# DCPI 1815/2020

[2023] HKDC 935

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1815 OF 2020

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BETWEEN

WONG YUN WAI黃潤偉 Plaintiff

and

CHINA OVERSEAS PROPERTY SERVICES LIMITED

（中國海外物業服務有限公司） 1st Defendant

HONG KONG COMMERCIAL CLEANING SERVICES

LIMITED（香港工商清潔服務有限公司） 2nd Defendant

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Before: Deputy District Judge Anthony Chan SC in Court

Dates of Hearing: 25, 26 and 28 April 2023

Date of Judgment: 13 July 2023

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JUDGMENT

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***A. INTRODUCTION***

1. This is an action for personal injuries resulting from an alleged slip and fall accident.
2. The plaintiff was 53 years old at the time, and was employed as a pastry chef in a bakery situated at Shop 107, 1st Floor, Shui Cheun O Plaza, Shatin, New Territories (“**Plaza**”).[[1]](#footnote-1)
3. On 30 September 2017 at around midday, the plaintiff went to a male toilet on the 1/F of the Plaza (“**Toilet**”). It is said that after he had entered the Toilet and as he was approaching the urinals, he stepped on a pool of water on the tiled floor and slipped and fell to the right and hit his right knee and right buttock.
4. The 1st defendant was the management company of the Plaza and the 2nd defendant was the cleaning contractor engaged by the 1st defendant, and was responsible for cleaning the Toilet and other toilets of the Plaza.
5. The defendants denied the accident happened and put the plaintiff to strict proof. Alternatively, if the accident did happen, the defendants argued a proper and adequate system to ensure the cleanliness and to prevent slip and fall in the Toilet had been provided. Further in the alternative, if the accident did happen and assuming the defendants were liable, the defendants argued the accident was caused wholly or contributed by the plaintiff’s negligence.

***B. LIABILITY***

1. I shall briefly describe the layout of the Toilet based on the photos shown to me. I should say that although the photos were taken some years after the alleged accident, the parties agreed the layout did not change over the years. The Toilet is rectangular in shape with the entrance at one narrow end. As one enters the Toilet, there is a row of cubicles on the righthand side. On the lefthand side near the entrance are wash basins. Adjacent is a pillar, and next to it are the urinals. A person intending to use the urinals would have to turn slightly left after walking past the wash basins and the pillar. At the narrow end opposite the entrance between the cubicles and urinals is a wall with a row of windows at the top. Sitting in front of that wall is a rubbish bin.
2. It appears to me there is no dispute that the plaintiff did suffer from a fall in the Toilet at the material time. Indeed, the evidence emanating from the defendants’ side was that the Plaza’s management was alerted that the plaintiff had fallen in the Toilet and that an ambulance was called to take him to the hospital.
3. Accordingly, it seems to me the question is whether the fall was on the balance of probabilities an unusual event which in the absence of explanation was more consistent with fault on the defendants than the absence of fault. If that is proved, the evidential burden shifts to the defendants to show, on a balance of probabilities, that the accident happened without negligence on their part. See *So Wang Chun v Rainforce Limited* [2008] 3 HKC 197 at §50.

*B1. Whether fall an unusual event?*

1. On this issue, the following points appeared from the plaintiff’s witness statement. At the time of the alleged accident, he was wearing his uniform including a pair of black plastic shoes. He left the shop and walked towards the Toilet. The trip took around 3 minutes. He entered the Toilet at a normal walking pace and then turned left and suddenly slipped and fell on the floor a few steps away from the urinals. After the slip, he felt a great pain on his right knee and was barely able to get up, but could not walk. A passerby saw him, and notified the security who called an ambulance. He said that while he was waiting for the ambulance, he noticed a puddle of water on the floor where he had slipped. Subsequently, an ambulance took him to the Accident and Emergency Department (“**AED**”) of the Prince of Wales Hospital (“**POWH**”).
2. Of the conditions of the Toilet, the plaintiff said in his witness statement that it was a public toilet frequented by tenants of the Plaza or members of the public. In particular, the Toilet was next to a restaurant and hence the use rate of the Toilet was high. The defendants did not dispute any of this.
3. What the defendants disputed was the plaintiff’s evidence in his witness statement that the interior of the Toilet was usually wet and filthy because of insufficient ventilation, the lack of blow drier on the floor, the absence of cleaners stationed in the Toilet and the inadequate time and frequency of cleaning. They also denied his claim that there were no warning signs in the Toilet at the material time. They further denied there was a puddle of water on the floor of the Toilet (or that the Toilet floor was wet) at the material time. According to them, the floor of the Toilet was dry, and the plaintiff’s fall had nothing to do with them and for which they should not be held responsible.
4. The plaintiff was cross-examined at some length on the details of his fall, his walking pace before the fall, the fall itself (including which of his foot stepped on the alleged water puddle, which direction he fell towards, and which part of his body hit the floor first), and about what he had seen of the interior conditions of the Toilet both before and after the fall. In response to my inquiry, both Mr Ricky Li for the 1st defendant and Mr Eric Chau for the 2nd defendant confirmed that the point of those questions was to test the plaintiff’s credibility.
5. In this regard, I remind myself of the relevant legal principles concerning the making of findings of fact and the assessment of credibility: *Hui Cheung Fai v Daiwa Development Ltd* (HCA 1734/2009, 8 April 2014) at §§76-83 (DHCJ Eugene Fung SC); *Lee Fu Wing v Yau Po Tung Paul* [2009] 5 HKLRD 513 at §53 (DHCJ Thomas Au). I also remind myself of Bharwaney J’s observation in *Chan Wa Kun v Secretary for Justice for and on behalf of Correctional Services Department* [2019] HKCFI 1688 at §39 that even if a plaintiff in a slip and fall case is unable to give direct evidence why he slipped and what caused him to fall, the court may infer the reason and cause of the fall from all the relevant facts and surrounding circumstances.
6. With respect to counsel, I very much doubt the utility of the line of questioning described above for the purpose of this case. There is little doubt to my mind that the plaintiff did fall as he alleged in the Toilet at the material time.
7. In the first place, as I have said, it appears to be common ground that the plaintiff did suffer a fall in the Toilet at the material time. Second, I do not think one should begrudge the plaintiff for being unable to precisely recount the minutiae of his fall given it must have happened in a flash and bearing in mind the passage of time.
8. Third and more importantly, it seems to me the plaintiff’s account of his fall was largely consistent with the contemporaneous medical record. His evidence in summary was that he slipped and fell on the wet floor of the Toilet and hurt his right knee and right hip area.[[2]](#footnote-2) According to a medical record entitled “Prince of Wales Hospital A&E Attendance Record” (“**Attendance Record**”), which bore time stamps of “12:45” and “16:30” on 30 September 2017 (ie the notes therein were taken shortly after, and during the same day of, the alleged accident), the doctor noted:

“*S/F [slip/fall] on wet floor @ 12 noon*

*Buttock landed…*

*S/F [slip/fall] in workplace*

*Buttock land*…” (additions supplied)

