## DCPI 1905/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1905 OF 2013

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##### BETWEEN

YIP MAU KEI（葉茂基） Plaintiff

### and

WONG KAM TIM（黃錦添） Defendant ----------------------

Before: HH Judge Levy in Court

Dates of Hearing: 22 and 23 January 2015

Date of Judgment: 10 February 2015

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J U D G M E N T

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*INTRODUCTION*

1. On 25 December 2011, the plaintiff sustained personal injuries when the taxi he was driving was hit from behind by a private vehicle driven by the defendant. On 12 September 2013, he brought this claim against the defendant for damages.
2. The plaintiff had two subsequent accidents after the traffic accident (“**1st Accident**”) on 25 December 2011. On 27 December 2012, the plaintiff suffered personal injuries in an accident (“**2nd Accident**”) at home.
3. On 21 March 2014, the plaintiff met another traffic accident (“**3rd Accident**”). No issue arises from this accident as the plaintiff made no claim in respect of it.
4. The plaintiff was 45 years old at the time of the 1st Accident. He is now 48 years old. He was working as a night-shift taxi driver for about 10 years prior to the 1st Accident. He is still driving a taxi at night.
5. Interlocutory judgment was entered by consent on 18 February 2014. This is the trial of the assessment of damages.
6. The plaintiff was legally aided until his legal aid certificate was discharged on 24 December 2014. The plaintiff thus became unrepresented at trial. The hearing was therefore conducted in punti but this judgment will be in English since all the documents filed with the court before the trial were in English.
7. The plaintiff was the only witness testifying at trial. The defendant was represented by counsel, Miss Leung, and did not call any witness.
8. The treatments the plaintiff sought have been well documented in the contemporaneous medical notes and the reports in evidence.
9. The plaintiff’s orthopedic specialist Dr Lee Po Chin (“**Dr Lee**”) and the defendant’s orthopedic specialist Dr Lam Kwong Chin (“**Dr Lam**”) conducted a joint examination (“**Joint Examination**”) of the plaintiff on 5 May 2014. The findings are detailed in their joint report dated 16 June 2014 (“**Joint Report**”).
10. There is little divergence in the opinions of Dr Lee and Dr Lam. The areas of disagreement largely relate to the causation of the disc herniation of the plaintiff’s lumbar intervertebral disc, the extent of the impairment on the plaintiff’s work efficiency and the issue of whether the plaintiff had exaggerated his symptoms during the Joint Examination.
11. The causation of disc herniation concerns the plaintiff’s pre-existing degeneration of his lumbar spine. In view of the fact that Miss Leung in her closing submissions had confirmed that the defendant is not arguing for a reduction in damages to be awarded to the plaintiff due to the plaintiff’s pre-existing degeneration condition along the lines in *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 4 HKC 523, the disagreement in the causation of the disc herniation has become irrelevant. No reduction should be made to the damages to be awarded on account of the plaintiff’s pre-existing condition.

*Injuries and treatments*

*1st Accident*

1. There is no dispute that after the 1st Accident, the plaintiff sought treatment at the Queen Elizabeth Hospital (“**QEH**”) about 2 hours after the accident when he felt increasing back pain. According to the report[[1]](#footnote-1) from QEH, an x-ray taken on that day showed that there was no fracture. He was able to walk unaided and found to have local tenderness at his back. He was treated and discharged with 2 days’ sick leave.
2. For the period between 30 December 2011 and 18 April 2012, the plaintiff sought treatment for his back pain from Our Lady of Maryknoll Hospital (“**Maryknoll**”), Hong Kong Baptist Hospital (“**Baptist**”) and a private orthopedic specialist, Dr Yam (“**Dr Yam**”). The plaintiff was diagnosed as having sustained a back sprain and soft tissue injuries to the back. Medication was prescribed for his back pain. In addition, the plaintiff also received three sessions of physiotherapy between March and April 2012.
3. The plaintiff was granted a total of 94 days’ sick leave from 25 December 2011 to 25 April 2012 for the 1st Accident.

