# DCPI 1306/2016

[2021] HKDC 1608

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1306 OF 2016

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BETWEEN

SE-TO CHUN ON ANDY (司徒振安) Plaintiff

and

HO KAM WAH (何錦華) 1st Defendant

UNI-SKY ENTERPRISE LIMITED 2nd Defendant

(長天企業有限公司)

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 28 and 29 September 2021

Date of Judgment: 22 December 2021

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JUDGMENT

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*INTRODUCTION*

1. This is the trial for the plaintiff’s personal injury claim against the 1st and 2nd defendants in respect of a traffic accident which occurred on Wong Chuk Hang Road, Aberdeen, Hong Kong (“the Road”) at or about 1731 hours on 28 June 2013 (“the Accident”).

*BACKGROUND*

1. At the material time, the plaintiff was the driver of a public double decker bus operated by Citybus Limited (“Citybus”) bearing registration number GZ 5804 (“the Bus”) and the 1st defendant was the driver of a heavy goods vehicle (which was a soil dump truck) owned by the 2nd defendant bearing registration number PM9804 (“the Truck”).
2. There were 2 lanes on the westbound carriageway of the Road. Both vehicles had just emerged from the toll booths of Aberdeen Tunnel (“the Tunnel”) and were travelling in the same direction towards Aberdeen on the same Road but on different lanes.
3. On liability, while there is no dispute that a collision occurred between the Bus and the Truck, a fundamental dispute of facts exists between the plaintiff and the defendants. The plaintiff claims that the Truck collided with the Bus when passing it from behind on his right. On the other hand, the defendants allege that the Bus was travelling behind the Truck on its left and it was the Bus which had collided into the rear of the Truck from behind.
4. In gist, the plaintiff’s case is that while he was driving the Bus on the 2nd right lane of the Road (ie the nearside lane of the westbound carriageway and hereinafter will be referred to as “the Nearside Lane”), he slowed down the Bus in order to stop at a bus stop on that lane, when 1st defendant, who was driving the Truck on the 1st right lane of the Road (ie the offside lane of the westbound carriageway and hereinafter referred to as “the Offside Lane”), came from behind and entered the Nearside Lane and collided with the Bus. The right rear mirror of the Bus was severally damaged and came off from its mount as a result of the collision.
5. The defendants’ case on the other hand is that at the time of the Accident, the 1st defendant was driving the Truck on the Offside Lane heading towards the Aberdeen direction while the plaintiff was driving the Bus on the Nearside Lane heading towards the same direction. The 1st defendant claims that the Bus was travelling behind the Truck prior to the impact. The Bus then collided into the rear left side of the Truck, thereby causing the Accident.
6. Quantum has also been disputed by the defendants. Amongst other things, the defendants contend that some other events and the natural progression of a pre-existing degenerative back condition have contributed to the plaintiff’s present condition.

*Issues to be decided by the Court*

1. Hence, the principal issues fall to be decided by the court are as follows:-
2. How the Accident happened?
3. Was the Accident caused by the negligence of the 1st defendant?
4. What injury did the plaintiff suffer as a result of the Accident?
5. To what extent did some other event(s) and/or natural progression of a pre-existing degenerative condition contribute to the plaintiff’s present condition?