1. Additionally, the doctor indicated in the Attendance Record (using arrows on two diagrams of a person’s torso) the areas where the plaintiff was diagnosed as suffering from a condition. One area was the right knee. The other area was consistent with the right hip area indicated by the plaintiff during trial.
2. Fourth and in any case, having carefully considered the so-called inconsistencies between the plaintiff’s evidence and the medical records identified by Mr Li and Mr Chau in their closing submissions, I do not accept there is any substance in the complaint.
3. I do not accept the suggestion that what the plaintiff had told the doctor (as recorded in the Attendance Record) was significantly different from his evidence in court. He told the court that his right knee hit the ground first and then his tailbone (which as I have mentioned above the plaintiff had meant it as a reference to his right hip area) also hit the ground.
4. I also do not accept the submission that the plaintiff’s evidence was at odds with what he had told the experts at the joint assessment as shown in the joint medical report (“**JMR**”). What the experts recorded they had been told was this: *“he slipped and fell backward on a wet floor. He landed on his right lower limb…”*. I accept the submission of Ms Josephine Tjia for the plaintiff that reading the words *“fell backward”* in their proper context (and not in isolation), it is relatively clear that the experts wanted to make clear the plaintiff did not fall forward or on his face.
5. As for the Progress Note dated 30 September 2017 at 18:09 (ie in the evening of the day of the alleged accident) where it was said the plaintiff *“S&F* [slip and fall] *on puddle at home…”*, the plaintiff was very firm in saying he never told the doctor that he fell at home. Understandably, the plaintiff would not know why the doctor wrote down what they did. But bearing in mind (i) there was never any suggestion let alone evidence (apart from the remark in the Progress Note) that the plaintiff had suffered a fall anywhere other than in the Toilet at the material time and (ii) it is common ground the plaintiff did not go anywhere after the alleged accident other than straight to POWH where the Progress Note was taken, it seems to me unlikely that the plaintiff had told the doctor the injury was the result of a slip and fall on a puddle at home.
6. In any case, I note that in a medical report dated 2 August 2019 signed by an associate consultant, it was confirmed that the plaintiff attended the AED of POWH at 12:45 pm on 30 September 2017 for injuries *“allegedly sustained while on duty”* and that the plaintiff *“tripped and fell in workplace”*. It would be reasonable to assume the associate consultant had checked the relevant medical records before penning and signing the medical report.
7. As to whether (a) the floor of the Toilet was wet at the material time and (b) the plaintiff slipped and fell on the wet floor of the Toilet, I have little hesitation in accepting that the plaintiff slipped and fell on the wet floor of the Toilet. As mentioned, the Attendance Record noted that the plaintiff slipped and fell *“on wet floor @12 noon”*, which seems to me to be a reliable indication of what had happened given the proximity in time between the alleged accident and the making of the Attendance Record.
8. The defendants countered by arguing that the court should not accept as correct what the plaintiff had told the doctor as recorded on the Attendance Record given his credibility is in doubt. I reject that submission not least because the point that the plaintiff lied to the doctor that he had slipped and fell on wet floor was never put to him (as counsel confirmed during oral closing submissions). I also do not think there is any mileage in debating whether the plaintiff was able to describe accurately the body of water on the Toilet floor at the material time.
9. Additionally, Madam Li (who was at the material time an employee of the 2nd defendant and the foreman leading the cleaners of the Plaza) said she inspected the Toilet carefully after the alleged accident – and produced a record of inspection bearing her signature with the remark “normal”, which she said evidenced her inspection of the Toilet at 1:15 pm on the day of the alleged accident – and reported the interior condition of the Toilet (which according to her had a dry floor in normal condition and without any puddle of water) to her superior orally who told her it was not necessary to write out a report. Madam Li also accepted that she was carrying her mobile phone at the time, which had a camera function, but she said she did not take any photos of the condition of the Toilet at the material time because it was not her job to take photos. She said the Plaza’s management (ie the 1st defendant) would take photos. However, the 1st defendant failed to produce any photos showing the interior condition of the Toilet at the material time. I have only been shown photos of the Toilet taken several years later but they obviously do not constitute evidence of the state of the Toilet at the time of the accident.
10. Had the interior condition of the Toilet at the material time been in the manner as Madam Li alleged, it is difficult to see why she or her colleagues employed by the 2nd defendant (and indeed the 1st defendant’s employees) did not take and produce the relevant photographs and compile and produce a written report to protect their position bearing in mind they were aware of the fact that an ambulance was called and the plaintiff was taken to the hospital. Indeed, it may even be thought that the defendants would be expected to have produced such documentary record. I am reminded of the principle that where a party without explanation fails to produce a document that party might be reasonably expected to disclose, the court may infer that the document was not produced as it would not have helped that party’s case: *South China Securities Ltd v Lam Kwen Yuen* [2012] 5 HKLRD 524 at §7 (DHCJ Lisa Wong SC). The record of inspection, of which I shall say more about below, is plainly insufficient for present purposes. In my judgment, the lack of contemporaneous record or photos in this respect from the defendants’ side strengthens the plaintiff’s case, supported by the Attendance Record, that the floor of the Toilet was wet at the material time.
11. In the circumstances, it appears to me that the plaintiff’s slip and fall on the wet floor of the Toilet was, on the balance of probabilities, an unusual event which in the absence of explanation was more consistent with fault on the defendants than the absence of fault. Accordingly, the evidential burden shifts to the defendants to show, on a balance of probabilities, that the accident happened without negligence on their part.

