## DCPI 2640/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2640 OF 2013

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##### BETWEEN

NG HIU MAN Plaintiff

### and

TRADE IN ASIA LIMITED Defendant

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Before: Deputy District Judge Michael Liu in Court

Dates of Hearing: 7 to 11 December 2015

Date of Judgment: 15 May 2017

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JUDGMENT

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*BACKGROUND*

1. This is a claim for damages for personal injury brought by the plaintiff Miss Ng Hiu Man who says that she was injured on 28 July 2011 (Thursday) in the course of her employment with the defendant company as an assistant merchandiser. The plaintiff was born on 29 January 1985 and aged 26 at the time of the alleged accident. She was 30 years of age at the time of the trial of this action and is now 32 years of age.
2. Both liability and quantum of damages are disputed by the defendant. Insofar as liability is concerned, the main issue between the parties are whether there was any accident happened on 28 July 2011 (Thursday) as alleged by the plaintiff. The defendant does not accept there was any accident as alleged by the plaintiff since the defendant was not told by the plaintiff that she was injured at work until 2 August 2011 (Tuesday), ie 5 days after the alleged accident. Insofar as quantum is concerned, it is the defendant’s case that: the plaintiff should be liable for contributory negligence of no less than 50%; the plaintiff’s injuries are not as serious as what she asserted; and the plaintiff’s sick leave should be no more than one month.
3. At the trial of this case, only the plaintiff herself gave evidence in support of her claim. None of her former colleagues were called to give evidence to corroborate her case. On the other hand, the defendant denies that there was any accident happened to the plaintiff as alleged or at all. The defendant asserts that there was no eye-witness to the alleged accident and it criticizes the plaintiff for not calling any of her colleagues to give evidence in support of her case. The defendant said that it would be calling four witnesses to refute the plaintiff’s claim. The four witnesses that the defendant originally intended to call were: Ms Lee Wai Yi, Kitty (李慧儀) (DW1), Ms Chan Si Man, Vanessa (陳思敏) (DW2), Ms Lui Wai Fong, Sally (呂惠芳) (DW3), and Mr Sin Lai Chung, Kasper (冼禮忠). However, on the first day of the trial, Mr Daniel Chan, counsel for the defendant, informed this court that Mr Sin Lai Chung, Kasper was no longer in the employ of the defendant and that he could not be located for service on him the witness subpoena. As a result, only the other three witnesses were called to give evidence on behalf of the defendant.
4. Of the three witnesses called to give evidence for the defendant, Ms Kitty Lee (DW1) is said to be the Shipping Supervisor (運務部主管) of the Shipping Department of the defendant; Ms Vanessa Chan (DW2) says she worked in the same department as the plaintiff as a Merchandiser (採購員); and Ms Sally Lui (DW3) says that at the time of the alleged accident she was the secretary to the Chief Executive Office of the defendant.