*2nd Accident*

1. According to the plaintiff’s testimony, he suffered a sprained back at home on 27 December 2012 when he squatted to stop a sliding metal gate that was being installed by a workman from falling.
2. After the 2nd Accident, the plaintiff attended Baptist for the increasing pain in his back. According to the report[[2]](#footnote-2) from Baptist, the plaintiff was found to have tenderness over his lumbar spine region and was given intramuscular analgesic for his pain. He was admitted and discharged on 29 December 2012 during which stay he was given medicine for his pain and provided with intensive inpatient physiotherapy. Sick leave was granted from 28 December 2012 to 7 January 2013.

*THE JOINT REPORT*

1. The medical history of all the three accidents has been fully set out in the Joint Report and has been agreed by Dr Lee and Dr Lam.
2. The plaintiff’s complaints at the Joint Examination were recorded in §§ 39 to 41 of the Joint Report [[3]](#footnote-3) as follows:-

“ 39. On and off low back pain

* Worse with prolonged sleeping (walking him after 4-5 hours), lifting weight (20 lb), sexual activity, prolonged standing (10-15 minutes)
* Overall improved 80%
* He rated pain intensity at 6 after 1st (A)ccident… 4 after treatment, 6 after 2nd (A)ccident …, 4 after treatment, 6 after 3rd (A)ccident…, and 4 now (0=no pain, 10=worse possible pain) for both the 1st and 2nd Accidents at 6 out of 10, but 4 after treatment.
* He is not taking painkillers

40. Episcodic bilateral big toe numbness, more on left.

41. He said he still works in night shift, but with less driving hours, unusually from 5 pm to 3 am”

1. The significant findings at the physical examination of the plaintiff as reported in the Joint Report are:-

“ 43. Gait

Could stand and walk on tiptoes or heels, with complaint of back discomfort

44. Back

Complained of tenderness at bilateral paraspinal muscles at lower lumbar. Simulation tests: Complained of increase in back pain on vertex pressure, shoulder elevation and shoulder pressure.

45. Lower Limbs

Sensory 30% loss in anterior thigh

20% in rest of whole limb”

1. An x-ray of the lumbar spine was taken. The plaintiff was found to have mild degenerative changes with marginal osteophytosis in the lower lumbar spine. Dr Lee and Dr Lam both agreed that such features were compatible with mild lumber spondylosis.
2. Dr Lee and Dr Lam both agreed that that the plaintiff suffered a back sprain with soft tissue/ paraspinal muscle involvement and that there was no evidence of any bony damage or neurological deficit. They further opine that the records of the MRI scans done in January 2012 show that there was dehydration of intervertebral discs and mild disc space narrowing of L4/5 , which were due to long standing disc degeneration.
3. The experts agree that “significant neurological symptom or deficit would be unlikely in respect of the discs degeneration”.
4. Dr Lee whilst agreeing that there is pre-existing degeneration of the plaintiff’s lumbar intervertebral, also takes the view that an injury can provide the final trauma rendering a previously asymptomatic disc herniation into a symptomatic one[[4]](#footnote-4).
5. Dr Lee also opines that the residual pain caused by the 1st Accident may not be severe enough to prevent the plaintiff from returning to work but would have only affected his work efficiency.
6. Dr Lam on the other hand holds the view that the multiple disc changes found in the plaintiff’s lumbar spine “are due to wear and tear phenomenon that occurs over the years and they are not the result of a single loading event”[[5]](#footnote-5). Dr Lam also believes that the plaintiff had a good recovery after the 1st Accident as he had been working for 8 months before he met the 2nd Accident.
7. Both doctors also believe, after having reviewed the medical notes and x-rays and MRI scans after the 2nd Accident, that the plaintiff’s injury in the 2nd Accident caused very slight change to the plaintiff’s intervertebral discs degeneration. The plaintiff’s condition at the time of the assessment was a summation of all the three accidents.
8. Both experts agree that the plaintiff has reached maximal medical improvement from the 1st Accident and that no further conservative treatment or surgery will be required.
9. Simulation tests for non-organic signs were conducted. From the tests’ results, Dr Lam believed that there was some exaggeration while Dr Lee opined that the plaintiff had made genuine effort during the tests.