*B2. Whether the defendants were negligent?*

1. On this issue, the 1st defendant said it was not negligent as it has engaged the 2nd defendant to provide a proper and adequate system to ensure the cleanliness and safety of the Toilet. The 2nd defendant claimed that at all material times the Toilet has sufficient and adequate ventilation, warning signs and stand in place and that cleaning workers were arranged to clean and dry the floor of the Toilet regularly. It is also said that anti-slip tiles were installed. Both defendants alleged that their staff carried out regular inspections of the interior condition of the Toilet and there were regular meetings to discuss and assess the cleaning work. Both also relied on the fact that prior to the accident in the present case, there had never been any slip and fall incident in the Toilet.
2. In terms of the evidence emanating from the defendants’ side, the 1st defendant called no evidence and relied on the 2nd defendant’s evidence. The 2nd defendant produced three witness statements:
3. The first was from a Mr Sze who was said to be a cleaner employed by the 2nd defendant who was stationed at the Plaza and charged with the responsibility of cleaning the Toilet on the material day of the accident.
4. The second was from Madam Li who, as I said, was the foreman employed by the 2nd defendant to lead the cleaners of the Plaza at the material time of the accident.
5. The third was from a Madam Lui who was at the material time of the accident and still is a manager of the 2nd defendant.
6. The 2nd defendant did not call Mr Sze to give evidence. Accordingly, I shall disregard Mr Sze’s witness statement. But more importantly, given the lack of proper explanation as to why Mr Sze was not called to give evidence, and his evidence as to the cleaning work done to the Toilet on the day of the accident is plainly material, it seems to me the court is entitled to infer Mr Sze’s evidence would not have assisted the defendants: *South China Securities Ltd* at §7; *Telings International Hong Kong Ltd v John Ho & Ors* (CACV 10/2010, 22 Oct 2010) at §§78-81 (Le Pichon JA). As for Madam Lui, she agreed during cross-examination that she managed the administrative aspect of the 2nd defendant’s work (such as office, personnel and insurance matters) and the cleaning and inspection work after the accident was not within her area of responsibility. She further agreed her work did not require her to go to the Plaza to inspect the cleaning work. She also accepted that her witness statement was substantially similar to Madam Li’s witness statement. Consequently, the evidence of both the cleaning work and inspection work came primarily from Madam Li. The other main group of evidence was the record of inspection and cleaning of the day of the accident.
7. Madam Li’s evidence may be summarized as follows:
8. She started as a cleaner in 2012 and was promoted to the position of foreman in 2014, which was the position she occupied at the material time of the accident. It was her responsibility as foreman to lead the cleaners in her team, assign cleaning tasks to the cleaners, arrange their holidays and working schedules, and deal with sick leaves. She also had to inspect the work of her cleaners and undertake some cleaning work as well.
9. At the material times, her working hours were between 9 am to 6 pm with a one-hour lunch break between 1 to 2 pm. As she was the only person assigned to inspect the work of her cleaners, she usually spent most of her working day going around the vicinity (including the Plaza – which has 3 floors: G/F, 1/F and 2/F and a podium on 2/F – and 5 car park areas serving 5 residential developments near the Plaza) to inspect the cleaning work.
10. Madam Li would usually conduct two inspections daily, with the morning inspection from 9 am to 11 am and the afternoon inspection from 2 pm to 5 pm. She would do her best to walk through the vicinity once each morning and afternoon to inspect the cleaning work of her colleagues. Given Madam Li had a substantial space to cover, she agreed with Ms Tjia’s estimation that she could only afford to spend around 15 to 20 minutes on each floor of the Plaza (ie G/F, 1/F and 2/F) each morning and afternoon. She also agreed that she could only spend around 5 minutes each morning and afternoon inspecting each toilet in the Plaza including the Toilet. She further accepted counsel’s suggestion that she would have to walk quite quickly and that she did not have time to go back to inspect the same spot twice.
11. Initially, Madam Li said she could not inspect the entire vicinity during one inspection session (ie there would be spots she would miss), but she later said she could cover the entire vicinity using different routes and she would arrange time to do so. But bearing in mind her acceptance that she would only have around 15 to 20 minutes to inspect each floor of the Plaza each morning and afternoon, and there are 3 toilets on each floor (male, female and accessible toilets) and that if there were problems (such as puddles of water on the floor) she would have to spend extra time either to deal with it herself or wait for colleagues to bring suitable tools to deal with it, I am inclined to think that a period of 2 to 3 hours was probably insufficient to inspect properly all that requires to be inspected in the vicinity. Indeed, Madam Li agreed that 2 hours was probably insufficient to inspect properly all that her boss required her to inspect.
12. I should say that according to Madam Li’s evidence, in September 2017 (ie around the time of the accident) many of the shops in the Plaza were not open and the car park areas were not in use. It seems to me that nothing turns on this given that Madam Li’s evidence was that she followed the inspection routine described above at the material time of the accident. Whether Madam Li’s inspection routine changed after the accident for whatever reason does not seem to me to be relevant for present purposes.
13. After the morning inspection, Madam Li would usually perform cleaning work herself until around 12:45 pm. After the afternoon inspection, Madam Li would usually deal with paperwork that required her attention (such as sick leave certificates or amending work schedules).
14. Madam Li would normally have a team of 7 cleaners at her disposal. She would assign areas to her colleagues to clean. For the 3 male toilets including the Toilet and the 3 accessible toilets spread over the 3 floors of the Plaza, Madam Li would assign a male colleague (ie Mr Sze) whose exclusive job would be to clean the 6 toilets and their surrounding vicinity.
15. Mr Sze’s working hours were between 7 am to 11:30 am and from 12:30 pm to 4:30 pm with a lunch break in between. Mr Sze would normally start with the male toilet and accessible toilet on G/F and work his way up to 2/F. Mr Sze was required to clean the male toilet and the accessible toilet on each floor within 45 minutes. As he would start cleaning the first toilet at around 7:45 am (the earlier time of his shift being spent on collecting tools and toilet rolls etc), he should normally reach 1/F by around 8:30 am and 2/F by around 9:15 am. After cleaning the male toilet and accessible toilet on 2/F, which he would normally complete by around 10 am, Mr Sze would take a rest and thereafter until 11:30 am he would go around the toilets he was responsible for to check on, and if necessary replace, the toilet rolls. In other words, Mr Sze would normally clean the Toilet once every morning.
16. In terms of the record of inspection, there was one form for all 3 toilets on G/F, one form for all 3 toilets on 1/F as well as a babies or nursing room and one form for all 3 toilets on 2/F. Madam Li told the court she would write down the time on the record after she had completed the inspection. In other words, for 1/F, she would fill in the time after she had inspected the 3 toilets (including the Toilet) and the babies or nursing room.
17. When Madam Li’s evidence is assessed against the record of inspection and the record of cleaning from the day of the accident, a number of substantial contradictions and inconsistencies emerge.
18. Insofar as the record of inspection is concerned:
19. It showed that Madam Li had purportedly inspected all 3 toilets on 1/F (including the Toilet) and the babies or nursing room) on 3 occasions that morning at 9:05 am, 10:15 am and 11:20 am.
20. When counsel asked her why she started her inspection on 1/F (which seems to me to be a reasonable assumption to make given Madam Li’s working hour started at 9 am) instead of either working her way up from G/F or working her way down from 2/F, she said she cannot give any explanation. It also seems extraordinary that she could complete the inspection in 5 minutes after the beginning of her work shift given her evidence that she would normally spend around 5 minutes inspecting each toilet.
21. More critically, when counsel challenged the record, which showed she had purportedly inspected all 3 toilets on 1/F (including the Toilet) and the babies or nursing room 3 times in the same morning, as being contrary to her evidence that she did not have sufficient time to inspect one location for more than once every morning, Madam Li said she had nothing to add or supplement.