*ON LIABILITY*

*The accident - as alleged by the plaintiff*

1. According to the plaintiff, the defendant had two offices situated in Po Lung Centre (“the PLC Office”) and Skyline Tower (宏天廣場) (“the SLT Office”), both in the Kowloon Bay District, Hong Kong, respectively. The PLC Office of the defendant housed the defendant’s Accounting Department (會計部) and Merchandising Department (採購部) whilst the SLT Office housed the offices of its boss and the Design Department (設計部).
2. The plaintiff says that the accident happened at about 2:30 pm on 28 July 2011 when she was holding and moving a carton box of price tags from its original position on a bench desk near the main entrance of the PLC Office with a view to placing it on the L-shape desk of a semi-enclosed workstation located further inside the PLC Office. Her left foot stumbled over a box of garment samples placed on the floor under the said L-shape desk on her left with a part of the box protruding into the aisle or passageway between two rows of writing desks. As a result, the plaintiff lost her balance, dropped the carton box of price tags, fell to her left side or backward with her left waist or low back hitting against the desk though she managed to stop herself from falling further onto the floor by supporting her body with both hands resting against the desktop on her left.
3. The plaintiff further says that the dimensions of the subject box containing garment samples placed on the floor under the desk were about 18 inches in length, 12 inches in width and 10 inches in height. Its weight was about 7 to 8 kilograms. In so far as the carton box containing price tags is concerned, it measured about 12 inches in length, 6 inches in width and 6 inches in height. Its weight was about 4 to 5 kilograms. According to the plaintiff, this carton box together with about five other carton boxes containing garment samples and price tags were delivered by courier or delivery workers to the PLC Office earlier on the same day of the accident on 28 July 2011. They were placed on the bench desk near the main entrance of the PLC Office temporarily. In order not to cause obstruction to the area in the vicinity of the bench desk near the main entrance, the plaintiff intended to move these 6 carton boxes to the said L-shape desk located further inside the PLC Office so that she could work on the price tags and distribute the relevant garment samples to the responsible merchandisers for them to take follow-up actions. The plaintiff claims that the accident happened and she stumbled over the aforesaid box of garment samples when she was holding with her hands one of the carton boxes containing price tags against her chest and had just walked past such part of the PLC Office where a strip of office space was used as a passageway with large amount of boxes, files, documents, rolls of fabrics, garment samples, etc being placed or stacked up on the two sides of such passageway leaving an aisle of about 4 feet in width.
4. The plaintiff ascribed the alleged accident to the negligence of the defendant in the following aspects:-
5. the defendant failed to ensure that there was sufficient space in the PLC Office that could be used as storage for storing the fabric rolls, garment samples, garment accessories, documents, labels, price tags, etc. It is the plaintiff’s case that the PLC Office was not a large one. It was rectangular in shape with an estimated floor area of about 1,500 square feet only and that there was no store room or warehouse in the PLC Office;
6. the defendant failed to ensure that there were sufficient and proper equipment such as storage racks and cabinets for storing the aforesaid items;
7. the defendant failed to ensure that items placed on the floor, desk tops, underneath the desks, etc were being kept in an appropriate and orderly manner without causing any obstruction to the passageways or aisles in the PLC Office or becoming a danger to staff walking around within the PLC Office;
8. the defendant failed to designate any person to supervise and ensure that the aforesaid items were placed or stored in the PLC Office in an appropriate and orderly manner; and
9. the defendant failed to give any warning or notice to its staff members to remind them of the danger of tripping by those items lying on the floor.
10. In support of the plaintiff’s claim, her solicitors had prepared a floor plan showing the general layout of the PLC Office and attached it to the plaintiff’s witness statement as “Enclosure 3”. There is not much difference between the parties on the general layout of the PLO Office. In fact, the plaintiff’s floor plan is very similar to the floor plan prepared on behalf of the defendant and attached to the witness statement of DW2 as “Enclosure VC-1”. In addition to “Enclosure 3”, the plaintiff also attached to her witness statement four photographs as “Enclosure 4”. These photographs show that large amount of fabric rolls, plastic bags containing garment accessories and some loose fabric samples were lying on the floor in the open area in the vicinity of the bench desk near the main entrance, whilst large amount of loose documents and miscellaneous items were seen to have been placed in a rather disorderly manner on top of a large number of carton boxes that were stacked up to a height taller than the partition boards used for separating individual work stations. According to the plaintiff, these photographs were taken by her and her colleague Isabel on 27 May 2011 on the instructions of their senior for the reference of their boss who was then considering merging the PLC Office and the SLT Office into one and was assessing how much space was needed for housing all the files, documents, fabric rolls, etc. The plaintiff confirmed that the general condition of the PLC Office at the time of the alleged accident on 28 July 2011, in particular concerning the open area and the passageway in the office, were the same as shown in the photographs.

*The plaintiff alleged that her colleagues knew the occurrence of the alleged accident*

1. It is common ground that the defendant had ten employees working in the PLC Office at the material time of the alleged accident. They included Elgi, Grace, Isabel, Kasper (the manager and supervisor of the plaintiff), Kitty (the Shipping Supervisor), Stephen (also the manager and supervisor of the plaintiff), Tony, Vanessa, Zoe, and the plaintiff.
2. According to the plaintiff, though she and her colleagues in the PLC Office were entitled to a lunch break they adopted a rather flexible practice concerning lunch break arrangement in that some of the colleagues would have their lunch in office by ordering take-away food when they were busy with their work and that most of the time they would take their lunch break at such time after the conventional lunch hours when most of the restaurants would offer “afternoon tea set” for a lower price.
3. It is the plaintiff’s case that on the very day of the alleged accident, she had her “take-away” lunch in the office. When the accident happened at around 2:30 pm, Kitty and Zoe were out for lunch; Vanessa was also out for lunch; Kasper was not in the office (though the plaintiff was not sure if he was out for lunch or on business duties); according to the plaintiff’s impression, Isabel and Tony were in the office but Stephen and Elgi were not; and the plaintiff was not sure if Grace was in the office.
4. The plaintiff says that she screamed out loudly when she was tripped over and hurt her low back. Her case is that both Tony and Isabel heard her scream and asked her if she was alright.
5. The plaintiff further says that she rested for a while and then obtained some kind of ointment from Isabel and applied the same to her low back for pain relief. The plaintiff then worked until she finished her work at about 7:30 pm in the evening.
6. The plaintiff attended the office on the following day on 29 July 2011 (Friday). She claims that some of her colleagues asked her if she was alright. When her supervisor Kasper learned about the accident and her injuries, he also showed his concern and advised the plaintiff to seek medical care if necessary. The plaintiff said that she then told Kasper how the accident happened.
7. The plaintiff did not seek any medical treatment until 31 July 2011 (Sunday) when she consulted a Chinese bonesetter for the first time. She went to the same bonesetter for the second time on 1 August 2011 (Monday). Since the pain in her low back subsisted, the plaintiff attended the Accident and Emergency Department of the Prince of Wales Hospital for consultation and treatment on 3 August 2011 (Wednesday).
8. According to the plaintiff, she rang Ms. Sally Lui (DW3) on 31 July 2011 (Sunday) and told the latter that she would need to take leave of absence from duty on the following Monday and Tuesday as she would need to seek medical treatment due to the serious pain in her low back. Under cross-examination, the plaintiff said that she had told Sally Lui that she hit her low back but she was not sure if she had told Sally that her injury was work-related.
9. The plaintiff never resumed duty again since then under her employment with the defendant. She tendered her resignation in writing more than 16 months later on 6 December 2012.