*DISCUSSION*

*LIABILITY*

*(A) How the Accident happened?*

*The plaintiff’s evidence*

1. The plaintiff’s evidence is straightforward and simple. At the time of the Accident, he was driving the Route no. 97 bus for Citybus from Exchange Square towards Lei Tung Estate in Aberdeen. Prior to the Accident, he was travelling inside the Aberdeen Tunnel where he first noticed the Truck was travelling ahead of him on the same lane. He said the Truck was travelling about 40 to 50 metres (about 4 buses’ length) ahead of him while inside the Tunnel. Upon emerging from the tunnel, the Bus then moved to the left most lane in order to drive through the Autotoll lane. He noticed that the Truck went “all the way to the right” in order to make use of one of the manually operated toll booths. He noticed that there was a goods van stopped ahead of the Truck at the toll booth so the 1st defendant was second in line.
2. After driving past the Autotoll lane, the plaintiff had to drive towards the right in order to reach the Nearside Lane so as to approach the bus stop on that lane. At this juncture, he noticed that the Truck had just come out from his toll lane. Hence, the Bus was travelling in front of the Truck after paying the toll.
3. About 60 to 70 metres before reaching the bus stop, the plaintiff had to slow down the Bus in order to get into the bus stop.
4. At about 40 metres in front of the bus stop, while the Bus was already on the Nearside Lane, the plaintiff saw the Truck (via his right rear mirror) overtaking the Bus from the Offside Lane. When the open bed/skip of the Truck was passing the Bus, he felt it was travelling very close to the Bus. He therefore sounded the horn of the Bus in order to indicate the danger to the driver of the Truck. Despite of this, the left open bed of the Truck hit the right side mirror. The impact took down the whole mirror including the leg support.
5. The plaintiff claimed that the Bus was about 35 to 40 metres away from the bus stop when the collision took place. The Bus was travelling right in the middle of the Nearside Lane when the Accident happened.
6. Upon impact, the plaintiff immediately stopped the Bus while he noticed the 1st defendant drove past the Bus for a further distance of about 10 to 11 metres before he managed to bring the Truck to a complete halt. The Truck stopped at the Offside Lane with its 4 left wheels all touching the solid white line which divided the Nearside Land and the Offside Lane. In other words, the Truck was protruding onto the dividing line which was used to separate the Nearside Lane (that was reserved as an exclusive “Bus Lane” during peak hours) and the Offside Lane. There was still plenty of space on the right hand side on the Offside Lane for the Truck to make use of if he wished to. The photographs taken by the plaintiff and the Police after the Accident confirmed the above stationary position of the Truck after the Accident.

*The 1st defendant’s evidence*

1. The 1st defendant testified at the trial.
2. He stated that, on the day of the Accident, at around 5:00 pm, he was driving the Truck from Chai Wan to Wah Fu Estate via the Tunnel in order to collect soil.
3. After the 1st defendant entered into the southbound lane of the Tunnel from the Happy Valley entrance, the Truck travelled on the left hand lane as all heavy vehicles and buses are requested to do. While inside the Tunnel, he noticed that the Bus was travelling about 1 to 2 dump trucks’ length behind him on the same lane.
4. At around 5:30 pm, when the Truck exited the Tunnel, the 1st defendant allegedly drove it to the 2nd left lane booth (which was operated manually by an attendant) in order to pay the toll. He did not pay attention to where the Bus was at this juncture.
5. A short distance after the toll, the Road split into left and right. The right side of the Road consisted of the westbound lanes leading towards Wong Chuk Hang / Aberdeen while the eastbound lanes of the Road leading to Deep Water Bay and Stanley. The Nearside Lane is a “Bus Only” lane which reserved for the use of franchised buses from 4:00 pm to 8:00 pm each day. As such, after driving past the toll booth, the 1st defendant had to move the Truck towards the far right in order to take the Offside Lane.
6. After leaving the toll booth, the 1st defendant stated that he took the right most lane of the Road and increased his speed from 40 to 50 km/h. He was aware that there was a “Bus Lane” on the Nearside Lane. Hence, he knew that he had to take the Offside Lane in order not to get inside the Bus Lane.
7. The 1st defendant alleged that after he left the toll booth, he did notice that the Bus was travelling on his left lane. He noticed that the distance between the 2 vehicles became closer as the Bus was travelling at a speed faster than the Truck. However, he claimed that it had never passed the Truck as the Bus had not exceeded the front of his vehicle at any stage. He said the Bus was on the Nearside Lane and the Truck was on the Offside Lane just prior to the collision.
8. The 1st defendant further claimed that the Bus then leaned towards his side and the right side front of the Bus before hitting the left rear part of the Truck. He immediately stopped the Truck and got out of his vehicle in order to find out what happened. The 1st defendant was also able to confirm that he saw the Bus’s rear mirror had been damaged and ended up on the Offside Lane behind one of the left rear wheels of the Truck.