22. I would add that as the accident happened around noon, there seems to be no reason, and Madam Li did not proffer any explanation, why she found it necessary to deviate from her usual routine to inspect, *inter alia*, the Toilet 3 times in one morning. In particular: (i) on Madam Li’s own admission, the time she had for morning inspection was probably insufficient to inspect all that she needed to inspect properly and (ii) the third inspection was said to have been carried out at a time when Madam Li would (on her own evidence) normally be carrying out cleaning duties of her own.
23. The record also showed that Madam Li had purportedly inspected all 3 toilets on 1/F (including the Toilet) and the babies or nursing room for a fourth time by 1:15 pm which, given the last inspection was said to have been completed by 11:20 am and Madam Li’s lunch break was 1 pm to 2 pm, suggests to me that the inspection was carried out during Madam Li lunch break.
24. When asked why the time noted in the record differed from her witness statement, which stated she had inspected the Toilet at 12:30 pm, Madam Li explained in the witness box that the management office called her at around 12:30 pm to notify her of the accident, and she arrived at the Toilet at around 12:30 pm. When she arrived, she saw many paramedics in the Toilet so she left to let them get on with their work, and returned at around 12:45 pm to inspect the conditions of the Toilet.
25. Not only does this not explain the discrepancy between Madam Li’s witness statement and the record of inspection, but focusing on Madam Li’s explanation given in the witness box for the moment, it is difficult to see why she took around 30 minutes to inspect all 3 toilets and the babies or nursing room on 1/F given that first, her case was that the conditions in the Toilet were normal and second, she did not say she was required to spend more time inspecting the other 2 toilets and the babies or nursing room on 1/F than she normally would.
26. As for the record of cleaning:
27. It initially showed that Mr Sze completed cleaning the male toilet on G/F at 8:15 am, the Toilet at 9:10 am and the male toilet on 2/F at 10 am and that he completed cleaning the 3 toilets again in the afternoon at 1:25 pm, 2:25 pm and 3:30 pm respectively.
28. However, corrections were made to the record concerning the Toilet, which showed that the Toilet was cleaned twice in the afternoon, with the first being completed at 1:15 pm and the second being completed at 2:25 pm. Madam Li explained that she had made the corrections because Mr Sze’s initial times recorded were wrong.
29. But if that were right, then according to Madam Li’s corrections Mr Sze completed cleaning the Toilet at 1:15 pm, which would have left him only 10 minutes to complete the cleaning work in the G/F male toilet, which according to Mr Sze’s record (and Madam Li confirmed it was correct) he completed at 1:25 pm. Madam Li frankly admitted it would have been impossible for Mr Sze to complete the work in 10 to 15 minutes.
30. Furthermore, according to Madam Li’s evidence, Mr Sze’s lunch break finished at 12:30 pm and he would normally clean the toilets starting from G/F and work his way up to 2/F. If as Madam Li said the conditions of the Toilet at the material time of the accident were normal, it seems to me odd (and no satisfactory explanation has been given to explain) why Mr Sze would have, according to the record as amended by Madam Li, cleaned the Toilet first (completed at 1:15 pm), followed by the G/F male toilet (completed at 1:25 pm) and then going back to clean the Toilet again (completed at 2:25 pm) before finally going to clean the male toilet on 2/F.
31. Again, if (as the defendants claim) the conditions of the Toilet at the material time of the accident were normal, it begs the question why Mr Sze cleaned the Toilet twice in the afternoon whereas he cleaned the male toilets on G/F and 2/F once each only. The defendants have failed to explain this.
32. With respect, the failure to call Mr Sze without a proper explanation to give evidence on the cleaning work done to the Toilet at the material time of the accident, the substantial contradictions and inconsistencies in the evidence emanating from the defendants about the cleaning and inspection work at the material time, and especially Madam Li’s explanations on why she amended the record of cleaning on the alleged day of the accident which I do not find impressive, do not inspire confidence that the cleaning and inspection work systems at the material time of the accident were adequate or reasonable.
33. In particular, as I have noted above, on Madam Li’s own evidence, which I am inclined to accept as it seems reasonable in the circumstances, the inspection system at the material time was inadequate in that the time and manpower allocated were probably insufficient to inspect properly the cleaning work required to be inspected especially during the morning inspection. For reasons explained above, this evidence does not square well with the record of inspection.
34. Further, as I have noted above, the defendants did not dispute the plaintiff’s evidence that the Toilet was at the material time a public toilet frequented by both tenants and visitors of the Plaza and its use rate was high as it was next to a restaurant. However, there is no evidence that the defendants had taken any additional or special measure to address the high usage of the Toilet especially during lunchtime. Even on Madam Li’s own evidence, the Toilet had only been cleaned once, which according to the record of cleaning was completed at 9:10 am, before the accident, which seems to me to be inadequate and unreasonable in the circumstances.
35. I should mention one point arising from Madam Lui’s evidence. She claimed in the witness box (when cross-examined by Mr Li for the 1st defendant) that the 1st defendant also regularly inspected the toilets in the Plaza. She pointed to the times and signatures noted in the remarks column of the 2nd defendant’s record of cleaning. This point was not raised in her witness statement. Ms Tjia understandably complained it was unfair for this evidence to come out so late in the day particularly when the 1st defendant could have called its own witness to address the point but chose not to do so. I agree and would disregard the evidence. At any rate, I do not think Madam Lui’s claim adds anything material to the discussion on whether the defendants were negligent. First, the 1st defendant’s alleged inspection system, and its adequacy or inadequacy in the circumstances, was not explored in any meaningful way in evidence. Second, the 1st defendant has always relied on the 2nd defendant’s system to discharge its duty of care.
36. As to the defendants’ claim that adequate warning signs had been installed or placed in the Toilet, which was also properly ventilated, on the day of the accident, that is based on Madam Li’s bare assertion, which for reasons explained do not inspire confidence, as well as photos taken of the Toilet years after the accident, which obviously do not constitute evidence on the adequacy or the lack of warning signs or ventilation in the Toilet at the time of the accident. Had there been adequate warning signs and ventilation inside the Toilet at the material time as the defendants alleged, it is difficult to see why they did not produce the relevant photographic evidence. As Madam Li accepted, who claimed to have inspected the Toilet shortly after the accident, she did carry a mobile phone with a camera that day. More tellingly, when counsel suggested to her that the warning signs were newly installed after the accident, she chose not to answer. For these reasons, I reject the defendants’ claim in this respect.
37. The defendants also rely on the fact that appropriate anti-slip floor tiles were installed in the Toilet at the material time. As I understand it, there was no dispute that I could look at the photographs taken recently as the same floor tiles remain in use to the present day and the conditions remain largely the same. During cross examination, Madam Li admitted there were stains on the floor tiles around the urinals and water drops in other parts of the floor tiles. It appears from the photos that the stains were either dirt stains or water stains thus suggesting the floor area around the urinals was filthy and/or wet on a regular basis. Bearing in mind all the relevant circumstances and my findings about the cleaning and inspection systems, the warning signs and the ventilation concerning the Toilet, the inevitable conclusion that I have come to is that it is more likely that the accident happened as a result of the defendants’ negligence.
38. I have no difficulty accepting the proposition of law advanced on behalf of the defendants, namely that they did not owe an absolute duty to ensure the floor was clean and dry at all times and they could not be expected to have a cleaner or staff stationed at all times to watch out for any spillages and to clean it up immediately as it occurs. All that the law required was that there was a reasonable system of cleaning and keeping dry the floor of the Toilet. See *So Wan Chun* at §§61-62; *Cheung Wai Mei v The Excelsior Hotel (Hong Kong) Ltd t/a The Excelsior* (CACV 38/2000, 22 Nov 2000) at §48 (Rogers VP). Indeed, it was not the plaintiff’s case that a cleaner ought to have been always stationed at the Toilet ready to mop up any spillage immediately. That would be unrealistic. But for reasons explained, and having regard to the fact that the Toilet was frequently used, I consider that the defendants were negligent in failing to provide a reasonable system of cleaning and keeping dry the floor of the Toilet.