*The defendant’s case – no accident – no colleagues saw or heard or been told about the accident – plaintiff injured her low back when moving her residence in July 2011*

1. The defendant denied that there was any accident happened to the plaintiff in the course of her work on 28 July 2011. In arriving at its stance, the defendant based on, *inter alia*, the following matters:-
2. The “Saleable Area” (「建築面積」) of the PCL Office was 2,665 square feet.
3. Ms Sally Lui and Ms. Iris Liu of the SLT Office would visit and inspect the PCL Office from time to time to ensure that the general condition of the PCL Office was kept and maintained in a neat and orderly manner.
4. Though there were 2 carton boxes placed underneath the said L-shape desk in the PLC Office, they were neatly placed without protruding out from their position into the passageway or aisle.
5. Based on the position and height of the said desk and the alleged position of the plaintiff, if an accident did happen in the manner as alleged by the plaintiff, the corner of the desk would have hit one of her thighs or buttock and not her waist and/or low back.
6. Long before the alleged accident, Kitty had been told by the plaintiff that she had problems in her waist or low back and that she would have low back pain in rainy days. Kitty understood from the plaintiff that she got problems in her low back as a result of the demanding duties of her previous job as a waitress in Watami Japanese Restaurant.
7. The plaintiff’s colleagues in the PLC Office, including Kitty and Vanessa, knew that she had just moved her residence in July 2011.
8. The plaintiff attended office late on 28 July 2011 between 10:00 am and 11:00 am. She was observed by Kitty to have been walking very slowly with her hand pressing on her waist or low back, and complaining about her back pain when she arrived at the office.
9. Kitty did not go out for lunch on 28 July 2011 since she was very busy on that day. Vanessa was also working in the PLC Office for the whole day on 28 July 2011. They did not see any accident nor did they hear any scream as alleged by the plaintiff. In fact, upon investigation conducted by the defendant, none of its employees in the PLC Office had ever seen the alleged accident or heard the plaintiff mentioning that she was injured at work on 28 July 2011.
10. The plaintiff worked through the whole day in the office on 28 July 2011 without any remarkable events.
11. On 29 July 2011, the plaintiff attended office as usual. She mentioned to Vanessa that she had great pain in her waist or low back and that she had just applied some ‘BenGay” cream she got from Isabel to her low back for pain relief. The plaintiff mentioned to Vanessa that she was not sure if her low back pain was caused by her own sleeping posture. The plaintiff did not mention to Vanessa that she was injured in any work-related accident. She did not say so to Vanessa even though she had dinner with Vanessa and some other friends after work on 29 July 2011.
12. On 29 July 2011, the plaintiff also mentioned to Kasper that she had pain and stiffness in her waist or low back which might have been caused by the moving of her residence that took place around that period of time in July 2011.
13. In the evening of 30 July 2011 (Saturday), Sally received a phone call from the plaintiff informing that she would not be able to attend work and would need to take sick leave on the following Monday and Tuesday due to her low back pain. Sally asked the plaintiff if she was injured at work but the plaintiff answered in the negative. The plaintiff said that it was an old problem. However, when the plaintiff rang Sally again on 2 August 2011 (Tuesday), she changed her story and said that she was injured at work.
14. Sally and Kasper had also conducted an interview with Isabel on 30 October 2012. Isabel, who, according to the plaintiff, was in the PLC Office at the time of the alleged accident, confirmed that she did not see the alleged accident. She also said that she also let the plaintiff have her “BenGay” cream at the plaintiff’s request in the morning of 29 July 2011.

