## DCPI 1236/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1236 OF 2014

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##### BETWEEN

LEUNG KA YAN Plaintiff

### and

SECRETARY FOR JUSTICE

(FOR AND ON BEHALF OF THE DIRECTOR OF

LEISURE AND CULTURAL SERVICES

DEPARTMENT OF THE HONG KONG SPECIAL

ADMINISTRATIVE REGION) Defendant

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Before: His Honour Judge MK Liu in Court

Dates of Hearing: 20-22 June 2017

Date of Judgment: 29 June 2017

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JUDGMENT

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1. On 13 June 2011 at around 8:15 am, when the plaintiff walked along a footpath (“the Footpath”) inside Nga Ying Chau Garden, Tsing Yi New Territories (“the Garden”), the plaintiff fell on the Footpath (“the Incident”). The plaintiff sues the defendant for damages as a result of the injuries sustained in the Incident. The defendant does not dispute that the Incident did occur but denies liability.
2. It is not in dispute that the spot where she fell is the area coloured pink on a photograph showing the Footpath, which is marked as “Exhibit P1”. A copy of Exhibit P1 is annexed hereto as “Annex 1”.

*THE PLAINTIFF’S CASE*

1. The plaintiff was born in 1984. She was educated up to Form 5. She has been employed by a law firm (“the Firm”) as a secretary since 2004, and she is still working in the Firm. The Firm is acting for her in these proceedings.
2. According to the plaintiff, she was walking through the Garden at about 8:15-8:20 am on 13 June 2011. She was on the way from her home (in Cheung On Estate) to Tsing Yi MTR station at that time. She intended to take the MTR to go to Central to work. It was raining. While she was walking on the Footpath, the Incident occurred. She fell on the Footpath because the floor was slippery. As a result of the Incident, she sustained injuries.
3. The plaintiff claims that the Incident was caused by the negligence or breach of the common duty of care under section 3 of the *Occupiers Liability Ordinance* (Cap 314) (“OLO”) by the Leisure and Cultural Services Department (“LCSD”) and pleads the following in the statement of claim:-

“6. The said accident was caused wholly by or alternatively contributed to by the negligence and/or breach of the statutory duties of the Defendant, its employees or agents acting in the course of their employment.

PARTICULARS OF NEGLIGENCE

The Defendant, its employees or agents were negligent in:

1. Causing or permitting the Footpath to be or to become or to remain disrepair whereby the same was slippery underfoot.
2. Failing to cause the defects to be repaired.
3. Failing to institute or enforce any or any adequate system for the inspection and maintenance of the Footpath whereby the defects in the same might have been detected and remedied before the Plaintiffs accident.
4. Failing to warn the Plaintiff of the existence of the defects.
5. Failing to fence off or otherwise guard the defective area.

7. Further or in the alternative the said accident was caused by the Defendant’s breach of the common duty of care under Section 3 of the OLO or by reason of negligence on the part of the Defendant, its employees or agents.

PARTICULARS OF NEGLIGENCE

1. Failing to cause the tiled surface of the Footpath to be covered with some suitable floor covering which would be absorbent and/or present a non-slip surface.
2. Failing to warn the Plaintiff of the danger presented by the wet tiled surface of the Footpath.
3. Failing to take any or any adequate care for the safety of the Plaintiff.

As a result the Plaintiff has suffered personal injuries, loss and damage.”

1. The plaintiff herself has given evidence in support of her case.

*THE DEFENDANT’S CASE*

1. The defendant denies liability. The defendant claims that the Footpath was covered by anti-slippery granite tiles which were suitable for external open area. The defendant’s case is that LCSD has taken reasonable care to ensure the safety of the visitors to the Garden, including the plaintiff, when walking along the Footpath.
2. The defendant has called 2 witnesses to give evidence:-
3. Ms Tang Chuk Kwan (Amenity Assistant II) (“Tang”); and
4. Ms Lau Yee Sze (Assistance District Leisure Manager) (“Lau”).

*THE PRINCIPLES*

1. The starting point is the principle set out by Megaw LJ in *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 at 815:-

“It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault.”

Applied by Mayo VP in *Cheung Wai Mei v Excelsior Hotel (Hong Kong) Ltd* (CACV 38/2000, 22 November 2000).