*THE PLAINTIFF’S EVIDENCE*

1. The plaintiff’s witness statement, which was written in English, was interpreted to him by the court interpreter before he gave evidence. The plaintiff complained that some parts of the witness statement did not correctly reflect the truth in respect of the following areas of the content.
2. In §8(h)[[6]](#footnote-6), which is concerned with the circumstances of how the plaintiff met the 2nd Accident, the plaintiff pointed out that he sprained his back not because he had tried to support a falling metal gate as stated in that paragraph but that he only lent support to stop the gate from falling.
3. In §8(k) and (l)[[7]](#footnote-7), the plaintiff also stated that he had actually requested to have the surgery done when he was advised by Dr Lam of Baptist to have further surgery after the 1st Accident. However, he said that Dr Lam had told him to wait and see.
4. Paragraph 13 concerns receipts for travelling and nourishing food expenses. The plaintiff said that he had receipts for nourishing food but none for the travelling expenses.
5. Notwithstanding having had the chance of correcting the content of the witness statement (a substantial part of which is actually a repetition of the findings of the Joint Report), the plaintiff seems to have appeared to disavow the witness statement by constantly complaining about his former solicitors. In my view, the plaintiff was neither a credible nor a reliable witness. He disputed some parts of his witness statement when there was no valid reason to doubt the accuracy of his own witness statement prepared by his former solicitors, which statement was accompanied by the plaintiff’s statement of truth.
6. The corrections that he made are neither material nor supported by medical evidence.
7. The plaintiff’s description of the 2nd Accident at trial is substantially similar to the content of the witness statement. The matter concerning receipts is undisputed since receipts for the nourishing food have been included in the Agreed Bundle.
8. His further amplification that he had requested surgery for his back pain upon the advice of Dr Lam of Baptist is not supported by the medical evidence. According to the medical report[[8]](#footnote-8) of Dr Lam dated 15 March 2013, Dr Lam’s diagnosis of the plaintiff’s injury after the 1st Accident was “sprain back and mild prolapsed lumber intervertebral disc” and his concluding remark was “permanent disability was not expected from the injury”. Not only can the alleged advice by Dr Lam not be found in his report, the diagnosis does not support any suggestion of surgery.
9. It seems that plaintiff is at pains to impress upon the court that his condition has not improved at all since the Joint Examination notwithstanding that he has been working full time and also that he has not received any medical treatment for his alleged persistent pain.
10. Three months after the Joint Examination, the plaintiff’s condition, as at 6 August 2014, the date of his revised statement of damages (“**Revised SOD**”), was shown to be no different to his condition three months ago because the plaintiff in §3 under Section C “Present Complaints” of the Revised SOC was substantially repeating his complaints recorded in the Joint Report already set out in §18 above.
11. The plaintiff also complained at trial of a sensation of numbness in his legs when sitting down for a prolonged period. During his testimony, the plaintiff had to stand up after having sat down for about 50 minutes due to his alleged electric-current like numbness in his legs.
12. Such complaint however is not supported by the latest findings from the Joint Examination. According to the complaints recorded in the Joint Report set out in §18 above, the plaintiff’s low back pain was worse with prolonged standing, but not sitting. Also, in §43 of the Joint Report, the plaintiff’s gait has been stated to be: “sitting without apparent distress”. None of these findings show any problem with prolonged sitting.
13. His complaint that the numbness in his legs and his back pain had only recovered to the extent of about 80 percent does not seem to be supported by the Joint Report. According to the Joint Report, the plaintiff was found to have reached maximum recovery at the Joint Examination and that even conservative treatment was not required. Had these complaints been genuine, there should have been evidence of the plaintiff’s medical treatment for his complaints. The absence of any such evidence in my judgment seems to suggest that the plaintiff had exaggerated his condition.
14. Dr Lam was of the view that the plaintiff had exaggerated his symptoms at the time of his Joint Examination. Dr Lam said in his summary that there were features suggesting magnification of symptoms for his complaints of back and lower limb pain and that there were minimal objective signs to support his claim. Dr Lee on the other hand stated: ‘Although two of the simulation tests were positive, the overall result from the (J)oint (E)xamination should still reflect adequate subjective effort”. I have no hesitation in preferring the opinion of Dr Lam to that of Dr Lee where there is disagreement between them as there were actually no objective signs to support the plaintiff’s complaints of pain. I accept Dr Lam’s opinion in the Joint Report (at §87) that the plaintiff’s then back and lower limb complaints are suggestive of magnification of symptoms.
15. I am therefore unable to accept the plaintiff’s evidence on the severity of his symptoms. On the totality of the medical evidence, I find that his injury caused by the 1st Accident was a back sprain with soft tissue injury and that he has, as the medical evidence has shown, recovered upon the expiry of the sick leave for the 1st Accident. I find that any residual pain of the plaintiff is less likely due to the 1st Accident, but more likely due to a summation of all the three accidents as well as to his pre-existing degeneration as recorded in the Joint Report.
16. I also do not find the plaintiff’s evidence in respect of his earnings credible. At trial, when the plaintiff was confronted with a copy of his signed application for financial assistance from the Social Welfare Department’s Traffic Accident Victims Assistance Scheme[[9]](#footnote-9), in which application the pre-accident daily income was stated to be $300, he admitted that the figure of $410 pleaded in the Revised SOD was incorrect. The plaintiff was unable to give any valid reason for the mistake his former solicitors had made in the Revised SOD.
17. Also, the plaintiff was wholly evasive when he was asked in cross-examination about matters such as the number of hours he drove after he resumed driving a taxi at night or the number of days he worked.
18. I am therefore unable to rely on the plaintiff’s evidence in assessing his damages, but have to rely on the objective medical evidence.
19. Before considering the appropriate damages to be awarded to the plaintiff, I should next consider the plaintiff’s claim for the damages for the 2nd Accident as the plaintiff in his Revised SOC has also included the further injury he suffered in the 2nd Accident.