*Discussions and findings on liability*

1. On the issues concerning the size and general layout of the PLC Office, there is not much difference between the evidence of the plaintiff and the defendant. The plaintiff estimated the floor area of the PLC Office to be about 1,500 square feet. The defendant referred to a plan that stated the figure of 2,665 square feet. Cleary, the plaintiff’s figure referred to the “usable area” or “carpeted area” whilst the defendant’s figure was likely to be referring to the “saleable area” of the PLC Office. It is not disputed that there was not any designated storeroom or warehouse inside the PLC Office. Further, it is also not disputed that part of the open area in the PLC Office was used for storing documents, garment samples, fabric rolls, etc.
2. Insofar as the general condition of the PLC Office is concerned, the plaintiff said that there were large amount of items including fabric rolls, garment samples and accessories, documents, boxes of price tags and labels, etc. being placed on the floor and desk tops in an untidy manner causing obstruction to the passageway in the office. She produced four photographs taken by her and Isabel on 27 May 2011 showing the amount of these items and the way they were being placed on the floor and desk tops in the PLC Office in support of her case. On the other hand, two of the three witnesses called to give evidence on behalf of the defendant, namely Kitty and Sally, had a different story to tell. Both of them said that Sally and Iris of the SLT Office would visit the PLC Office on regular basis and from time to time to ensure that the general condition of the PLC Office was in order and that they would remind colleagues working in the PLC Office to keep the office area in a tidy and orderly manner. During her cross-examination, Kitty at first tried to create the impression that Sally and Iris would visit the PLC Office on a weekly basis to do the inspection. It was only when I tried to clarify the situation with her, she then explained that Sally and Iris would visit the PLC Office weekly to collect cheques but inspection of the office was only done on irregular basis. Kitty and Sally said, however, that Sally and Iris would remind colleagues in the PLC Office to keep the office area neat and tidy every time when they visited the PLC Office. The plaintiff did not agree with these allegations made by the defendant. She also said that the general condition of the PLC Office on 28 July 2011 was very similar to or the same as what was shown in the four photographs taken by her and Isabel on 27 May 2011. I have considered the evidence carefully and I found both Kitty and Sally were evasive and untruthful when giving their evidence on this topic. I, therefore, prefer the plaintiff’s evidence to the evidence of Kitty and Sally in this matter regarding the general condition of the PLC Office and the lack of a safe system on the part of the defendant. I do not accept the defendant’s evidence that there was in place a safe system under which Sally and Iris would inspect the PLC Office on a regular basis or from time to time to ensure that the office was kept and maintained in a tidy and orderly manner. Based on what could be seen from the four photographs and the plaintiff’s evidence, I found that there were large amount of loose and untidy items such as fabric rolls, garment samples and accessories, plastic bags, documents, boxes, etc allowed to be lying on the floor of the open area in the office and on the two sides of the passageway for a considerable period of time in terms of not only weeks but months. I also accept the plaintiff’s evidence that there were two boxes containing some defective garments placed underneath the desk mentioned by the plaintiff. My finding is also supported by the evidence of Vanessa (DW2), though it is her evidence that those two boxes were not protruding out from their position beneath such desk into the passageway.
3. It is therefore my finding that the defendant, as the employer of the plaintiff, was in breach of its implied duty under the employment contract it made with the plaintiff and its statutory duty under s 6 of the Occupational Safety and Health Ordinance (Cap 509) (“the OSHO”) to provide the plaintiff with a safe place of work and a safe access to and from the workplace within the PLC Office. Further, the defendant, as the occupier of the PLC Office, was also in breach of its common duty of care owed to the plaintiff under s 3 of the Occupiers’ Liability Ordinance (Cap  314) (“the OLO”).
4. Though the defendant has been found to be in breach of its contractual and statutory duties, the plaintiff must also satisfy this court on a balance of probability that such breach of duties by the defendant had caused the alleged accident and her injuries and damages before she could successfully establish liability against the defendant. See *Li Tin Sang v Poon Bun Chak & Others*, CACV 153 of 2002 (Court of Appeal, 18 November 2002). In the present case, the issue that has been most heatedly contended by the parties is whether the alleged accident did occur. On this issue I find that the plaintiff has failed to prove and I am not satisfied on a balance of probabilities that the accident did occur as alleged by the plaintiff or at all. I reach my finding based on the following grounds :-
5. The plaintiff is not a reliable witness. She had been changing her evidence, in particular that part of her evidence relating to how the alleged accident happened, as she moved along.
6. Based on the description and the demonstration given by the plaintiff at the trial on how the alleged accident happened, it is difficult to see how the alleged tripping could have caused any accident in the way as alleged by the plaintiff. In my finding, if the alleged tripping did take place as alleged, it is more likely than not that the plaintiff would have fallen forward instead of backward or backward towards her left as she originally stated in her witness statement when her left foot stumbled over the box allegedly protruding from underneath the desk on her left into the passageway.
7. Also based on the description and the aforesaid demonstration given by the plaintiff at the trial, I am not satisfied that the alleged tripping could have caused the plaintiff to fall in the way she described and sustain the kind of injury to her waist or back as alleged.