1. In *Wat Kwing Lok v The Kowloon Motor Bus Company (1933) Ltd* (HCPI 936/2005, 20 November 2007), Sakhrani J said at [17]:-

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

Applied in *So Wang Chun v Rainforce Ltd & Others* [2008] 3 HKC 196.

1. It is clear that the mere occurrence of the Incident does not give rise to any presumption of negligence on the defendant’s part. The plaintiff bears the burden to prove that the Incident occurred as a result of the defendant’s fault. In other words, the plaintiff has to prove that (a) she fell on the Footpath because of the slippery floor, and (b) the slippery floor was the defendant’s fault.
2. Mr Leon Ho, counsel for the plaintiff, submits that as the Garden is open to the public under all weather conditions, LCSD has a duty to ensure that the tiles of the Footpath are sufficiently safe for all types of visitors under rainy conditions. Mr Ho’s point is that in the absence of any satisfactory explanation, the presence of the slippery floor on 13 June 2011 itself is evidence of the defendant’s negligence. Mr Ho relies upon the following authorities in support of his submission: *Laverton v Kiapasha (t/a Takeaway Supreme)* [2002] EWCA Civ 1656, *Tang Chung Loi v MTR Corp Ltd* [2005] 2 HKC 330, *Heard v Canada Safeway Limited* [2008] ABQB 439, *Appleton v Cunard S S Co* [1969] 1 Lloyd’s Rep 150, *Raad v VM & KTP Holdings Pty Ltd as Trustee for VM & KTP Nguyen Family Trust* [2016] NSWSC 888, *Partridge v Hobart City Council* [2010] TASSC 62, and *Murphy v City of Bradford Metropolitan Council* [1992] PIQR P68.
3. What has been submitted by Mr Ho does not detract from the general principles set out in paragraphs 9 and 10 above. It remains for the plaintiff to prove that the cause of the Incident was the slippery floor of the Footpath on that date. Only after the discharge of that burden, the debate on whether the slippery floor was the defendant’s fault would begin. If the plaintiff has failed to prove that the cause of the fall was the slippery floor, it would be the end of the matter. In fact, both Mr Ho for the plaintiff and Ms Katherine Chan for the defendant have agreed that if this court refuses to accept the plaintiff’s evidence, that would be the end of the plaintiff’s case.
4. Thus, the first question is whether the Incident occurred in the way suggested by the plaintiff. If yes, the second question is whether the slippery floor was the defendant’s fault. If the answer to the second question is also yes, the court would proceed to assess the quantum of damages.
5. In order to answer these questions, credibility of the witnesses is an issue. In respect of assessing credibility of witnesses, DHCJ Eugene Fung SC has provided useful guidelines in *Hui Cheung Fai v Daiwa Development Ltd* (unreported, HCA 1734/2009, 8 April 2014), in which the learned judge said:-

“77. Generally speaking, contemporaneous written documents and documents which came into existence before the problems in question emerged are of the greatest importance in assessing credibility: *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at 431 (Lord Pearce) ...

78. In deciding whether to accept a witness’s account, importance should also be attached to the inherent likelihood or unlikelihood of an event having happened, or the apparent logic of events: eg *Lam Rogerio Sou Fung v Tan Soon Gin George* (unreported, HCA 2576/2005, 5th May 2011) §39 (Chu J).

79. In determining a witness’s credibility, I have also attached importance to the consistency of the witness’s evidence with undisputed or indisputable evidence, and the internal consistency of the witness’ evidence. The latter type of consistency is often tested by a comparison between the witness’ oral testimony and his or her witness statement.

80. I have cautioned myself against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses: *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 at §§36, 37 (Bokhary PJ).

81. The practical approach to assessing credibility of witnesses in a case such as the present may have best been summarised by the words of Robert Goff LJ, as he then was, in The Ocean Frost [1985] 1 Lloyd’s Rep 1 at 57:-

“Speaking from my experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.”

82. Whilst these words were spoken in the context of a fraud case, I believe they are applicable to any case where a witness’ credibility features prominently in the court’s determination …...”