*Findings of the Court on Liability*

*On the witnesses’ credibility*

1. The plaintiff and the 1st defendant gave 2 completely different versions of events. Both of them cannot be true at the same time. Hence, this case very much turns on the credibility of those 2 witnesses.
2. In assessing witnesses’ credibility, I find the following passage by Deputy High Court Judge Eugene Fung SC in *Hui Cheung Fai v Daiwa Development Ltd* [2014] HKCFI 650 helpful:-

“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](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I142C4001E42811DA8FC2A0F0355337E9) at 431 (Lord Pearce) …

1. In deciding whether to accept a witness’ 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, 5 May 2011) §39 (Chu J).
2. In determining a witness’ credibility, I have also attached importance to the *consistency of the witness’ 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.
3. 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](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I554CAC271D9244DDBB2E3ADE993C990A) at §§36, 37 (Bokhary PJ) or from the assessment of the witnesses’ character (*Esquire Electronics Ltd v HSBC* (2007) 3 HKLRD 439 at §135 (Stock JA)).

81. The practical approach to assessing credibility of witnesses in a case such as the present may have best been summarized by the words of Robert Goff LJ, as he then was, in *The Ocean Frost* [[1985] 1 Lloyd’s Rep 1](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I6721D960E42711DA8FC2A0F0355337E9) 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 ……” (emphasis added)

*Contemporaneous documents and indisputable evidence*

1. In my judgment, the most important contemporaneous and indisputable evidence in this case can be found in the form of the set of photographs taken by the plaintiff immediately after the Accident.[[1]](#footnote-1)
2. Those photographs show the respective stationary position of the Bus and the Truck immediately after the Accident. They revealed that:-
   1. The Truck stopped with all four sets of its left wheels on the solid dividing line separating between the Nearside Lane and the Offside Lane;
   2. The Truck was driving very close to the Nearside Lane, in fact straddling onto the “Bus Lane”, leaving a wide gap of about 1 metre on its right where some temporary road bollards (“water bollards”) had been placed due to ongoing roadwork;
   3. The end up position of the Truck strongly suggests that it had either intruded into the Nearside Lane where the Bus was travelling on or at least driving very close to it prior to the Accident;
   4. The right rear mirror of the Bus came off from its mount in the Accident and fell onto the ground. It ended up at the left rear of the Truck immediately behind one of the rear left wheels;
   5. The Bus stayed right in the middle of the Nearside Lane some 10-11 metres behind the Truck after the collision; and
   6. Except the right rear mirror of the Bus which had come off, there was no other damage caused to the Bus or the Truck.

*Position of the Truck*

1. In my judgment, the above photographs strongly suggest that the 1st defendant had driven the Truck too close to the right hand side of the Bus when trying to overtake it from the Offside Lane. The photographs show that the 1st defendant could not have travelled in the middle of the Offside Lane as claimed by the 1st defendant in his evidence.
2. In fact, the end up position of the Truck clearly shows that it had intruded into the dividing line of the Bus Lane, leaving a wide gap on its right which it could have made use of when passing the Bus. In my judgment, this is consistent with the fact that 1st defendant was driving the Truck either very close to or had actually intruded on the Bus Lane. I so find it was the case. In doing so, I find that he was driving without due care and attention and was therefore negligent.
3. The 1st defendant tried to undermine the force of the photographs by alleging in the witness box that he had swerved the Truck to the left after the collision. I have no difficulty in rejecting his evidence on this based on the following undisputed facts:-
4. The photographs were provided to the defendants by way of discovery before the 1st defendant’s witness statement was prepared;
5. Despite of this, in the 1st defendant’s witness statement, he has never said that he had swerved the Truck after the collision;
6. Instead, he maintained that when the Truck came to a halt, his vehicle was completely inside the right lane (“停下時，我的車輛完全在右線內。”)[[2]](#footnote-2); and
7. Even in the police statement which was taken after the Accident, the 1st defendant has never mentioned the fact that he had moved the Truck[[3]](#footnote-3);