8. It appears from the witness statement of the plaintiff, no report of the alleged accident was made to her supervisors (such as Kasper or Stephen) or any of the seniors in the PLC Office or people responsible for the personnel or administrative matters in the SLT Office such as Sally on 28 or 29 July 2011, though the plaintiff said in her witness statement that her colleagues Isabel and Tony heard her scream when the accident happened; that they also asked the plaintiff about her condition; and that the plaintiff’s supervisor Kasper also came to know on 29 July 2011 the plaintiff had met with an accident and sustained injuries. Even when the plaintiff was giving evidence at this trial, she said under cross-examination that she was not sure if she had told Sally that her injury was work-related when she allegedly rang Sally on 31 July 2011 (Sunday) to inform Sally that she would need to take leave of absence from duty on the following Monday and Tuesday as she would need to seek medical treatment due to the serious pain in her low back. In this connection, it is the evidence of Sally that she received a phone call from the plaintiff in the evening of 30 July 2011 (Saturday) informing that she had to take leave on the following Monday and Tuesday; and that when Sally asked the plaintiff if she was injured at work, the plaintiff replied in the negative and told Sally that it was some kind of old problem. It is also Sally’s evidence that the plaintiff changed her story on Tuesday when she rang again and alleged that she was injured at work. In fact, the plaintiff’s story has not been always consistent regarding the date of the alleged accident. After the Employees’ Compensation (Ordinary Assessment) Board had issued its Certificate of Assessment on 22 August 2012, the plaintiff filed an application for Review of the Certificate of Assessment on 4 September 2012. In the application form, she entered “1/8/2011” as the date of the alleged accident. If the plaintiff had really met with an accident at work and if the alleged accident had really occurred on 28 July 2011 as she claimed, it would be very unlikely that she would have misstated the date of accident as 1 August 2011 in the relevant application form. On the issue concerning the telephone conversation between the plaintiff and Sally, I prefer the evidence of Sally. If the plaintiff was really injured at work as she alleged, I find it hard to believe that she would have not mentioned it to Sally when she rang to inform Sally that she would have to take sick leave on the following Monday and Tuesday.
9. Further, it is the evidence of Vanessa that the plaintiff attended office on 29 July 2011 as usual. However, the plaintiff mentioned to Vanessa that she had great pain in her waist or low back and that she had just applied some ‘BenGay” cream she got from Isabel to her low back for pain relief. The plaintiff mentioned to Vanessa that she was not sure if her low back pain was caused by her own sleeping posture. The plaintiff did not mention to Vanessa that she was injured in any work-related accident. She did not say so to Vanessa even though she had dinner with Vanessa and some other friends after work on 29 July 2011. Though Vanessa had been asked about this part of her evidence in her cross-examination at the trial, it was not seriously challenged by counsel for the plaintiff. In any event, Vanessa was unshaken in her cross-examination. I find her a truthful and reliable witness. Had the plaintiff really injured her waist or back at work on 28 July 2011, it is inconceivable that the plaintiff would have failed to tell Vanessa that she was injured at work when they talked about the pain in the plaintiff’s waist or back in office or during dinner on 29 July 2011. It would be even more incredible that the plaintiff would have mentioned to Vanessa that she was not sure if her low back pain was caused by her own sleeping posture.
10. According to the pro forma medical report dated 4 January 2012 by Dr Ma Kwok Ping of the Accident and Emergency Department of the Prince of Wales Hospital (“A&E of PWH”), the plaintiff attended the A&E of PWH at 10:47 pm on 3 August 2011 for “injury(ies) allegedly sustained … ‘Back sprain 3 days before’” (ie on or about 30 or 31 July 2011). It is noted that there is included in the pro forma medical report a selection of the standard ways as to how injuries were sustained including “in an assault”, “while on duty”, “in a traffic accident” and “(others)”. It is noted that the box for “while on duty” was not ticked. Instead, the box for “(others)” was ticked and with the description of “Back sprain 3 days before” added as elaboration. Further, there is also in the pro forma medical report a selection of five choices for the “mode of injury” including “was compatible with blunt trauma”, “was compatible with a sprain”, “was compatible with sharp object infliction”, “could not be determined” and “*(others)*”. It is note that the box for “was compatible with a sprain” was ticked. The plaintiff was treated and discharged and was given 4 days of sick leave from 3 August 2011 to 6 August 2011. The plaintiff was cross-examined on what she told the nurse and the doctor when she attended and sought medical treatment from the A&E of PWH on 3 August 2011. She explained that she told the nurse that she had “hit her waist” (“撞到腰”) and not “sprained her waist” (“扭到腰”); that her injuries were sustained “三幾日前” instead of “三日前”. However, the plaintiff said that she could not recall whether she told the nurse that her injuries were sustained in the course of work. It is my finding that the plaintiff did not tell the nurse that she had injured her back at work. If she did, I could not see any reason why the nurse would have not ticked the box for “while on duty”. Again, I find it hard to believe that the plaintiff would have chosen not to tell the nurse that her back injury was work-related if she was really injured at work as she alleged.
11. If the plaintiff was really injured at work on 28 July 2011 as she alleged, I find it unimaginable that she would have got the date of accident wrong and put down “1/8/2011” in her application form dated 4 September 2012 when she was applying for a review of the assessment contained in the certificate issued by the Employees’ Compensation (Ordinary Assessment) Board dated 22 August 2012.
12. The plaintiff’s case is that both Tony and Isabel heard her scream when she met with the accident and was injured on 28 July 2011. It is also her case that she had told Kasper how the accident happened on 29 July 2011. These 3 colleagues are important witnesses to the plaintiff’s case. However, no attempt has been made by or on behalf of the plaintiff to call these 3 colleagues or any one of them to give evidence for her. Insofar as Kasper is concerned, this court has been told by Mr Daniel Chan, counsel for the defendant, that Kasper, who had made a witness statement for the defendant, was no longer in the employ of the defendant and could not be located for service on him the witness subpoena. So nothing can be said against the plaintiff insofar as the lack of Kasper’s evidence is concerned. Regarding Tony, the plaintiff explained in her cross-examination that he had left the employment of the defendant and she was not in contact with him. In the case of Isabel, the plaintiff explained in her cross-examination that Isabel had also left the employ of the defendant. Though the plaintiff knew that the defendant disputed whether the alleged accident really happened as alleged or at all and that the plaintiff has been in contact with Isabel, she has never thought about asking Isabel to be her witness in support of her claim against the defendant. In these circumstances, this court is entitled to draw adverse inference against the plaintiff, at least on the issue of whether the accident really happened, if necessary. See: *Cavendish Funding Ltd v Henry Spencer & Sons Ltd* [1998] 1 EGLR 104; *O’Donnell v Reichard* [1975] VicRp 89, [1975] VR 916 (14 April 1975); and *Li Sau Keung v Maxcredit Engineering Ltd & Anor* [2004] 1 HKC 434.