1. The reminder given by Sir John Dyson in *MA (Somalia) v Secretary of State for the Home Department* [2011] 2 All ER 65 on the effect of lies by a witness on a central issue is also relevant:-

“31. ...... where a claimant tells lies on a central issue, his or her case will not be saved by general evidence unless that evidence is extremely strong. It is only evidence of that kind which will be sufficient to counteract the negative pull of the lie. But much depends on the bearing that the lie has on the case. ......

32. Where the appellant has given a totally incredible account of the relevant facts, the tribunal must decide what weight to give to the lie, as well as to all the other evidence in the case, including the general evidence. ......

33. ...... where the appellant tells lies on a central issue in the case, the [tribunal] may conclude that they are of great significance. ...... It will be a matter for the [tribunal] to decide whether the general evidence is sufficiently strong to counteract what we have called the negative pull of the appellant’s lies.”

*THE EVIDENCE*

*The plaintiff*

1. Having seen the plaintiff and heard her evidence, I am of the view that the plaintiff is not a truthful witness and her evidence is not reliable.
2. The plaintiff described the way in which the Incident occurred in paragraph 7 of her witness statement:-

“在當日早上約8時15-20分左右，本人途經往搭港鐵的青衣牙鷹洲公園（下稱「該公園」）時就發生意外，因當時下着毛毛細雨，地面濕滑外，亦開始有薄薄的積水，本人因而跌倒受傷。……”

1. During cross-examination, upon Ms Chan’s request, the plaintiff coloured the spot where she fell on Exhibit P1 by pink, and coloured the area containing water by green. So, according to the plaintiff, the green area was a water puddle.
2. As shown in Exhibit P1, it is clear that there were parts of the Footpath with no water, yet the plaintiff still walked right into the water puddle. When it was put to the plaintiff that “你睇到有灘水都照踩落去?”, she answered “我睇唔到灘水”. However, in paragraph 7 of her witness statement, the plaintiff clearly and unequivocally said that “地面濕滑外，亦開始有薄薄的積水” (emphasis added). If she had paid attention to the surface of the Footpath and knew that there was/were water puddle(s) on the Footpath on that date, it would be inherently improbable that she would have failed to see the water puddle (the green area), for the water puddle was in the middle of the Footpath. If she had failed to pay attention to the surface of the Footpath, it would not be possible for her to say whether there was any water puddle on the Footpath on that date, and her evidence that the green area was a water puddle would not be reliable.
3. The plaintiff was shown photographs (“the Footpath Photos”) showing the surface of the Footpath. It was put to her that the surface of the tiles were rough（凹凸不平）and that there were cracks（坑）between the tiles, but the plaintiff disagreed. The plaintiff also disagreed that the surface of the tiles was rough upon touching them with her hands after she had fallen on the floor, and maintained her stance that the tiles were smooth（平滑）. In my view, the Footpath Photos clearly show that the surface of the Footpath was covered by tiles with rough surface and there were cracks between the tiles. The plaintiff’s answers are clearly contradicted by the Footpath Photos.
4. The plaintiff testified that she was responsible for issuing cheques and handling MPF matters. With regards to the cheques, she was the one who wrote the payees’ names and the numerical amounts on them, then they were signed by her employer. Even during her period of sick leave, she would return to the office to write the cheques for her salaries. On MPF, she said that she would upload her monthly income online to the MPF company personally on a monthly basis. The information from the cheques representing her salaries and the MPF statement disclosed by the plaintiff is summarized in the table (“the Table”) annexed hereto as “Annex 2”.
5. With regards to her tax return for the year of 2010/11, the plaintiff’s evidence is that she wrote the figure HK$285,905 representing her income in part 4.1. She was aware of the declaration of truth in part 9 and the warning about giving false information at the bottom of page 4 when she completed the said tax return.
6. The plaintiff said the following in paragraph 23 of her witness statement:-

“23. 本人在受傷時在該行的月薪平均為港幣$35,000.00，另有年終雙糧。……”

So according to the plaintiff, at the time of the Incident, her average monthly salary from the Firm was HK$35,000, and apart from this, she would also have double pay at the end of each year.