*IS THE 2nd ACCIDENT TOO REMOTE?*

1. It is not in dispute, as evidenced by the medical report dated 13 March 2013 [[10]](#footnote-10) from Dr Mak of Baptist, that the plaintiff sustained a back sprain injury from the 2nd Accident, and that he had sought medical treatment at Baptist.
2. It is however observed that when this claim was instituted on 12 September 2013, the plaintiff, for some unknown reason, had not set out the claim for the 2nd Accident in either the Statement of Claim or the Statement of Damages when the 2nd Accident had already occurred by the time of the issue of the writ and should have been pleaded.
3. The claim for the 2nd Accident was only subsequently added in the Revised SOD after interlocutory judgment was entered by consent.
4. Arguably, therefore, the interlocutory judgment that had been entered should only be for damages to be assessed for the 1st Accident, but not for the 2nd Accident. Since this point has never been taken or argued throughout the proceedings, I find it inappropriate to express a view on this pleading point, and am content to treat the 2nd Accident as having been properly included.
5. The consequence of this inclusion is that the issue of whether or not the plaintiff might have been responsible, whether wholly or in part, for the 2nd Accident, is academic.
6. The court only needs to determine the issue of remoteness of damage that is whether the damages recoverable should be limited to the 1st Accident or be extended to the 2nd Accident as well.
7. To succeed, the plaintiff needs to prove on the balance of probabilities that there existed a sufficiently close or proximate connection between the defendant’s initial negligent act in the 1st Accident that has caused the plaintiff’s injury, and the further injury, i.e., whether the original injury caused by the 1st Accident is found to have triggered off the further injury the plaintiff suffered in the 2nd Accident.
8. In disputing the plaintiff’s entitlement to the claim for the 2nd Accident, Miss Leung suggested that the court should adopt an ordinary common sense approach[[11]](#footnote-11) by taking an overall view of the facts of this case, that include, Miss Leung submitted, the evidence that the experts did not state in the Joint Report that there was any causal link between the 1st and 2nd Accidents and that by the time of the 2nd Accident, the plaintiff’s sick leave granted for the 1st Accident had already expired and he had resumed working for 8 months without seeking any medical treatment.
9. The authority Miss Leung referred to me is concerned with the issue of direct causation. The plaintiff’s further injury however is concerned with the issue of a subsequent intervening event. The common sense approach however should still be applicable.
10. An overall view of the facts of this case will require in particular an examination of the circumstances of the occurrence of the 2nd Accident and the objective medical evidence.
11. After having considered all the evidence, I conclude that the plaintiff has failed to prove that the injury he suffered in the 1st Accident has caused or contributed to the 2nd Accident. The reasons are as follows.
12. First, the plaintiff’s pleaded case is not supported by evidence regarding how the 2nd Accident occurred.