*Position of the rear mirror*

1. Immediately after the Accident, the rear mirror of the Bus fell onto the ground and was found just behind the left rear wheel of the Truck. In fact, one of the photographs captured a policeman who arrived the scene after the Accident was picking it up from that position.
2. It is not disputed that, immediately after the Accident, the Truck stopped in front of the Bus. Judging from the photographs, the Truck was about 10 – 11 metres ahead of the Bus.
3. In other words, it is most likely that during the Accident the rear mirror of the Bus fell forward from the Bus and eventually ended up at the back of the Truck.
4. I find the end up position of the rear mirror is more consistent with the fact that the Truck actually hit the side of the Bus when it was trying to overtake it on the Offside Lane due to the following reasons:-
   1. If the Bus had hit the Truck from behind as claimed by the defendants, the rear mirror would most likely fall backwards or strike the side glass window of the Bus;
   2. Only if the Truck had hit the Bus from the side when it was catching up from behind that the rear mirror would fall forward and end up in the position that it had as shown in the photographs; and
   3. The momentum of the forward movement of the Truck most likely would have dragged the mirror along with it and therefore the rear mirror finally ended up at the back of the Truck.

*Inherent improbabilities of the 1st defendant’s evidence*

1. The 1st defendant changed his story in the witness box. He stated in the witness box that he saw the Bus was leaning towards his Truck when the collision occurred (“挨埋嚟”). I find such allegation inconsistent with the statements he had made previously:-
2. In the police statement, he claimed that “he was looking ahead of him all along until he heard someone sounded the horn at him. As to how he was hit he did not see” (“我一路望前面…直到聽到有人響「安」，實際佢點解撞落嚟我就見唔到”)[[4]](#footnote-4);
3. Even in his witness statement, he did not say that he saw the collision.[[5]](#footnote-5) At most, he only “guessed”[[6]](#footnote-6); and
4. The 1st defendant’s allegation that he saw how the collision occurred is nothing but again a recent fabrication of the 1st defendant.
5. According to the 1st defendant’s latest version which was given in the witness box, he alleged that:-
6. While inside the Tunnel, the Bus was at a 2 trucks’ distance behind the Truck;
7. The Truck stopped at the left 2nd toll booth;
8. The Bus then passed the booth by Autotoll on the 1st lane;
9. After passing the toll booth, the Bus was still travelling 3 trucks’ distance behind the Truck;
10. The Truck then accelerated to about 40-50 km/h before the collision took place. The 1st defendant alleged that the Bus was still one or half of a truck distance behind the Truck.
11. I find the 1st defendant’s allegations inherently improbable for the following reasons.
12. First, if the 1st defendant was right about his speed, then the plaintiff would have to accelerate to a speed substantially greater than 50 km/h in order to catch up with the Truck so as to hit it at its rear.
13. Second, with such high speed, it is difficult to imagine that the plaintiff was able to bring the Bus to a complete stop immediately after the collision and ended up about 10 metres behind the Truck right in the middle of the nearside lane.
14. Third, the fact that the plaintiff was able to bring the Bus to a complete stop without causing any injury to the passengers suggest that he could not have been travelling at a high speed at all. Therefore, it is extremely unlikely that he was trying to overtake the Truck at speed at the time.
15. Last but not the least, the end up position of the Truck and where the rear mirror was found as shown by the photographs in my view amply demonstrate that the 1st defendant’s version is inherently improbable.

*Conclusion on 1iability*

1. In the aforestated premises, I find the Accident was entirely caused by the negligence of the 1st defendant. The 2nd defendant will be vicariously liable for the Accident in the capacity of his employer.
2. I find the plaintiff not liable in contributory negligence.
3. Therefore, I find the 1st and 2nd defendants 100% liable in causing the Accident.