*B3. Contributory negligence*

1. The defendants assert that if their liability were established the plaintiff should be liable to the extent of at least 70% on account of contributory negligence. In particular, Mr Li and Mr Chau argued that on the plaintiff’s own case he was a frequent user of the Toilet and was aware of the wetness of the Toilet and accordingly he should have taken (but failed to take) proper precaution and paid sufficient attention for his own safety whilst in the Toilet such as walking slowly and carefully. The defendants also relied on the plaintiff’s evidence at §7 of his witness statement where he said he was not careful when he fell.
2. On the other hand, the plaintiff said no contributory negligence should be found. Ms Tjia relied on the following factors in the main: first, given water is transparent and the light coloured floor tiles, it was not easy for the plaintiff to see a water puddle or he might have mistakenly thought the water puddle was in fact a reflection of the lights; second, at the time of the accident he was not in a hurry and he did reduce speed as he approached the urinals; third, given the urinals’ location *vis-à-vis* the adjacent pillar the plaintiff might not have seen the water puddle. As an alternative case, Ms Tjia submitted that bearing in mind the relevant circumstances, it should be less than 40%.
3. I have considered with care the approach of the court in the cases cited by counsel. I acknowledge that each case must be decided on its own facts and the facts of the cases cited are different from the present. That said, my observations in brief are these:
4. In *Lau Shui Chun v Leung Tung Ping Metal Factory Ltd* (HCPI 75/1997, 7 October 1998), the defendants were held liable for the plaintiff’s fall in a communal toilet. The court held contributory negligence at 40% after taking into account that (i) the plaintiff was well aware of the toilet conditions having used it for over 10 years or so and his awareness of the need to take caution was somewhat blunted (ii) the plaintiff was not in a hurry (iii) the plaintiff was bound to use the toilet (iv) the hard rubber slippers he was wearing would probably be more slippery on a wet concrete floor than soft ones but he was doing much the same as anyone else including his boss (v) but he should have taken better care of himself knowing the condition of the floor was wet and slippery.
5. *So Wang Chun* was not a slip and fall case in a toilet. The court rejected the plaintiff’s claim on liability and therefore the discussion of contributory negligence was short and *obiter*. The court held it would have found contributory negligence at 50% bearing in mind (i) the plaintiff walked hurriedly (ii) he was speaking on the phone which he held in his right hand and was carrying other items in his left hand (iii) he failed to see the patch of water which he stepped on.
6. Similarly, *Yau Tze Hin v Broadway Theatre Company Ltd* (HCPI 674/2010, 3 April 2013) and *Pak Sai Ming v JV Fitness Ltd* [2019] HKCFI 2268 were not slip and fall cases in a toilet. In both cases, the court dismissed the plaintiff’s claim on liability. In the former case, the court commented (*obiter*) that had it found the defendant was liable, it would have held that the plaintiff had a 50% share of the responsibility as she had not taken reasonable care of her own safety as a reasonable person would have when walking down steps known to be wet and potentially slippery. In the latter case, the court held (*obiter*) that if liability could be established, it would have held the plaintiff’s contributory negligence to be 60% as (i) he was a frequent user of the staircase, 15-20 times each working day for several years (ii) with the foresight of a risk of slip and fall he did not take the care as a reasonable person would have by holding the handrails when descending.
7. In *Ying Ka Chun v JV Fitness Ltd* [2021] HKCFI 3349, the court dismissed the plaintiff’s slip and fall claim inside a changing room on liability. The court held (*obiter*) the plaintiff to be liable to the extent of 50% for the reasons that (i) the plaintiff was generally aware of the wetness in the area close to the shower room and that the locker room area was liable to be wet and slippery (ii) he worked there almost every day and should be taken to be very familiar with the layout and condition of the changing room (iii) had he exercised reasonable care he would have detected the patch of water and there would have been no difficulty at all for him to walk around it in a safe manner.
8. In *Or Bik Yuk v Maxway Corporation Ltd* [2020] 1 HKLRD 259, the plaintiff slipped on the pavement immediately outside a store owned and operated by the defendant. The court held that the pavement was rendered damp and littered with pieces of rubbish and vegetables. The defendant put up warning signs but did nothing else to abate the hazardous conditions. Therefore, the learned Judge found for the plaintiff on liability. However, there was little discussion on contributory negligence (and the court found the defendant was wholly liable) as it was not explored in evidence how the plaintiff had failed to exercise sufficient care. In my view, this case is distinguishable from the present where the plaintiff was cross-examined at length on the contributory negligence issue.
9. In this case, the plaintiff began working in the Plaza in June 2017 meaning that by the time of the accident, he had been in post for around 3 months. I accept he was a frequent user of the Toilet although there was no suggestion he had no alternative but to use the Toilet when at work. I also accept he ought to be familiar with the layout and conditions of the Toilet but not to the extent as some of the plaintiffs in the cases above given he had only worked in the Plaza for around 3 months at the time of the accident. I further accept he was not in a hurry when he went to the Toilet and he had slowed down his pace when he walked into the Toilet. That is consistent with his evidence that the Toilet was usually wet and filthy. So even though it was said on his behalf that it was not easy to see a water puddle given the light coloured floor tiles, he really ought to be aware of the potential hazards he had discussed. Additionally, I cannot ignore the plaintiff’s admittance in his witness statement he was not careful when he fell. In the circumstances, it seems to me if the plaintiff had exercised reasonable care in ensuring his safety by maintaining a proper lookout, he would have detected the water puddle and there would have been no difficulty at all for him to avoid it safely.
10. For these reasons, I find the plaintiff to be liable to the extent of 40% on account of contributory negligence.

***C. QUANTUM***

*C1. Personal particulars*

1. The plaintiff was born on 23 November 1963 in the Mainland. He received education until form 3 in secondary school. In 1982, he came to Hong Kong. He has been a baker for over 30 years. He was 53 years old at the time of the accident. He is now 59 years old.
2. At the time of the accident, he had been working in the Plaza for around 3 months. He worked 10 hours per day, and 26 days a month. His main daily duties included 70% manual and physical work (including lifting materials up to 30 kg, squatting and climbing ladders) and 30% administrative work.
3. After the accident, and after the sick leave expired on 26 June 2019, the plaintiff worked as a part-time baker. His working hours and physical demands were less when compared to those identified in the preceding paragraph. He works 3 to 4 hours a day for 20 days a month. His duty is decorating cakes.
4. Prior to the accident, the plaintiff was in good health. He had no history of surgery or chronic illness. He did not suffer from any right lower limb or right knee problem previously. He has no previous injury on duty.