1. It is clear that from the figures in the cheques, or from the figures in the MPF statement, or from the 2010/11 tax return, it is impossible to arrive a figure showing that at the time of the Incident, the plaintiff had an average monthly salary of HK$35,000. All these figures show that before the Incident, the plaintiff’s monthly salary was well below HK$35,000.
2. There are inconsistencies between the cheques, the incomes as shown in the MPF statement and the 2010/11 tax return. When being cross-examined on these inconsistencies, the plaintiff was clearly evasive and was unable to provide any explanation (the plaintiff said“我解釋唔到”).
3. I regret to say that the plaintiff’s assertion that she had an average monthly salary of HK$35,000 at the time of the Incident is a lie.
4. The plaintiff was also cross-examined on the double pay. She said that each year, she would receive the double pay in the Chinese New Year. Ms Chan asked the plaintiff that the documents disclosed by her did not show any double pay to her in the Chinese New Year in 2011. The plaintiff answered that she had not disclosed the cheque concerning the double pay (“the 2011 Double Pay Cheque”), for she was under the impression that it would only be necessary for her to disclose the cheques representing her usual monthly income. I regret to say that this must also be a lie. At all times, the plaintiff is legally represented in these proceedings. In her 2nd list of documents filed on 4 September 2015, the description of item 16 is “Copy cheques as the Plaintiff’s income proof for the period from June 2010 to May 2011”. In disclosing those cheques, the plaintiff must know that she is disclosing her income proof for the period from June 2010 to May 2011. If the 2011 Double Pay Cheque exists, she must know that the cheque has to be included in the said item, for the sum in that cheque would be part of her income from June 2010 to May 2011. Further, the Firm is her employer and also the solicitors acting for her in these proceedings. If the 2011 Double Pay Cheque exists, the Firm would not miss this out in item 16 of the plaintiff’s 2nd list of documents.
5. Mr Ho submits that as evidenced from the cheques produced by the plaintiff, during the plaintiff’s sick leave period (up to the end of January 2012), the plaintiff did receive HK$28,000 each month, which was 80% of her normal monthly salary and her entitlement during the sick leave period. This is evidence showing that the plaintiff’s monthly salary was HK$35,000. With respect, all these at most show that there was an increase in the plaintiff’s monthly salary after the Incident, but these would not be evidence showing the plaintiff’s monthly salary at the time of the Incident.
6. The plaintiff said that as a result of the injuries sustained in the Incident, she was unable to get an increase of HK$2,000 in her monthly salary. However, the evidence as summarized in the Table shows that in fact there was an increase in her monthly salary after the Incident, and the increase was substantial.
7. By reason of the aforesaid, in particular the plaintiff’s lies on her average monthly income at the time of the Incident and on the double pay (which are important issues in these proceedings), I reach the conclusion that the plaintiff is an untruthful witness. Her evidence is not reliable, and I reject the evidence in its entirety.

*Tang*

1. Tang was responsible for patrolling and managing about 20 gardens in the Tsing Yi District from July 2010 to June 2011, including the Garden. She said that she would go to the Garden to do inspection regularly and at least once every 2 weeks. During each inspection, she would check the facilities in the Garden, including the slipperiness of the Footpath. If any problem was found, she would report the matter. She said that she would check the slipperiness of the Footpath by looking at its surface and also by walking on the Footpath. She said that she had not found any problem concerning the Footpath prior to the occurrence of the Incident.
2. I would not attach any weight to Tang’s evidence, for all the documents concerning the inspection and checking done by Tang have not been produced. Without seeing these documents, one does not know how frequent the inspection was done, whether any problem concerning the Footpath has ever been found, and what remedial work has been done. It would not be prudent by merely relying on Tang’s memory in 2017 to ascertain what has happened and what has not happened in 2011.

*Lau*

1. Lau took up the post of Assistant District Leisure Manager (Kwai Tsing) on 3 December 2012. Before that, she worked in Shatin. In other words, at the time of the Incident, Lau was not responsible for the management of the Garden. She does not have any personal knowledge in respect of matters concerning the Incident. As Lau does not have any personal knowledge concerning the Incident, her evidence is not particularly useful for the purpose of these proceedings.
2. The only document produced by Lau in her witness statement which has some evidential value is a document from the Architectural Services Department dated 4 October 2003 (“the ASD Document”) showing that the Footpath was covered by natural granite. In the light of the ASD Document, coupled with the Footpath Photos, I find that the Footpath was covered by natural granite at the time of the Incident.

