the trial.

# *Loss of earning capacity*

1. The parties reminded me of the well-established legal principles laid down in the Hong Kong Court of Appeal decision of *Yu Kok Wing v Lee Tim Loi* [2001] 2 HKLRD 306 at 311-312 (citing *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132):-

“It is important to remember what an award for loss of future earning capacity is actually for. As was said by Lord Fraser of Tullybelton in the Privy Council in Chan Wai Tong v Li Ping Sum [1985] HKLR 176 at 183B-D, it is intended:

… to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk — see Moeliker v A. Reyrolle & Co. Limited [1977] 1 WLR 132, 140, where Browne L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant’s age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant.

It is also useful to remember what Browne LJ actually said in Moeliker at p 142A-C:

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 materialises, 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.” (emphasis added)

1. I will first assess whether there is a substantial or real risk that the plaintiff will suffer from disadvantage in the labour market because of her injuries. In doing so, I take into account the following evidence:-
   1. I have made findings at paragraph 24 above that the plaintiff’s coccygeal pain has largely subsided since end of April 2014, 3-4 months after the coccyx fracture was found to have healed (or 8-9 months after the Accident). Any residual tenderness or discomfort in the lower back, sacrococcygeal, or buttock area is possible but should be of a mild degree.
   2. As to the effect of the Accident on the plaintiff’s working capacity, as I have stated above, there is no real difference between the opinion of Dr Tio and Dr Tsoi. Both stated in the Joint Medical Report that the plaintiff should be able to resume her pre-Accident job as a school janitor. While Dr Tio stated that the plaintiff is expected to have “reduced efficiency” in fulfilling her job tasks, there is no evidence that such “reduced efficiency” will result in a “substantial” or “real” risk that the plaintiff will suffer from a disadvantage in the job market. I note also that it is Dr Tsoi’s opinion that the plaintiff’s “future employability will unlikely be affected”.
   3. More importantly, there is no evidence that the plaintiff has actually been rejected a job due to her lack of competitiveness arising from her injury. On the contrary, the plaintiff was able to find another job as a janitor at another kindergarten commencing from 1 September 2016, with a salary of HK$10,700 (ie higher than the salary of her previous job at the School). Although the plaintiff said that she quitted the new job after two months due to the physical demand, she also said that her new employer actually tried to convince her to stay with the job despite her intention to quit. This is evidence showing that the plaintiff did not suffer from any disadvantage in the job market as a result of her injuries.
2. As the plaintiff cannot pass the first hurdle of the test in *Moeliker*, no sum is awarded under this head.

# *Special damages*

1. I have found above that by June 2014, the plaintiff’s condition has become static and that she should be able to return to work, logically, the award of special damages for medical expenses should broadly commensurate with such a timeframe.
2. I am prepared to accept that June 2014 should not be a hard cut-off point for medical expenses, as the plaintiff might need to go back to the see the doctors for medical check up even if her lower back pain has largely subsided. I am also mindful of the plaintiff’s consultation of Chinese bonesetters.
3. Taking a broad brush approach, I am prepared to award HK$5,000 for medical expenses, HK$5,000 for tonic foods and HK$2,000 for travel expenses, ie a total of HK$12,000 under the head of special damages.

# *Summary of the damages awarded*

1. In summary, I award the following sums to the plaintiff:-

|  |  |
| --- | --- |
| Pain, suffering and loss of amenities | HK$150,000 |
| Pre-trial loss of earning | HK$19,365.23 |
| Special damages | HK$12,000 |
| Total: | **HK$181,365.23** |

# *Interest*

1. I also award interest on the amount of awarded PSLA at 2% from the date of the Writ (ie 24 May 2016) to the date of this judgment; and on the amount of the awarded pre-trial loss of earnings and special damages at half judgment rate from the date of the Accident (ie 24 July 2013) to the date of this judgment.

# *Costs*

1. There shall be a costs order *nisi* that the costs of the plaintiff be paid by the defendant, to be taxed if not agreed, with certificate for Counsel. Unless any party applies to vary the costs order *nisi* within 14 days hereof, the costs order shall become an order absolute.

( K C Hui )

Deputy District Judge

Mr Tim Wong, instructed by B Mak & Co, for the plaintiff

Mr Daniel K K Chan, instructed by Winnie Mak, Chan & Yeung, for the 1st and 2nd defendants