In §B2 (i) and (k) of the Revised SOD, the plaintiff avers:-

“ (i) The Plaintiff confirmed that due to weakness of his back as a result of the injuries sustained in the 1st Accident…, he accidentally sprained his back while he performed household work on 27 December 2012 (“the 2nd Accident’)”

(k)The Plaintiff says that he felt pain and weakness of his back since the 1st Accident. Because of such weakness, his back has become prone to injury. His back pain aggravated as a result of the 2nd and 3rd Accidents…” (Emphasis added)

In §C (g) of the Revised SOD, the plaintiff similarly states:-

“Weakness of low back as a result of … such weakness, back pain aggravated by the 2nd and 3rd Accidents.”

1. The case as pleaded is that the 2nd Accident was caused by the pain and weakness of the plaintiff’s back after the 1st Accident. If the plaintiff can prove that the injury he suffered from the 1st Accident made him become vulnerable to a back injury, it may not be too remote that the 2nd Accident had likely been caused by the injury of the 1st Accident.
2. I heard the plaintiff’s evidence regarding the circumstances of how the 2nd Accident occurred, which are already set out in §30 above. In spite of the repetition of the averment in §B2 (k) of the Revised SOD averring that “ because of such weakness, his back has become prone to injury” in §8(k) of his witness statement, the plaintiff, having had the opportunity to, at trial, amplify or correct the contents of his witness statement, has failed to state either in his testimony or witness statement that he sprained his back in the 2nd Accident as a result of a weak and vulnerable back caused by the 1st Accident. All he had emphasized was that he sprained his back when he tried to slightly squat to lend support to the metal gate that was being installed. Nowhere had he mentioned specifically that he sprained his back because of such alleged weakness or vulnerability.
3. Secondly, the pleaded case is not supported by the objective medical evidence. There is no evidence that the plaintiff’s back after the 1st Accident had become weak and vulnerable to further accident or an injury of a sprained back.
4. The nature of the plaintiff’s injury, according to the various medical reports and the Joint Report, was back sprain with soft tissue injury at his back. The physical symptoms were pain with tightness around the lumbar spine. Further, the medical reports concerning the plaintiff’s condition and treatment for his back injury he suffered in the 1st Accident show that the plaintiff’s main symptom was back pain and that he had not suffered any permanent disability.
5. It is particularly pertinent to note the findings made by Dr Yam in his report[[12]](#footnote-12) dated 29 November 2012 in respect of the consultations the plaintiff made between February and April 2012 for the injury he sustained from the 1st Accident.

“7. Back Examination:

There was spasm and swelling of his lumbar paraspinal muscle. Tenderness was noticed at mid lumbar spine. Range of motion of his back was limited. His fingers reached the knee level on truck forward flexion and buttock level on backward extension. Rotation was measured 20 degree to the left and 20 degree to the right.

8. Limbs Examination:

Straight Leg Raising Test was normal. There was no neurological deficit found. Limb control was normal.”

1. According to Dr Yam’s diagnosis at §10 of his report, the plaintiff’s “limitation of function was related to pain and stiffness of his back. There was no functional loss over the limbs.”
2. The medical evidence I have discussed above does not seem to suggest that the plaintiff has suffered a severe back injury that would render his back weak and vulnerable to further injury.
3. Also, in the Joint Report (at §§67 and 68) , Dr Lam opined that the plaintiff had a good recovery after the 1st Accident and Dr Lee only stated that the residual pain only impaired the plaintiff’s work efficiency. There is no mention anywhere in the Joint Report that the plaintiff has suffered an injury of a kind that made him more prone to further back injury.
4. Had the plaintiff had a weak and vulnerable back as he had pleaded, he would have required, during the 8 months after his sick leave for the 1st Accident expired before he met the 2nd Accident on 27 December 2012, some medical treatment or at least some physiotherapy for his condition. As stated in §41 above, there were no such treatments and the plaintiff was unable to provide for a reason for this.
5. The overall view of the facts of this case, as Miss Leung submitted, in my judgment, clearly shows that it is far too remote to find on the balance of probabilities that the further back injury of the 2nd Accident was caused or contributed to by the injury of the 1st Accident.
6. In the circumstances, therefore, when assessing the appropriate damages to be awarded to the plaintiff, I need only to consider the injuries resulting from the 1st Accident.