*LIABILITY*

1. I have ruled that the plaintiff is not a truthful witness, and I have rejected her evidence in its entirety. Accordingly, there is no evidence showing why the plaintiff fell on the Footpath on that date. There is no evidence showing the cause of the Incident.
2. In the circumstances, the plaintiff’s claim must be dismissed.

*QUANTUM*

1. For the sake of completeness, I would set out my opinion on quantum in the paragraphs below.
2. The plaintiff has received various treatments after the Incident, including 3 operations and physiotherapy. She resumed work in the Firm with full duty on 1 February 2012.
3. The plaintiff was jointly examined by Dr Wong See Hoi (for the plaintiff) and Dr Yeung Sai Hung (for the defendant) on 24 November 2015 ie 53 months after the Incident. Having read the joint report by Dr Wong and Dr Yeung dated 21 December 2015 (“the Joint Report”), I am satisfied that both of them are qualified to give the expert evidence as set out in the Joint Report.
4. As recorded in the Joint Report, at the time of the joint examination, the plaintiff raised the following complaints:-

“22. Right anterior knee and thigh pain, continuous, Pain increases when walking on slope or climbing stairs. The pain is more severe when descending stairs or walking down slope. She needs to rest after walking up or down one floor of stairs. She would have pain after prolong walking for more than 30 minutes, standing for more than 45 minutes and or sitting for around 2 hours (i.e. watching film). The pain occasionally wakes her up at night, about 3 times a week. The pain also increases during the change of weather. No analgesic intake is required. Subjectively, the pain has improved by ~30-40%. She estimated the severity of her right knee pain is 6 to 9 in a scale of 0 to 10 where 0 is no pain and 10 is maximal pain.

23. Right knee stiffness associated with limping, causing her unable to squat.

24. Right knee weakness.

25. Right knee pigmentation over lateral aspect of her knee.

26. Depression around scar.

27. Decreased right thigh size.

28. For activities of daily living, she has no problem in selfcare. She used to share housework with husband, but after the accident, housework is mostly done by her husband. She has difficulties in squatting down. She is also unable to lift heavy object from supermarket that weights more than 10 oranges.”

1. At the time of the joint examination, both experts observed that:-
2. The plaintiff was limping during tip-toe walking and heel walking.
3. The plaintiff could only perform single leg standing with right leg for 3 - 4 seconds.
4. The plaintiff could only perform half squat and required support to rise.
5. There was a 5cm x 1 cm scar over depressed skin of anterior knee, with tenderness, and a patch of faint hyperpigment of 6cm x 4cm lateral to the scar.
6. There was muscle wasting of the right thigh.
7. There was tightness on patella grinding test associated with pain.
8. The patella fracture was healed with mild arthritic changes at the patellofemoral joint. Opacity was detected over the patella ligament.
9. The 2 experts gave the following opinion in the Joint Report:-
10. The agreed diagnosis was fracture right patella.
11. The plaintiff’s complaint and examination results are “compatible with the post-injury status”. Both experts agree that the 2cm wasting of the plaintiff’s right thigh muscle indicated disused atrophy probably because of the residue pain over right knee.
12. The experts agreed that the prognosis is fair.
13. Both experts agree that at around 10-15 years, she may require total knee replacement for treatment of progressive degeneration. The cost estimate is around 200,000 if performed in private sector including around 3 months of rehabilitation.
14. If the plaintiff was required to do outdoor work, she would have difficulties and would need short rest after walking up and down stairs. For her indoor clerical job, both experts agreed that she would need to stretch her knee every now and then (say an hour).
15. Dr Wong opined that the degree of whole person impairment (“WPI”) and loss of earning capacity (“LOEC”) to be 6% and 5-6% respectively. Dr Yeung opined that the degree of WPI and LOEC to be 4%.
16. Both experts agree with the sick leaves granted by the Employees’ Compensation (Ordinary Assessment) Board, which are from 13 June 2011 to 30 January 2012, 14-23 July 2012, and 27 July 2012, the total period of which is around 8 months.