*CONTRIBUTORY NEGLIGENCE*

1. Since it is the finding of this court that despite the breach of duties by the defendant, the plaintiff has failed to prove to the satisfaction of this court on a balance of probabilities that the accident did occur as alleged or at all, there is no need for this court to consider the issue of contributory negligence as raised by the defendant. However, if I were wrong and that the defendant is liable, my finding is that there is no contributory negligence on the part of the plaintiff based on the finding of facts already made by this court.
2. Mr Daniel Chan, counsel for the defendant, submitted that, according to the plaintiff, she was walking at a normal speed in the PLC Office towards the aforesaid L-shape desk and that it was inconceivable that she would have tripped and fallen if she had taken reasonable care of herself while walking. Mr Chan relied on the case of *Limbu Jas Maya v HK Scafframe System Limited* (unreported; DCPI 2790/2008, HH Judge Leung in Court, 20 May 2010) and submitted that the extent of the plaintiff’s contributory negligence should be no less than 50%. I do not agree. The facts in *Limbu* are fundamentally different from that in the case before this court. In particular, the trial judge in *Limbu* expressed in paragraphs 49 and 51 of the judgment that “the risk that Limbu chose to take was disproportionate to the trouble of following the path that she wanted to avoid” and “[w]hat Limbu chose to do in the circumstances was extraordinary”. In the present case, there is no allegation by the defendant that the plaintiff had chosen to do anything extraordinary or taken any disproportionate risk when she was holding a box with her hands and walking inside the PLC Office.
3. In all cases where contributory negligence is alleged, the real question to be decided by the court is: Whose negligence or breach of duties caused the accident? Was it that of the defendant alone, or of the plaintiff alone, or of both together or a combination of both and others? See *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 165, per Lord Atkin. Whether the plaintiff failed to take such care as was reasonable in the circumstances must be judged in the light of all the circumstances. In the present case, it is the finding of this court that there were large amount of loose and untidy items such as fabric rolls, garment samples and accessories, plastic bags, documents, boxes, etc. allowed to be lying on the floor of the open area in the office and on the two sides of the passageway for a considerable period of time in terms of not only weeks but months. It then cannot be said that the plaintiff failed to take such care as was reasonable in such circumstances if it is found that the alleged accident happened in the way as described by her, namely, that she stumbled over the aforesaid box of garment samples when she was holding with her hands one of the carton boxes containing price tags against her chest.

*ON QUANTUM OF DAMAGES*

1. Again, if I were wrong and that the defendant is somehow liable, I proceed to assess the loss and damages suffered by the plaintiff as a result of the accident.