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

1. Based on the objective medical evidence, I find that the plaintiff as a result of the 1st Accident had suffered a soft tissue injury to his back, and there were only residual back symptoms with mild adverse effects. The plaintiff had been appropriately granted sick leave of 94 days for the injury.
2. The plaintiff seeks an award of $300,000 under this head, which is inclusive of the damages caused by the further injury of the 2nd Accident. In the light of my ruling concerning the 2nd Accident, this amount is no longer valid.
3. The defendant submitted that the award for PSLA should be about $80,000. Miss Leung referred to the following authorities:-

(1) *Leung Hiu Yan Hilda v Lau Kam Hung* (DCPI 220/2012, 15 May 2013)

(2) *Tamang Udas v Global Sunny Engineering Limited & Anor* (HCPI 732/2011, 7 January 2013)

(3) *Fazal Ahmed v MTR Corp Limited* (DCPI 29/2011, 25 April 2012)

(4) *Rai Pabitdara v Vegetable Marketing Organization* (DCPI 2473/2009, 23 December 2010)

1. In *Leung Hiu Yan Hilda*, the plaintiff suffered a whiplash injury and sprained back with 10 days’ sick leave. A sum of $80,000 was awarded upon the court finding that the plaintiff suffered from residual neck and back pain.
2. In *Tamang Udas*, the plaintiff suffered an injury to his back while moving metal scaffolds. He was hospitalized for 4 to 5 days and granted sick leave for about 7 months. The judge awarded $100,000 (before a 30% deduction for his pre-existing degenerative condition).
3. In *Fazal Ahmed*, the plaintiff slipped and fell, and sustained injury with a simple contusion of his back. Although the plaintiff had been hospitalized for his back, the doctor recorded multiple inconsistencies not suggestive of an organic case of subjective complaint. The judge awarded $50,000.
4. In *Rai Pabitdara*, the plaintiff suffered a sprained back with soft tissue injury from lifting. A sum of $60,000 was awarded.
5. I have considered Miss Leung’s submissions and the authorities cited to me. Each case, of course, depends on its own facts. After having carefully considered the plaintiff’s injuries as revealed from the medical evidence, and compared them with the cases counsel cited, I’m inclined to the view that the seriousness of the plaintiff’s injury falls between those of the plaintiffs in *Leung Hiu Yan Hilda* and *Tamang Udas*.
6. In my judgment, the appropriate award for PSLA is $90,000 and I so award.

*PRE-TRIAL LOSS OF EARNINGS*

*Full loss of earnings*

1. The period of 94 days’ sick leave has been agreed at the trial.
2. Based on the plaintiff’s concession made at the trial that his pre-accident daily income was $300, I award the plaintiff a sum of $28,200 ($300 x 94 days).
3. The plaintiff’s claim for loss of earnings under §6(c) of the Revised SOD is for sick leave as a result of the 2nd Accident, and this should be declined in the light of my rejection of the claim for the 2nd Accident.