*DAMAGES*

*Treatment and disability*

1. The nature of the plaintiff’s injuries, medical treatments and alleged disabilities have been set out in revised statement of damages (“RSOD”).
2. In short, immediately after the Accident, the plaintiff experienced right back pain, right leg numbness and left knee pain. He was sent to the Accident & Emergency Department of Ruttonjee & Tang Shiu Kin Hospitals for treatment.
3. The plaintiff then received treatments in private clinics, Aberdeen Jockey Club General Out-patient Clinic, Department of Orthopaedics and Traumatology (“O&T”) of Queen Mary Hospital for physiotherapy and occupational therapy.
4. As a result, the plaintiff had been granted sick leave of a total of 234 days from 28 June 2013 to 22 September 2013 and 24 September 2013 to 17 February 2014.
5. After the expiry of the sick leave period, the plaintiff has resumed his pre-accident job as a bus driver with Citybus.

*The plaintiff’s pre-existing condition & PSLA*

1. The defendants submit that the plaintiff is not entitled to damages, if any, in the amount claimed in the RSOD, in light of, *inter alia*, the plaintiff’s pre-existing conditions to his back.
2. The principles governing the issues of causation and quantification of loss in a case where there are pre-existing conditions on the part of the claimant has been summarised in *Yu Wai Kan v Law Cho Tai* (HCPI 62/2010, unreported, 11 May 2011) at §71.
3. It is not disputed that the plaintiff suffers from pre-existing degenerative changes of the lumbar spine: see joint medical expert report of Dr Fong Chi Ming and Dr Kong Kam Fu James dated 23 November 2018 (“the Joint Medical Expert Report”);medical report of Dr Tang Yuk Kwan dated 25 January 2016 and; medical report of Dr Cheung Pui Yin Jason dated 28 January 2016.
4. It is not disputed that in 2005, the plaintiff suffered back injury at work: See §20 of Joint Medical Expert Report; supplemental joint medical expert report of Dr Fong and Dr Kong dated 3 September 2019 (“the Supplemental Joint Medical Expert Report”); and the certificate of review of assessment dated 25 July 2014.
5. Further, it cannot be disputed that he plaintiff has a well-documented history of being treated for low back pain prior to the Accident: see medical report of Dr Anita Fan; physiotherapy report of Annie Au; consultation notes of Dr Lee Pui Wai; consultation note of Dr Cheung Man Ha.
6. In addition, it is not disputed that the plaintiff has been followed up for low back pain since January 2008: see medical report of Dr Tang Yuk Kwan.
7. The diagnosis of the plaintiff on the day of the Accident was only back sprain. He was treated and discharged on the same day: see occupational therapy report of Grace Tse; medical report of Dr Chu Alvin Po Ngai; medical report of Dr Leung Lik Hang; Joint Medical Report; and medical report of Dr Tang Yuk Kwan.
8. Further, after the Accident, the plaintiff suffered 2 further back injuries on duty. They were respectively:-
9. On 18 April 2014 (“the 2014 Accident”): See medical report of Dr Anita Fan; physiotherapy report of Annie Au; occupational therapy report of Grace Tse; Joint Medical Expert Report; Supplemental Joint Medical Expert Report; medical report of Dr Ng Pui Lok; medical report of Dr Tang Yuk Kwan; and medical report of Dr Cheung Pui Yin; and
10. On 21 January 2017 (“the 2017 Accident”): physiotherapy report of Annie Au; Joint Medical Expert Report; Supplemental Joint Medical Expert Report; and medical report of O&T of QMH.
11. In the present case, both medical experts Dr Fu and Dr Fong are of the opinion that there is a strong possibility that some other event or natural progression of the condition would have brought about the present condition: See Supplemental Joint Medical Expert Report[[7]](#footnote-7).
12. It has been held that where there is a strong possibility that some other event or natural progression of the condition would have brought about the plaintiff’s present state, it would be necessary to assess the degree of the possibility in deciding what reduction is appropriate, as in assessing the effect of other vicissitudes of life: see *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958, at 963E-H.
13. Mr Bong-Kwan for the defendants submits that an appropriate discount in the circumstances would be 80%. Indeed, according to the defendants, the Accident accounts for 20% of the plaintiff’s present condition only: See Dr Kong’s opinion in Joint Medical Expert Report[[8]](#footnote-8); Supplemental Joint Medical Expert Report[[9]](#footnote-9).
14. Thus, on such basis, the defendants submit that the plaintiff should be entitled to no more than HK$30,000 under his claim for PSLA. The defendants rely on the following authorities:-
15. *Siu Leung Shang Peter v Chung Wai Ming* (HCPI 43/2006, unreported, 16 March 2007): HK$30,000 for neck sprain in road traffic accident taking into account degenerative cervical spine.
16. *Lai Ka Yin v Chan Yiu Kei* (DCPI 453/2008, unreported, 7 January 2009): HK$50,000 for soft tissue injury of neck and back as a result of a road traffic accident.