*C2. Injury and treatment*

1. As I have said, after the accident, the plaintiff was taken to the AED of POWH. Physical examination revealed that there was local tenderness over the plaintiff’s right buttock and right knee and he was diagnosed (and confirmed by x-ray) to have fracture right femoral condyle. There was also an osteolytic lesion over the right lateral femoral condyle. The plaintiff was then admitted to the Orthopaedics and Traumatology Department (“**OTD**”) of POWH.
2. On 4 October 2017, CT guided biopsy was performed, and the findings were suggestive of giant cell tumour (“**GCT**”) of bone, complicated by pathological fracture. On 13 October 2017, the doctors thought he was clinically fit to be discharged with analgesics and he was discharged accordingly from POWH. Thereafter, he was admitted to POWH several times (which were pre-scheduled before his discharge on 13 October 2017) for follow up and pre-operation denosumab treatment.
3. On 20 March 2018, an operation for wide resection of right distal femur and reconstruction with metal prosthesis and total knee replacement was performed for the plaintiff’s right distal femur fracture and GCT of bone. The procedure was said to be *“uneventful”*. Thereafter, the plaintiff received physiotherapy and occupational therapy. Sick leave was granted from 30 September 2017 to 26 June 2019 and according to Form 7, the loss of earning capacity permanently was 3%.
4. More specifically concerning the physiotherapy after the accident:
5. On 26 October 2017, the ODT of POWH referred the plaintiff for physiotherapy for walking aids prescription and training with a diagnosis of right distal femur pathological fracture. On 7 November 2017, the plaintiff underwent initial assessment.[[3]](#footnote-3) He complained of dull ache on the posterior aspects of neck and the left upper arm. He also felt prickling on the side of the right arm. On examination his neck movements were full and tilting the head backward was painful. The right knee range was reduced to 30 degrees in flexion but was full in extension. The strength of the right quadriceps was above grade 3 out of 5. The plaintiff was able to walk with a walking frame and was able to undertake partial weight bearing on right leg with a hinged knee brace.
6. Physiotherapy was given to the plaintiff including exercise therapy and gait training but was stopped on his own accord with the last treatment session falling on 23 November 2017.
7. On 14 April 2018, the ODT of POWH referred the plaintiff for physiotherapy with a diagnosis of right distal femoral GCT. On 26 April 2018,[[4]](#footnote-4) he was initially assessed where he complained of right knee stiffness. On examination, the plaintiff’s right knee flexion range was reduced to 80 degrees. The knee extension range was lack of 10 degrees. The strength of the right quadriceps was grade 4 out of 5. The plaintiff was able to walk unaided with slightly limping gait.
8. Physiotherapy was given to the plaintiff including exercise therapy. After 3 months of treatment, the plaintiff’s right knee flexion range had improved to 100 degrees and the right knee extension range was full. The strength of the right quadriceps was grade 5 out of 5. The plaintiff walked unaided with minimal limping gait and could manage to walk up and down the stairs. The last session of treatment was 24 July 2018.
9. As regards the occupational therapy, the plaintiff was assessed on 30 August 2018 to determine his capability to return to his previous job. The conclusion was that the *“Degree of match between Work Capacity and Job Demands: Not match, with significant degree of limitation”*, including *“Marked decondition after injury”*, *“Inadequate postural tolerance for sustained standing/walking – 30 mins, found increased (R) knee stiffness afterwards”*, *“Unable to squat down fully for a safe and proper lifting posture, which was crucial in his job demands”* and *“Inadequate bilateral lifting (horizontal level) and carrying capacity, max. 20 kg (not match his job demands)”*. The plaintiff was advised to consider a change of his job nature or to return to the same job as a baker but as a part time worker for trial.
10. The plaintiff also had to attend OTD of POWH for follow up appointments in February and November 2021.

*C3. Pre-existing condition*

1. On 12 March 2021, the plaintiff was jointly assessed by Dr Hung Siu Lun Tony (“**Dr Hung**”) instructed by the plaintiff and Dr Chan Wai Fu (“**Dr Chan**”) instructed by the defendants. Both doctors are specialists in orthopaedics and traumatology and there was no dispute both have the necessary expertise and experience to serve as experts. The JMR was produced on 13 May 2021.
2. During the joint assessment, both Dr Hung and Dr Chan noted his past medical history especially the fact that before the accident he did not suffer from any right lower limb or right knee problem previously. As to the plaintiff’s present status, the experts noted that:-
3. *“Mild limping on walking, did not require aids, unsteady on tiptoes or avoid trying on heels”*.
4. *“Squatting up to ¼ with support and 1/6 only without support”*.
5. In terms of his lower limbs, *“Scars: 25 cm midline, slightly hypertrophic, non-tender”*.
6. In terms of his knee joints, *“No effusion but swelling”*, *“Tenderness at lateral joint line of right knee”*, *“Reduced muscle power 4/5 in flexion and extension of right knee”*.
7. Both experts agreed that the plaintiff suffered from pathological fracture of right lateral femoral condyle and there was a pre-existing condition of GCT of right lateral femoral condyle. Their difference was over which of the 3 scenarios would the plaintiff’s said pre-existing condition fall into, *viz*: (a) the plaintiff would have gone through life unaffected by the pre-existing condition (b) there is a strong possibility that some other event or natural progression of the condition would have brought about the present condition or (c) this would have certainly occurred at some stage in any event.[[5]](#footnote-5) It follows that the expert differed on the apportionment of the plaintiff’s whole person impairment (“**WPI**”) and loss of earning capacity (“**LOEC**”) between his pre-existing condition and the accident.
8. According to Dr Hung, the plaintiff probably did not definitely belong to the second scenario. He pointed to the fact that GCT of the bone is not a malignant bone tumour and it is not bone cancer and that it can be locally aggressive or it can stay inside the bone and remain static or grow very slowly without causing any symptom such as pain. In the plaintiff’s case, *“if he had not fallen on 30 September 2017, GCT of his right distal femur would not have caused any problem to him at all”* (“**Dr Hung’s Proviso**”). Dr Hung further opined that ideally, the only objective assessment whether the GCT in the plaintiff could have continuously expanded is to discover the lesion before any fracture and perform CT scan at interval to detect any size difference over time. However, this cannot be done after the accident and the fracture.
9. Consequently, Dr Hung estimated that the plaintiff suffered from 10% WPO and 10% LOEC due to the right knee pain, stiffness and weakness after total knee replacement surgery with the apportionment 50% to his pre-existing condition and 50% to the accident. Accordingly, according to Dr Hung, 5% WPI and LOEC are attributable to the accident.
10. On the other hand, Dr Chan opined that GCT is quite rare and even though it is not cancerous, it is aggressive and can destroy the surrounding bone. The most common symptom of a GCT is pain in the area of the tumour. The patient may also have pain with movement of the nearby joint, and the pain usually increases with activity and decreases with rest. The pain is usually mild at first, but gets worse over time as the tumour increases in size. Occasionally, the bone weakened by the tumour breaks and causes the sudden onset of severe pain. Sometimes the patient will have no pain at all but will notice a mass or swollen area instead. Dr Chan thought it is likely that the plaintiff’s case belongs to the third scenario.
11. Dr Chan agreed the plaintiff suffered 10% WPO and 10% LOEC but would attribute 70% of it to the plaintiff’s pre-existing condition meaning that he would attribute 3% WPI and LOEC to the accident.
12. Ms Tjia submitted that Dr Hung’s opinion, properly understood and bearing in mind especially Dr Hung’s Proviso, was that the plaintiff’s case falls between the first and second scenarios and more towards the first scenario. I do not accept the submission. First, that was not what Dr Hung had said in the JMR. Indeed, he specifically said the plaintiff *“probably but not definitely belongs”* to the second scenario.
13. Second, Dr Hung opined that the GCT could be locally aggressive or may grow slowly (without causing any symptom such as pain) although it can remain static. Dr Chan agreed GCT is aggressive and may cause pain, which would worsen over time, but he did not say the GCT may remain static or without symptoms. In the circumstances, it seems to me it is for Dr Hung to demonstrate the plaintiff’s GCT would have remained static or symptomless but for the accident. However, according to Dr Hung there is no evidence, or means of establishing, that the plaintiff’s GCT would not have caused any problem but for the accident. This is notwithstanding the fact that both experts agreed that before the accident the plaintiff did not suffer from any right lower limb or right knee problem previously. It follows, in my view, that any suggestion that the plaintiff’s case falls within or is more towards the first scenario (because the GCT would have remained static or symptomless but for the accident) is speculative.
14. Third and more importantly, it is not entirely obvious to me what Ms Tjia really meant when she argued that the plaintiff’s case falls between the first and second scenario and more towards the first scenario. As far as I am aware, nobody suggested that no discount should be applied. Both experts agreed there should be a discount. Hence, any suggestion that there should be no discount must be rejected as being unsupported by expert evidence. On the other hand, if Ms Tjia is saying that a lesser discount should be applied given Dr Hung’s view (as construed by Ms Tjia) that the plaintiff’s case falls between the first and second scenarios and more towards the first scenario, I do not think she can get around the fact that Dr Hung’s view was that there should be a 50% discount, nothing more nothing less. In other words, if it is suggested a discount lower than 50% should be applied in the present case, I would reject that suggestion as it is unsupported by any expert opinion.
15. Ms Tjia’s other argument is that as both experts failed to state when the plaintiff’s present condition would have occurred, the court should refuse to apply any discount advocated by the experts. Even then, as both experts were of the view that a discount should be applied, I would be very hesitant to deviate from that without any sound basis, for which I do not see any.
16. As to the discount that should be applied, with respect both experts did not dwell on the underlying reasons behind the discount recommended. As Dr Chan’s discount would lead to a result that is consistent with the assessment by the Medical Assessment Board recorded in Form 7 that the plaintiff’s LOEC permanently because of the accident is 3%, I prefer and would apply the discount recommended by Dr Chan.