*Injuries, medical treatment, and permanent disabilities*

*(a) Medical consultations, physiotherapy, occupational therapy, etc*

1. It is the case of the plaintiff that she sustained injuries to her low back as a result of the accident alleged to have occurred on 28 July 2011. According to the plaintiff, she did not seek medical treatment until 31 July 2011 and 1 August 2011 when she consulted a bonesetter Chow Yun Sum due to persistent pain. She attended the A&E of PWH for treatment on 3 August 2011. According to the *pro forma* medical report of Dr Ma Kwok Ping of the A&E of PWH dated 4 January 2012, the plaintiff attended the A&E of PWH on 3 August 2011 for treatment of alleged “back sprain” sustained “3 days before”. The attending doctor found that the plaintiff had “lower back muscle pain” which “was compatible with a sprain” and that “permanent disability was not expected”. She was treated and discharged. Four days of sick leave from 3 August 2011 to 6 August 2011 were granted to the plaintiff.
2. According to the plaintiff, she consulted Dr Ho Sie Kiu of the Town Health Medical Centre (康健醫務中心), a private medical doctor, on 8 August 2011. Starting from 12 August 2011 and until 20 September 2011, the plaintiff consulted Dr Edmund Wong of the Hong Kong Traumatology and Orthopaedics Institute 6 times. She was also referred to a physiotherapist and received 3 sessions of physiotherapy treatment between this period between 18 August 2011 and 15 September 2011. In the medical report prepared by Dr Edmund Wong, he remarked that he first assessed the plaintiff on 12 August 2011 and she complained of back pain with stiffness but there was no lower limb radiation and no sphincter problem. There was no lower limb neurological deficit of her lower limbs. It is noted from the medical report of Dr Wong that he had been told by the plaintiff that she sustained injury on duty on 28 July 2011 when her back hit the edge of a table. Dr Wong last saw the plaintiff on 20 September 2011 and he referred the plaintiff to government hospital for further management at her request. Sick leave granted by Dr Edmund Wong covered a period of a month and a half from 12 August 2011 to 26 September 2011.
3. When the plaintiff was under the management of Dr Edmund Wong, she had a MRI scan done in Mainland China on 18 September 2011. The MRI report revealed bulging of intervertebral discs at L2-S1 levels with mild bilateral nerve root compression at L2/L3, mild left nerve root compression at L3/L4, and mild right nerve root compression at L4/L5.
4. Upon the expiry of the sick leave period granted by Dr Edmund Wong on 26 September 2011, the plaintiff sought medical treatment at the A&E of PWH again on 27 September 2011. She was treated and discharged with 10 days sick leave from 27 September 2011 to 6 October 2011. It is noted from the medical report prepared by Dr Tai Chun Kuen of the A&E of PWH that the plaintiff complained that she was injured whilst on duty when she slipped and fell with her left low back hitting against a table in July 2011. Reference was also made to the MRI scan done in Mainland China on 18 September 2011. The plaintiff was referred to orthopaedic specialists for further medical information. Initial screening of the plaintiff was done by the Physiotherapy Department of PWH on 28 September 2011 and a report on her condition was made and sent to the Department of Orthopaedics and Traumatology, PWH (“O&T of PWH”) for follow up. It appeared from the documents that the plaintiff was subsequently scheduled to attend the O&T of PWH on 24 October 2011.
5. Up the expiry of the sick leave granted by doctor of the A&E of PWH on 6 October 2011, the plaintiff attended the Department of Family Medicine & General Outpatient Clinic in Tai Po (“the OPC”) for consultation on 7 October 2011 and was granted sick leave from 7 to 10 October 2011.
6. Again, upon the expiry of her sick leave granted by the OPC on 10 October 2011, the plaintiff consulted Dr Wong Ping Kin, Raymond of Ever Health Medical Center on 10 October 2011. She was given 5 days of sick leave from 10 to 14 October 2011.
7. When her sick leave expired on 14 October 2011, the plaintiff went back to the OPC for consultation again on 14 October 2011 (according to the relevant medical report, though the plaintiff said 15 October 2011 in her witness statement) and she was given 4 days of sick leave from 15 to 18 October 2011.
8. When her sick leave again expired on 18 October 2011, the plaintiff consulted Dr Wong of Ever Health Medical Centre again on 18 October 2011 and was given another 5 days of sick leave from 19 to 23 October 2011.
9. On 24 October 2011, the plaintiff attended the O&T of PWH as scheduled for consultation. According to the relevant medical report, during the period between 24 October 2011 and 3 May 2012 the plaintiff’s case was managed by the O&T of PWH and sick leave of almost 8 months was granted to her from 24 October 2011 to 14 June 2012.
10. During this period when the plaintiff was covered by the long sick leave granted by the O&T of PWH, she was also given appointments by the Physiotherapy Department, Occupational Therapy Department, and the Pain Clinic of the Alice Ho Miu Ling Nethersole Hospital (“Nethersole Hospital”) in Tai Po for the treatment and management of her conditions.
11. During the period from 13 October 2011 to 1 February 2012, the plaintiff attended 9 sessions of physiotherapy but had defaulted 6 appointments.
12. The plaintiff was seen by doctor of the Pain Clinic on 23 February 2012 and the doctor noted degeneration in multiple levels of her spine from her private MRI report. She was followed up in the Pain Clinic for 4 months until 20 June 2012. She failed to attend the follow-up appointment scheduled for September 2012 and her case was then closed with the Pain Clinic.
13. Besides being followed up by the Pain Clinic, the plaintiff was also referred to the Occupational Therapy Department of the Nethersole Hospital on 6 February 2012. According to the relevant Occupational Therapist report dated 8 November 2012, initial occupational therapy assessment of the plaintiff was done on 21 May 2012. Work capacity evaluation was done on 6 June 2012. After that, the plaintiff changed the subsequent occupational therapy appointments three times. As a result, the work capacity evaluation could only resume on 29 June 2012. By then, the plaintiff claimed that the pain at her lower back had decreased. She also reported that her walking and standing tolerance had increased to 3 hours. She also demonstrated that she was able to carry a 12kg-weigh for 15 meters for 5 consecutive times without difficulty. Further, there was also improvement in the plaintiff’s own perception of her functional ability. She anticipated “no problem in resuming her work”. The occupational therapist arranged the plaintiff for a review of her work capacity on 6 August 2012. However, the plaintiff defaulted without calling back for booking another appointment. Hence, the plaintiff’s case was closed with the Occupational Therapy Department until she was later referred to the same department again for training on 28 March 2013. She attended 6 sessions of work hardening training. The results showed that the plaintiff’s physical capacities marginally matched her job demands. She was discharged on 5 September 2013 upon her request.