*Contributory negligence*

1. Ms Chan submits that if the defendant is liable to the plaintiff, the plaintiff also has contributory negligence on her part. It is clear from Exhibit P1 that the plaintiff had walked straight into the water puddle, and had thus slipped and fell. The plaintiff should be very familiar with the Garden and the Footpath as she had been using that route to go to Tsing Yi MTR Station for 7 years prior to the Incident. The plaintiff had failed to keep a proper lookout and hence she had contributory negligence.
2. Mr Ho submits that the defendant is not entitled to take issue on contributory negligence, for the question of contributory negligence was not put to the plaintiff during cross-examination. In my view, as set out in paragraph 20 above, Ms Chan has asked why the plaintiff would step into the water puddle, and the plaintiff has provided her answer on the question. As a result of the question asked and the answer provided, the defendant is entitled to make use of the point arising from that exchange to make an argument on contributory negligence.
3. Ms Chan submits that the deduction of damages as a result of contributory negligence should be 50%. That is in the light of *Cheung Wai Mei* case and the *So Wang Chun* case.
4. Mr Ho submits that it would not be appropriate to apply the figure in *Cheung Wai Mei* and *So Wang Chun*, for in these cases, the surrounding floor was dry, and the claimants therein did not have proper lookout and slipped on a patch of water. In this case, the plaintiff only had a choice of walking into the water puddle or walking on the floor not covered by water but was also wet due to the rainy weather. It is unclear why the former is necessarily more slippery than the latter. Mr Ho submits that the deduction for contributory negligence should be no more than 20%. He relies upon *Raad* (10% contributory negligence for running on wet tiles) and *Partridge* (20% contributory negligence for not looking carefully at the steps).
5. In my judgment, if the defendant is liable to the plaintiff, the plaintiff also has contributory negligence as suggested by Ms Chan. On the percentage of deduction as a result of the plaintiff’s contributory negligence, I accept Mr Ho’s submission. There should be a deduction of 20% as a result of the plaintiff’s contributory negligence.

*PSLA*

1. In respect to PSLA, the parties are in agreement that the injuries suffered by the plaintiff are similar to the injuries sustained by the claimants in the following cases:-
2. In *Lee Chun Fat and Chan Kin Wo & Another* [2002] 2 HKLRD G20, the claimant involved in a dispute with the respondents and was pushed by the respondents from behind, causing him to fall to his knees and fracture his right patella. The claimant underwent four operations and received physiotherapy as an outpatient for about 16 months. An award of HK$300,000.00 was made as damages for PSLA.
3. In *Yeung Wai Ming v Tsui Ma Sing* (HCPI 561/2007, 4 September 2009), the claimant, a 28-year-old driver and delivery worker, when he was delivering a bag of flour to the respondent’s shop, he slipped and fell and landed on his right knee. X-ray examination showed that he suffered fracture of his right patella. The claimant had a long history of treatment with 2 operations. An award of HK$300,000.00 was given for PSLA.
4. In *Kwok Wing Ming v Wong Lin Lung* (HCPI 1341/1996, 22 October 1998), the claimant, a 34-year-old delivery worker, in a road traffic accident suffered fracture of the left patella which was reduced and fixed with wires and had since united. The post-operation recovery was uneventful. There was residual stiffness of the knee, pain and muscle wasting of the thigh. An award of HK$360,000.00 was given for PSLA.

I accept that these are the relevant authorities for the purpose of PSLA.

1. In fixing the PSLA award, I have to consider the inflation factor:-
2. Ms Chan refers me to the figures in Personal Injury Tables Hong Kong 2016 and submits that I may use the figures therein in considering the inflation.
3. Mr Ho submits that it would not be sufficient for just using the figures in those tables, for the Composite Consumer Price Index (“CPI”) table in Personal Injury Tables Hong Kong 2016 only includes CPI indices from January 2005 to December 2015. Mr Ho refers me to *Wong Man Kin v Golden Wheel (C & HK) Transportation Co Ltd* [2015] 5 HKC 570, in which Bharwaney J demonstrated at footnote 3 of [48] that PSLA should be adjusted taking into account inflation of the CPI. Mr Ho submits that adopting this approach, and using the data from the Census and Statistics Department dated 20 June 2017, the CPI of May 2017 is 104.3 (November 2014 set at 100). Thus, if *Yeung Wai Ming*, *Lee Chun Fat*, and *Kwok Wing Ming* are decided today, the PSLA awards would be as follows:-

|  |  |  |
| --- | --- | --- |
| Judgment | CPI as at time of Judgment | PSLA if awarded today  (HK$) |
| Yeung Wai Ming  (9/2009) | 78.9 | 300,000 x 104.3/78.9 = 396,577.95 |
| Lee Chun Fat  (5/2002) | 75.0 | 300,000 x 104.3/75.0 = 417,200 |
| Kwok Wing Ming  (10/1998) | 84.0 | 360,000 x 104.3/84.0 = 447,000 |