17. *Yip Mau Kei v Wong Kam Tim* (DCPI 1905/2013, unreported, 10 February 2015): HK$90,000 for soft tissue injury to the back from road traffic accident.
18. I am very disappointed that Mr Tse for the plaintiff has completely failed to address this important issue which would significantly affect the plaintiff’s claim, particularly on the issue of PSLA and loss of earnings, in his written opening submissions. In his closing submissions, he only dealt with this important issue in one single short paragraph with no reference made to any decided authorities at all. He merely stated that “P had **recovered quite substantially** from 2005 accident. The **contribution** of the 2005 accident to the present disabilities should **be very mild**. No discount is necessary.” [emphasis as appeared in original text]: See §42 of the defendants’ closing submissions.
19. Mr Tse submits therefore that an appropriate award for PSLA should be around HK$200,000 in this case. He relies on the following cases in support of his contention:-
20. *Choi Ying Chi v Loyal Engineering Limited* (HCPI 53/2006, unreported, 25 September 2007): HK$280,000 for back sprain injury;
21. *Shah Nisar v Wai Kit Engineering Co. Ltd* (HCPI 1092/2003, unreported, 11April 2005): HK$300,000 for back injury;
22. *Wong Yun Chiu v Union Printing Company Limited* (HCPI 282/2009, unreported, 29 July 2011): HK$200,000 for sprain back;
23. *Ali Shoukat v Hang Seng Bank Limited* (HCPI 3/2013, unreported, 23 June 2004): HK$250,000 for sprain back injury; and
24. *Yeung Sze v Win Art Design & Decoration Company Limited* (HCPI 6/2000, unreported, 27 June 2001): HK$200,000 for back injury.
25. With respect to Mr Tse, he has completely ignored the clear and indisputable opinions of the experts on this issue as summarized above, including the plaintiff own appointed expert Dr Fong’s opinion, that the plaintiff has suffered from a serious pre-existing condition to his back which would definitely have affected his claims in this case. The court expects a lot more from experienced counsel to deal with such live issue which the court has to determine. With respect, a short paragraph consisted of 3 shorts sentences with no analysis whether as to the fact or to the law simply does not assist the court at all. Nor does that do justice to his legally aided client.
26. In my judgment, given the plaintiff’s pre-existing condition and the 2014 and 2017 Accidents, I agree with Mr Bong-Kwan that the plaintiff would fall within the 2nd scenario as agreed by both medical experts, ie Dr Fong (for the plaintiff) by Dr Kong (for the defendant) in the Supplemental Joint Medical Expert Report, namely, “(T)here is a strong possibility that some other event or natural progression of the condition would have brought about the present condition.”[[10]](#footnote-10)
27. However, I would reject Dr Fong’s opinion that the pre-existing condition, including the 2005 accident, will account for 20% of the plaintiff’s present condition only. Given the above very clear medical records and notes from the public hospitals on both of his pre-accident and post-accident treatments and condition, there is in my view no reason why Dr Fong did not take into account of the injuries sustained in both of his pre-existing lumbar spondylosis (which caused him chronic low back pain) and the 2014 and 2017 Accidents. While Dr Fong has mentioned in the Joint Medical Expert Report that the 2014 and 2017 Accidents on duty were only briefly mentioned in the physiotherapy records with no detailed description provided and with no mention of these in any other medical reports from different medical personnel from any other hospitals, I cannot agree with his condition that the injuries caused by these 2 episodes should be mild and the aggravation of symptoms could be transient.
28. I find as a fact that the plaintiff’s pre-existing lumbar spondylosis and his chronic low back pain together with the injuries sustained in the 2014 and 2017 Accidents at work are the major factors causing his current condition and complaints. While I would not go as far as Dr Kong in finding that the Accident had contributed 20% of his current condition only (given the lack of detailed information in regard to the 2014 and 2017 Accidents), on balance, I find that those matters had contributed 60% of his current condition. In other words, I find that the Accident has contributed 40% of his current condition only. Therefore, there should be a corresponding reduction of 60% on his PSLA claim. In this regard, I would reject the plaintiff’s expert Dr Fong’s opinion that his pre-existing condition had only contributed 20% of his present condition.
29. In the circumstances, having taken into account of the cases on PSLA cited by the parties, I would have allowed a PSLA award of HK$150,000 for the back injuries had it not been for the pre-existing condition and subsequent accidents. I therefore would make a 60% discount for the general damages award for PSLA resulting from the injuries sustained in the Accident. I would award a sum of HK$60,000 for PSLA in this case.