*Partial loss of earnings*

1. In his evidence in cross-examination, the plaintiff said that before the 1st Accident, he used to work from 5 pm until 5 am. After the 1st Accident, apart from finishing work at around 2 to 3 am instead of 5 am, the plaintiff also said that he had taken a lot of rests in between driving because of the pain in his waist and the numbness he felt in his legs. He asserted that as a result of the reduced working hours, his daily earnings had been reduced by $100. When he was repeatedly asked by counsel how much he actually earned every month after the 1st Accident, the plaintiff refused to state a figure but only muttered some vague response that his earnings had been reduced by half.
2. Knowing probably that his early reply that his earnings had been reduced by half would have conflicted with his earlier answer of a reduction of $100 per shift and his pleaded case, the plaintiff then stated that his monthly earnings after the 1st Accident were not $7,000 as pleaded in the Revised SOD but were only $4,800. He attributed the error in the Revised SOD to the fault of his former solicitors.
3. Before examining the amount of the partial loss of earnings as a result of the downward revision of his pre-accident earnings for the partial loss of earnings, the periods of loss the plaintiff claims should now be mentioned. According to §6(b), (d) and (f) of the Revised SOD, the plaintiff claims partial loss of earnings in respect of the following periods:-
4. From the expiry of sick leave for the 1st Accident until the date of the 2nd Accident on 27 December 2012
5. From the expiry of sick leave for the 2nd Accident until the occurrence of the 3rd Accident, i.e. from 8 January 2013 to 21 March 2014, a total of 438 days.
6. From the period of the expiry of sick leave for the 3rd Accident to the date of trial.
7. The claims for the partial loss of earnings for periods (ii) and (iii) can be disposed of very quickly. Since they relate to the periods respectively after the 2nd Accident (in respect of the claim arising out of which I have rejected) and the 3rd Accident (in respect of which the plaintiff has expressly stated that no claim is being made), I am firmly of the view that there is no basis for this court to award any sum for any loss of earnings (whether partial or full) for these periods.
8. In respect of period (i), the loss of earnings of $3,000 as pleaded in the Revised SOD can no longer be relied on as a result of the plaintiff’s admitted downward revision of his pre-accident earnings.
9. The admitted pre-accident daily income of $300 means that the plaintiff’s pre-accident monthly earnings were $7,200, not $10,000 as pleaded. Thus, if one were to rely on his pleaded monthly reduced income of $7,000 as pleaded in §6(b) of the Revised SOD, the amount of loss will only be $200 per month.
10. However, in order to tally with his evidence in line with his admitted reduced pre-trial earnings, the plaintiff no longer stated that his reduced earnings were $7,000 as pleaded, but said that they were $4,800. I do not accept his evidence.
11. In my judgment, the plaintiff’s complaints of numbness and pain were not supported by any medical evidence. The Joint Report only states that the plaintiff had returned to work after the expiry of the sick leave for the 1st Accident but the complaints he made at the Joint Examination were only a summation of all three accidents. As I have pointed out above, there is also no evidence that he needed to consult any doctors for these alleged symptoms.
12. For these reasons, I agree with counsel’s submission that if the plaintiff had suffered any partial loss of earnings, it was due to the plaintiff’s own choosing rather than due to the 1st Accident. In my judgment, the plaintiff has failed to prove any partial loss of earnings, and I make no award for these claims.

*POST-TRIAL LOSS OF EARNINGS*

1. In the Revised SOD, the plaintiff claims a sum of $360,000 for this item of loss, based on the pleaded partial loss of $3,000 per month with a multiplier of 10.
2. Miss Leung asked me to reject this claim on the basis that the plaintiff has failed to prove he has suffered any loss as result of the 1st Accident. It was also submitted that this was questionable as he had not pleaded it when the action was first commenced.
3. On the evidence that I have examined, I agree with Miss Leung that the plaintiff has failed to prove any loss of earnings after his return to work upon the expiry of the sick leave granted for the injury of the 1st Accident.
4. I make no award under this head.

*LOSS OF EARNING CAPACITY*

1. The plaintiff claims a sum of $30,000 for the likely handicap in the labour market as a result of his residual injuries.
2. Generally this head of damages is to be awarded to a plaintiff if it can be demonstrated on the date of the trial that there is a risk that he may lose his employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job (see *Moeliker v Reyrolle & Co Ltd* [1977] WLR132 at 140A-C).

1. Miss Leung contended that since the plaintiff is self – employed and the experts agree that he is able to resume working as a taxi-driver, no award should be made. She also relied on *Chan Lung Hing v Ng Kam Man*, (HCPI 405/2012, 20 June 2014), in which Master K Lo rejected such a claim by a plaintiff who had been self-employed prior to the accident.
2. I am in respectful agreement with counsel. In my judgment, this award is not suitable to be made in respect of the nature of the plaintiff’s job. According to the plaintiff’s evidence at trial, before working as a taxi driver, he used to be employed as a bus driver for several years. He had chosen to change to work as a taxi driver because of his preference for the more flexible working hours of a taxi driver. Last, but not least, I also do not find any evidence that warrants the making of such an award.

*SPECIAL DAMAGES*

*Medical expenses*

1. The plaintiff claims a total sum of $31,000 for medical expenses. Apart from disputing a sum of $11,295 in respect of the medical expenses paid to Baptist for the 2nd Accident, the defendant agrees to all the expenses claimed.
2. Given my finding above in respect of the 2nd Accident, I decline to allow this amount incurred in connection with the 2nd Accident. Hence, a total sum of $19,705 as agreed is awarded.