*C4. Pain, suffering and loss of amenities (“PSLA”)*

1. The parties have referred me to various authorities, which I have considered carefully. Unsurprisingly, none of them are on all fours with the present case on the facts and hence not directly applicable. Instead, they serve as a guide to my PSLA assessment based on the facts of this case.
2. One point in dispute between the parties was whether I should apply a percentage apportionment or discount to reflect the pre-existing condition of the plaintiff. Ms Tjia referred me to *Chan Yuet Keung v Harmony (International) Knitting Factory Ltd* [2010] 5 HKLRD 599 at §28 where Bharwaney J awarded PSLA in the sum of HK$300,000 and did not apply a discount for pre-existing condition but held that the award would have been slightly higher but for the pre-existing degeneration of the plaintiff’s back at the time of the accident. With respect, I agree with the defendants that given the discount to be applied in the present case is 70%, the approach in *Chan Yuet Keung* should not be adopted here.
3. Ms Tjia further reminded me that in considering the PSLA to be awarded, the court must also take into account inflation: *Yu Chun Kit v Wong Wing Yau (formerly t/s Viewbond Cargo Service Co)* [2021] 3 HKLRD 938 at §34. I do not think this point was seriously disputed by the defendants.
4. Bearing in mind all the relevant circumstances, and particularly Dr Hung’s view (agreed to by Dr Chan) that the plaintiff would suffer permanent right knee aching and stiffness that may need intermittent symptomatic treatment and life-long follow up for recurrence of GCT and possible loosening of the right knee replacement prosthesis (which if it happens may require revision knee replacement surgery that was described as *“an ultra-major surgery of limb”*), I award PSLA in the sum of HK$500,000. Applying 70% discount in light of the plaintiff’s pre-existing conditions and 40% discount for contributory negligence, the sum becomes HK$90,000.

*C5. Pre-trial loss of earnings*

1. The plaintiff’s claim under this head comprised of 2 parts. First, before the accident, the plaintiff said he earned HK$22,000 (plus MPF) per month as a baker. Accordingly, the plaintiff first claimed HK$22,000 (plus MPF) per month for 24 months (ie from September 2017 to September 2019). Thereafter, the plaintiff resumed his pre-accident occupation as a baker on a part time basis doing light duty work earning around HK$8,000 per month. Accordingly, the plaintiff also claimed the difference between HK$22,000 and HK$8,000, ie HK$14,000 per month, for 42 months and 25 days, ie from October 2019 to 25 April 2023. The total sum claimed (inclusive of both parts of the claim) is HK$1,126,666.67.

*C5a. First claim: loss during sick leave*

1. In connection with the first part of the plaintiff’s claim, the 2nd defendant did not dispute the plaintiff’s monthly income before the accident. The 1st defendant, relying on the Form 2, claimed the monthly income should be HK$20,000 (plus MPF) per month. As I understand it, Form 2 emanated from the plaintiff’s former employer and not the plaintiff. In my judgment, the better evidence is the plaintiff’s deposit receipts and corresponding passbook entries. I accept Ms Tjia’s submission that the figures show the plaintiff’s monthly income before the accident was HK$22,000 (plus MPF).
2. In respect of the period of 24 months claimed by the plaintiff, that is made up of (a) 30 September 2017 to 26 June 2019, which was the period of sick leave granted and (b) 27 June 2019 to 30 September 2019, which represented a reasonable time after the expiration of sick leave for the plaintiff to obtain new employment.
3. The defendants disputed the period by relying on the JMR. Dr Hung agreed that the sick leave was appropriate. Dr Chan opined that the sick leave as appropriate for the *“treatment and rehabilitation of* [the plaintiff’s] *clinical condition after knee replacement for GCT”*. Both the defendants focused on Dr Chan’s next sentence, ie *“The duration of sick leave for knee injury with uncomplicated fracture should be about 3-6 months.”*
4. It seems to me what Dr Chan meant was that 3-6 months of the sick leave should be attributed to the accident, with the balance of the sick leave granted attributed to the plaintiff’s pre-existing condition. That is a question, which I shall come to when I decide whether I should apply any discount to take account of the plaintiff’s pre-existing conditions.
5. Since both experts agreed that the sick leave granted was appropriate, the present case is different from *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210 cited by the 1st defendant. Further, as both the defendants have not raised a separate argument (other than reliance on Dr Chan’s opinion, which I have addressed above) concerning the 3-month period after the sick leave, I accept 24 months as the appropriate period.