*Loss of earnings and MPF*

1. It is not disputed that the plaintiff earned HK$15,183.24 per month on average before the Accident. Both experts agreed that the sick leave granted is reasonable.
2. The plaintiff claims the pre-trial loss of earnings and MPF as follows:-

HK$15,183.24 x 234 days/30 x 1.05 = HK$124,350.74

1. The defendants do not dispute the plaintiff’s entitlement for the pre-trial loss of earnings claimed.
2. Since the sick leave covered the period for around 8 months and before the 2014 and 2017 Accidents occurred and that there is no evidence to suggest that immediately prior to the Accident he had to take time off due to his pre-exiting condition and the 2005 accident, I agree with counsel on both sides that the whole of the sick leave of 234 days should be attributable to the injuries sustained by him in the Accident.

*Loss of earning capacity*

1. It is the plaintiff’s case that the plaintiff will suffer disadvantage in the labour market due to his back injury. The plaintiff claims a sum of $80,000 under this head which is equivalent to about 5 months’ salary: See *Yu Kok Wing v Lee Tim Loi* [2001] 2 HKLRD 306 at 311I-313D.
2. In the witness box, the plaintiff testified that he needed to take sick leave for the low back pain when the pain was serious. The plaintiff also said that he was entitled to work after the retirement age. Mr Tse submits that it is still likely that the plaintiff will suffer a disadvantage in the labour market due to his current condition and that such loss of earning capacity should be awarded to the plaintiff as claimed.
3. However, again with respect to Mr Tse, he has not taken into account of the fact that both experts have assessed the loss of earning capacity at a negligible level of 3% (by Dr Fong) and 0.2% (by Dr Kong) respectively only and that the plaintiff has managed to return to his full-time job as a bus driver with Citybus since the expiry of the sick leave in February 2014 until now. Given the fact that his normal retirement age as a full-time bus driver is at 65 and that he was largely able to hold onto his job (save for the unrelated 2014 and 2017 Accidents), the evidence does not in any way suggest that he will likely to lose his present employment due to the Accident and therefore will suffer a disadvantage in the labour market as a result.
4. I therefore do not see there is any basis for the plaintiff to make a claim for loss of earning capacity in this case. His claim in this regard is therefore rejected.