1. Ms Chan submits that Mr Ho’s approach is unconventional, not supported by the authorities, and should not be adopted. With respect to Ms Chan, Mr Ho’s approach is supported by *Wong Man Kin* and is logical and sensible. I adopt the approach suggested by Mr Ho.
2. Ms Chan fairly says that if the approach suggested by Mr Ho is adopted, she agrees with the calculation set out in Mr Ho’s table. I adopt the figures set out in Mr Ho’s table.
3. Taking all the aforesaid into account, for PSLA, I would award HK$400,000.

*Pre-trial loss of earnings plus MPF*

1. The parties are in agreement that for pre-trial loss of earnings, the sum should be the total of the plaintiff’s monthly salary for 8 months. The difference between the parties is what was the plaintiff’s monthly salary at the time of the Incident. Since I have rejected the evidence given by the plaintiff, I would approach the question by considering the figures as shown in the documents.
2. Ms Chan submits that the figures in the 2010/2011 tax return and the figures in the MPF statement should be used. Ms Chan submits that according to the 2010/2011 tax return, the plaintiff’s taxable income from 1 April 2010 to 31 March 2011 is HK$285,905.00, ie HK$23,825.42 per month. The MPF statement shows that the plaintiff’s total relevant income for the period of 1 June 2010 to 31 May 2011 is HK$214,000.00, ie HK$17,833.33 per month. Ms Chan therefore suggests that the figure of HK$20,829.38, ie (HK$23,825.42+ HK$17,833.33)/2, should be adopted as the plaintiff’s monthly salary at the time of the Incident. I accept these submissions.
3. Accordingly, taking the MPF factor into account, the pre-trial loss of earning would be HK$20,829.38 x 8 x 1.05 = HK$174,966.79

*Post-trial loss of earnings plus MPF*

1. Based upon the evidence accepted by this court, the plaintiff did not suffer any loss of earnings after the Incident. In fact, her salary was increased and not decreased after the Incident. There is no evidential basis justifying an award under this head.

*Loss of earning capacity*

1. The parties agreed that the award under this head should be a figure equivalent to the plaintiff’s monthly salary at the time of the Incident for 3 months. I have found in the above that the plaintiff’s monthly salary at the time of the Incident should be HK$20,829.38. Accordingly, the award under this head should be HK$20,829.38 x 3 = HK$62,488.14

*Special damages*

1. The parties agreed that there should be HK$82,759 as medical expenses.
2. As regards the travelling expenses, Ms Chan submits that the plaintiff has not provided any evidence in support of the claim and the defendant would only accept HK$1,000.00 for travelling expenses. Mr Ho submits that the plaintiff has produced some taxi receipts, and given the nature of the injuries suffered by the plaintiff, it would be reasonable for the plaintiff to take taxi to see doctors. I accept Mr Ho’s submissions on this point. I would allow HK$2,000 for travelling expenses.
3. As to tonic food, Ms Chan submits that there is no evidence showing any tonic food has been purchased or was necessary. Ms Chan draws my attention to *Chan Hung Hang v Fat Kee Marine Repairing & Engineering Co. Limited & Anor* (DCPI 2328/2007, 3 September 2008), in which the claimant claimed for tonic food expenses in the sum of HK$4,000.00 without providing any evidence for the same, and it was held that following *Yu Ki v Chin Kit Lam* [1981] HKLR 419 and judging from the mild nature of the plaintiff’s injuries, a global sum of HK$2,000.00 was allowed for tonic food expenses. Ms Chan submits that HK$1,000.00 would be appropriate for tonic food expenses in the present case. In my view, in the light of *Chan Hung Hang* and taking inflation into account, the appropriate sum for tonic food is HK$3,000.
4. Accordingly, the award under this head would be HK$82,759 + HK$2,000 + HK$3,000 = HK$87,759.