*C5b. Second claim: loss after sick leave*

1. Given my finding on the period of loss during sick leave, the focus of the dispute over loss after sick leave is the amount of the monthly loss.
2. In this regard, both experts agreed in the JMR that in terms of the plaintiff’s working capacity he *“should be able to resume his pre-accident occupation as a baker with moderately reduced lifting capacity and endurance”* and that *“he has to change to a part-time bakery job and adopt a working position of cake decoration only”*. I reject the 2nd defendant’s submission that the occupational therapist’s view was the plaintiff may change his job or to part time nature. The occupational therapists’ view (given on 20 September 2019) was that the plaintiff should change his job nature or return to the same job as a baker but as a part time worker for trial. Therefore, it seems to me that the occupational therapists’ view was tentative. Insofar as there is any difference, I prefer the more recent and definitive view of the experts expressed in the JMR dated 13 May 2021.
3. The defendants next argued that the plaintiff accepted during cross-examination that he is presently physically capable of working 26 days a month. But the plaintiff’s evidence must be understood as a whole, which is that after the accident he was unable to find an employer willing to offer him full-time employment in a role that is commensurate to the full-time position he had occupied prior to the accident. I accept that to be true in view of the experts’ physical findings concerning the plaintiff and their opinion about his working capacity, which I have quoted in the preceding paragraph. In the circumstances, I accept the monthly loss claimed by the plaintiff.

*C5c. Computation*

1. In the circumstances, for the pre-trial loss of earnings during sick leave, the sum is HK$22,000 x 24 months x 1.05 = HK$554,400.
2. As for the pre-trial loss of earnings after sick leave, the sum is HK$14,000 x 42 months and 25 days x 1.05 = HK$629,650.
3. I will apply a 40% discount for contributory negligence.
4. As to whether a discount, and if so what discount, should be applied attributable to the plaintiff’s pre-existing condition, the Court of Appeal has provided guidance in *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958 at 965E-F where Mortimer VP held:

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

1. In the present case, Dr Hung and Dr Chan did not indicate when would the plaintiff’s present conditions have occurred had there been no accident despite being specifically ordered to provide a view on this. It is unclear why the experts did not provide any view on this issue and I do not wish to speculate. But given the lack of evidence, it cannot be said what is the level of risk of the plaintiff’s present conditions occurring during the pre-trial period had there been no accident. That said, there is also no evidence on the risk of the plaintiff’s present conditions occurring after the pre-trial period either. However, as I have found a 70% discount should be attributable to the plaintiff’s pre-existing condition, it seems to me the discount should, in view of the state of the evidence, be applied to both pre-trial and post-trial loss of earnings.
2. Accordingly, the pre-trial loss of earnings I award after applying the discounts is HK$213,129.

*C6. Post-trial loss of earnings*

1. It follows from my findings in respect of pre-trial loss of earnings that I reject the defendants’ submission that no post-trial loss of earnings should be awarded to the plaintiff. Additionally, I reject the 2nd defendant’s submission that the multiplier should be zero on the basis that the plaintiff’s present condition *“would have occurred latest at the trial date”*. As I have said, there is no evidence on this issue.
2. I note that the defendants agreed (as a fall back) with Ms Tjia’s submission, which I accept, that given plaintiff’s circumstances, the multiplier should be 5.71. Accordingly, the plaintiff’s post-trial loss of earnings I award is HK$14,000 x 12 x 5.71 x 0.3 (attributable to pre-existing condition) x 0.6 (for contributory negligence) x 1.05 = HK$181,303.92.

*C7. Loss of earning capacity*

1. The plaintiff claims a modest sum equivalent to 6 months of his post-accident monthly salary, ie HK$8,000 x 6 months = HK$48,000. The 1st defendant accepted the sum.
2. On the other hand, the 2nd defendant argued that the court should not award anything under this head as the plaintiff has failed to demonstrate any risk that he will lose his present job at some time before the end of his estimated work life. The 2nd defendant pointed to the fact that the plaintiff has had his present job since September 2019 and had received a HK$5,000 bonus from his present employer. That notwithstanding, given both Dr Hung and Dr Chan estimated 10% WPO and 10% LOEC for the plaintiff (prior to apportionment), which is not insignificant, it seems to me the risk is “substantial” or “real”.
3. It also seems to me that the sum of HK$48,000 represents an appropriate quantification of the present value of the risk of financial damage that the plaintiff will suffer if that risk materializes. Accordingly, the sum I order under this head is HK$48,000.

*C8. Special damages*

1. The defendants did not dispute the sum claimed by the plaintiff, ie HK$120,514.50. The 2nd defendant argued that discounts should be applied to take account of the plaintiff’s pre-existing conditions and contributory negligence. I do not see any reason why the discounts should not be applied.
2. Consequently, the sum awarded under this head is HK$120,514.50 x 0.3 (attributable to pre-existing condition) x 0.6 (for contributory negligence) = HK$21,692.61.

*C9. Summary*

1. Damages assessed to be payable by the defendants to the plaintiff (after applying the relevant discounts discussed above) is summarized as follows:

PSLA HK$90,000.00

Pre-trial loss of earnings HK$213,129.00

Post-trial loss of earnings HK$181,303.92

Loss of earning capacity HK$48,000.00

Special damages HK$21,692.61

\_\_\_\_\_\_\_\_\_\_\_\_\_

Sub-total: HK$554,125.53

Less EC received (DCEC 2204/2019) (HK$474,823.33)

\_\_\_\_\_\_\_\_\_\_\_\_\_

Total: HK$79,302.20

***D. CONCLUSION***

1. For all these reasons, I order the defendants to pay the plaintiff damages in the sum of HK$79,302.20 together with interest on damages for PSLA at 2% per annum from the date of the Writ of Summons to the date of judgment and interest on pre-trial loss of earnings and special damages at half of the judgment rate from the date of the accident to date of judgment. Thereafter, interest at judgment rate is to be paid on the sum of HK$79,302.20 from date of judgment until payment.
2. Costs of the plaintiff, including all costs reserved (if any), shall be paid by the defendants, with certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs is to be taxed in accordance with the Legal Aid Regulations.

( Anthony Chan SC )

Deputy District Judge

Ms Josephine Tjia, instructed by Yip, Tse & Tang, assigned by the Director of Legal Aid, for the plaintiff

Mr Ricky K.Y. Li, instructed by Ho & Associates, for the 1st defendant

Mr Eric Chau Hin Chung, instructed by Eric Yu & Co, for the 2nd defendant

1. It would appear the Plaza is divided into the North side and the South side. Unless otherwise stated, references herein to the Plaza and its interior layout are to the North side. [↑](#footnote-ref-1)
2. I should say that during trial, the plaintiff mentioned his tailbone hit the floor during the fall. He later stood up in the witness box to indicate the area he was referring to, and he pointed to his right hip area. [↑](#footnote-ref-2)
3. The Physiotherapy Report dated 23 September 2019 stated the initial assessment was done on 7 November 2019, which seems to be an obvious typographical error. The parties do not seem to dispute the correct date should be 7 November 2017. [↑](#footnote-ref-3)
4. The Physiotherapy Report dated 23 September 2019 stated the initial assessment was done on 26 April 2019, which seems to be an obvious typographical error. The parties do not seem to dispute the correct date should be 26 April 2018. [↑](#footnote-ref-4)
5. This was a question posed to the experts at §5 of the Order of Master Louise Chan dated 25 March 2021. [↑](#footnote-ref-5)