*Travelling expenses*

1. A total sum of $3,000 is claimed for travelling incurred by the plaintiff for attending various medical consultations and treatments. In his testimony, the plaintiff admitted that the $3,000 is for all 3 accidents. Miss Leung contended that since the plaintiff lived in Wong Tai Sin and his consultations and follow-ups were in Nathan Road or Wong Tai Sin, $1,000 is a reasonable award in the absence of any supporting receipts.
2. The plaintiff had admitted that $3,000 is for all three accidents. Having considered the number of medical consultations that he received in respect of the 1st Accident, I am of the view that $1,500 is a reasonable amount, and so award.

*Tonic Food*

1. A sum of $4,087 is claimed for this item.
2. The receipts[[13]](#footnote-13) show that the expenses were incurred in June 2012, i.e. after the expiry of sick leave for the 1st Accident. The plaintiff testified that his mother bought the tonic food “Essence of Chicken” and “Deer’s tail” for his general well being. Counsel questioned the reasonableness of such expenses submitting that it was incredible that the plaintiff would have chosen to consume tonic food instead of seeking conventional medical treatment.
3. The defendant suggests that $1,000 should be a reasonable amount.
4. It is settled that for a claim to be allowed, the sum spent must be suitable to assist the recovery of the injured person (see *Mui Ling-Kwan v Wong Yin Wah* [1973] HKLR 465). It is observed that the two receipts in the Agreed Bundle are respectively for Deer’s Tail in the sum of $1,700 and Essence of Chicken in the sum of $387. Thus, only a total amount of $2,087 is supported by receipts. Bearing this in mind, together with the absence of evidence that the “Essence of Chicken” or the “Deer’s Tail” would be beneficial to assist the plaintiff’s recovery for the back sprain, I accept the defendant’s submission that only $1,000 should be allowed, and so award.

*SUMMARY*

1. I summarize the above awards as follows:-

A. PSLA $90,000

B. Pre-trial Loss of Earnings $28,200

C. Future Loss of Earnings Nil

D. Loss of Earning Capacity Nil

E. Special damages:-

1. Medical expenses $19,705
2. Tonic food $1,000
3. Travelling expenses $1,500

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Total $140,405

1. I further award interest on the award of PSLA at 2% per annum from the date of writ 12 September 2013 to judgment, and thereafter at the judgment rate until full payment, and on loss of pre-trial earnings and special damages at half the judgment rate from the date of the accident 25 December 2011 to judgment, and thereafter at judgment rate until full payment.

*ORDER*

1. I enter judgment for the said sum of $140,405 together with interest calculated in accordance with §109 above.
2. I also make a costs order nisi that the defendant should pay the plaintiff’s costs to be taxed, if not agreed. The plaintiff’s own costs up to the date of the discharge of the legal aid certificate are to be taxed in accordance with the legal aid regulations.
3. Unless an application is made by an inter-partes summons to vary the said costs order nisi within 14 days of the handing down of this judgment, the costs order nisi shall become absolute.
4. An arrangement will be made for the court interpreter to interpret this judgment to the plaintiff at the time of the handing down of the judgment.

(Katina Levy)

District Judge

The plaintiff appeared in person

Ms Pauline Leung, instructed by Simon C W Yung & Co, for the defendant

1. Agreed Bundle (“**AB**”) p57 [↑](#footnote-ref-1)
2. AB p66 [↑](#footnote-ref-2)
3. AB p67 [↑](#footnote-ref-3)
4. AB p80 §61 [↑](#footnote-ref-4)
5. AB p80 §60 [↑](#footnote-ref-5)
6. AB p49 [↑](#footnote-ref-6)
7. AB p50 [↑](#footnote-ref-7)
8. AB p63 [↑](#footnote-ref-8)
9. AB pp200-203 [↑](#footnote-ref-9)
10. AB p66 [↑](#footnote-ref-10)
11. The approach adopted by the Court of Appeal in *Lee Kin Kai, a patient by his father and next friend Li Wah v Ocean Tramping Co Ltd t/a Ocean Tramping Workshop* [1991] 2 HKLR 232 when discussing the issue of causation in a personal injury case [↑](#footnote-ref-11)
12. AB p61 [↑](#footnote-ref-12)
13. AB p204-5 [↑](#footnote-ref-13)