*Future medical expenses*

1. In the Joint Report, the 2 experts expressed the following view in paragraph 38 of the report:-

“At around 10-15 years, [the plaintiff] may require total knee replacement for treatment of progressive degeneration. The cost estimate around 200,000 if performed in private sector including 3 months rehabilitation. Of course, she can select to receive operation in private or public sector.”

Relying upon this, the plaintiff claims HK$200,000 under this head.

1. Ms Chan draws my attention to *Lam Kwong Ting v Ho Yau Yuen* [1990] 2 HKC 381, in which the court set out the following principles:-
2. The burden is on a plaintiff to satisfy the court that the future operation to be carried out is done on medical advice, and that it is necessary or reasonably required for the purpose of recovery or improvement of the injuries sustained or the relief of persistent pain and suffering.
3. The operation is anticipated or likely to take place in the near or reasonably foreseeable future.
4. The expenses to be incurred must be reasonable.
5. Ms Chan submits that there is no evidence suggesting that total knee replacement operation is anticipated, and there is no evidence suggesting that such surgery is likely to take place in the near or reasonably foreseeable future. Ms Chan submits that the claim under this head should be disallowed.
6. Mr Ho does not dispute the principles in *Lam Kwong Ting*. However, Mr Ho refers me to *Leung Yun Keung v Citybase Property Management Ltd* (HCPI 457/2008, 30 April 2010), in which the claimant had two operations on his right eye before the trial, and the second operation was performed to rid of the gradual developments of complications arose from the first operation. The experts opined that the future operations would be similar to the second operation if there are complications. Master Levy then concluded that the test for claiming future medical expenses for the potential third operation is justified for reasons given at [69]:-

“Though the experts have not expressly stated how likely such complications would be, given the severity of injury and the occurrence of previous complications, I find - with the passage of time - such complications would likely develop, and surgery similar to the second operation would have likely be necessary.”

1. Relying upon *Leung Yun Keung*, Mr Ho submits that the requirements in *Lam Kwong Ting* can be satisfied even as at the time of trial, no definite date can be given for the future medical treatment.
2. In this case, the 2 experts opine that the plaintiff ***may*** require total knee replacement operation at around 10-15 years. The 2 experts have not stated how likely that the operation is necessary. Unlike *Leung Yun Keung*, there is no occurrence of any complication affecting the plaintiff in this case. In my judgment, there is no sufficient evidential basis justifying a conclusion that the total knee replacement operation is anticipated or likely to take place in the near of reasonably foreseeable future. The claim under this head is declined.

*Employee’s compensation*

1. The parties agreed that the plaintiff has received HK$280,004.67 as employee’s compensation, which should be deducted from the award (if any) in these proceedings.

*Summary on quantum*

1. For the reasons above, if the plaintiff succeeds in establishing liability, I would award to the plaintiff the following:-

Amount (HK$)

PSLA 400,000.00

Pre-trial loss of earnings plus MPF 174,966.79

Post-trial loss of earnings plus MPF Nil

Loss of earning capacity 62,488.14

Special damages 87,759.00

Future medical expenses Nil

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725,213.93

After deducting 20% for contributory

negligence 580,171.14

Less: Employee compensation (280,004.67)

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Total 300,166.47

1. Further, if I am with the plaintiff on liability, I would award the following interests:-
2. For PSLA, there would be interest at 2% pa from the date of the writ until the date of this judgment.
3. For pre-trial loss of earnings and other special damages, there would be interest at half of the judgment rate from the date of the Incident, ie 13 June 2011, until the date of this judgment.
4. However, since I have ruled against the plaintiff on liability, the plaintiff’s claim would be dismissed.

*CONCLUSION*

1. I dismiss the plaintiff’s claim.
2. Mr Ho and Ms Chan have agreed that costs should follow the event, with a certificate for counsel. I order that costs of these proceedings (including all costs reserved, if any) be to the defendant, with a certificate for counsel, to be taxed if not agreed.
3. I thank Mr Ho and Ms Chan for the helpful assistance provided to the court.

( MK Liu )

District Judge

Mr Leon Ho, instructed by Michael Pang & Co, for the plaintiff

Ms Katherine Chan, Government Counsel of Department of Justice, for the defendant

Annex