*Special damages*

1. The plaintiff claims a total sum of HK$40,750 for special damages.
2. In their Answer, the defendants do not dispute items (a) to (f) pleaded in the RSOD equivalent to a total sum of HK$3,790.
3. The defendants further submit that the awards for Chinese medicine (item (g)), travelling expenses (item (h)) and tonic food and medicine oil (item (i)) should not be more than HK$2,000, HK$1,000 and HK$2,000 respectively. Accordingly, the defendants say that the total special damages should not exceed HK$8,790.
4. The plaintiff’s expenses for Chinese medicine (bone setting) have been recorded in the documents.[[11]](#footnote-11) The documents supporting the claim of medical expenses at the public hospitals and out-patient clinics have been enclosed in the trial bundle.
5. I am of the view that the bonesetter’s fees and the hospital expenses incurred during his sick leave period and immediately after the Accident are directly attributable to the Accident and not due to his pre-existing conditions. They are therefore recoverable without any deductions.
6. The total amount for both the medical expenses and bonesetter’s fees as recorded by his employer was at a total of HK$24,175: (See receipts signed by the plaintiff for medical expenses reimbursements from his employer which included medical expenses incurred at public hospitals and clinics and private doctors listed out at items (a) to (f) of §17 of the RSOD).[[12]](#footnote-12)
7. For travelling expenses, I would allow the modest claim at HK$2,000 despite the lack of documentary proof.
8. For tonic food and medicine oil, in the absence of any documentary evidence and any credible evidence to the advisability and necessity of such items, I would allow a nominal sum of HK$5,000 only.
9. Therefore, the total special damages awarded will be at HK$31,175 ($24,175 + $2,000 + $5,000).

*Interest*

1. For general damages, I will allow interest at 2% per annum from the date of issue of writ on 23 June 2016 until the date hereof, and thereafter at judgment rate until payment. For special damages, I will allow interest at half of the judgment rate from the date of accident on 28 June 2013 until the date hereof, and thereafter at judgment rate until payment.

*Employees’ Compensation Received*

1. The plaintiff is willing to give credit to the employees’ compensation received resulting from the Accident in the sum of $126,611.26.
2. I shall take this into account when making the final award for damages in this case.

*CONCLUSION*

1. In summary, I find the defendants 100% liable for causing the Accident.
2. In respect of damages, based on the above findings, I would allow the following sum as award for damages in this case:

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  | HK$ |
| (1) | PSLA |  | $60,000.00 |
| (2) | Loss of Earnings & MPF |  | $124,350.74 |
| (3) | Loss of Earning Capacity |  | Nil |
| (4) | Special Damages |  | $31,175 |
|  | Sub-total |  | $215,525.74 |
|  | Less: employees’ compensation |  | $126,611.26 |
|  | Net total |  | $88,914.48 |

1. In the circumstances, I would therefore enter judgment in favour of the plaintiff in the sum of HK$88,914.48 plus interest thereon at 2% per annum from the date of issue of writ on 23 June 2016 until the date hereof, and thereafter at judgment rate until payment for general damages and interest at half of the judgment rate from the date of accident on 28 June 2013 until the date hereof, and thereafter at judgment rate until payment for special damages in this case.
2. Costs will follow the event. I will make an order nisi that the plaintiff will be entitled to costs of this action to be taxed if not agreed with certificate for counsel, such costs to be assessed at the District Court scale to be taxed if not agreed. The plaintiff’s own costs will be taxed in accordance with the legal aid regulations. The order nisi will become absolute in the absence of any application by the parties within 14 days from the date of handing down this judgment.

( Andrew SY Li )

District Judge

Mr Matthew Tse, instructed by Au Yeung, Chan & Ho, for the plaintiff on the instructions of the Director of Legal Aid

Mr Justin CY Bong-Kwan, instructed by Francis Kong & Co., for the 1st and 2nd defendants

1. [E/147-148] [↑](#footnote-ref-1)
2. [B/92] [↑](#footnote-ref-2)
3. [E/152-154] [↑](#footnote-ref-3)
4. [E/153-4] [↑](#footnote-ref-4)
5. [B/092/§12] [↑](#footnote-ref-5)
6. [B/092/§15] [↑](#footnote-ref-6)
7. [D/145] [↑](#footnote-ref-7)
8. [D/138/§8] [↑](#footnote-ref-8)
9. [D/146/§8] [↑](#footnote-ref-9)
10. [D/141-142] & [D/145-146] [↑](#footnote-ref-10)
11. [F/237- 249] [↑](#footnote-ref-11)
12. [F/237-249] [↑](#footnote-ref-12)