*(b) Assessment by the Employees’ Compensation (Ordinary Assessment) Board*

1. At around the time when the plaintiff’s case was discharged from the Pain Clinic and the Occupational Therapy Department of Nethersole Hospital in mid-2012, she was assessed by the Employees’ Compensation (Ordinary Assessment) Board (“the Assessment Board”) on 20 July 2012 and 8 August 2012. The Board issued the Certificate of Assessment on 22 August 2012 certifying the plaintiff’s loss of earning capacity caused by her injury at 2% and the period of necessary sick leave for a total of 1 year and 7 days from 1 to 6 August 2011 and from 8 August 2011 to 8 August 2012. The plaintiff was not happy with the assessment of the Board. She prepared and filed an application for Review of the Certificate of Assessment on 4 September 2012. This court noticed that when the plaintiff filled out the standard form for the application for Review of the Certificate of Assessment, she entered “1/8/2011” as the date of accident. The review was carried out on 5 December 2012. The Board issued the Certificate of Review of Assessment on 19 December 2012. In it, the Board reduced its assessment on the plaintiff’s loss of earning capacity from 2% to 1% but extended the sick leave by almost 4 months to cover the period between the date of the original assessment on 8 August 2012 and the date of the review assessment on 5 December 2012.
2. It is noted from the documents placed before this court that as soon as the review of assessment was done on 5 December 2012 the plaintiff submitted to the defendant a letter dated 6 December 2012 acknowledging the mutual agreement made between the plaintiff and the defendant for termination of the employment relationship between them with immediate effect.

*(c) Joint examination by the plaintiff’s and the defendant’s orthopaedic experts*

1. On 15 January 2013, the plaintiff was jointly examined by Dr Wong See Hoi, orthopaedic expert retained on behalf of the plaintiff, and Dr Ho Ching Lun Henry, orthopaedic expert retained on behalf of the defendant. Shortly after the joint examination by the two experts, another MRI scan was done on the plaintiff in PWH on 26 February 2013. The two experts subsequently rendered their joint report on 23 June 2014. It was noted by both experts that the latest MRI of the plaintiff’s lumbar spine showed multiple levels disc degeneration without significant nerve root compression and it also showed a small annular tear at L3/L4 level. It was further noted that another course of occupational therapy was given to the plaintiff from 8 May 2013 to 5 September 2013 as mentioned above.
2. The main complaints made by the plaintiff to the two experts at the time of the said joint examination on 15 January 2013 included:-
3. Left side stretching back pain and stiffness; intermittent attack especially on prolonged sitting or standing for more than one hour, or lifting heavy object. Such pain and stiffness occasionally occurred at night time once in every 3 to 4 days and required intake of analgesic.
4. Left lower limb numbness over anterior thigh, buttock and leg with intermittent attack around once every 2 to 3 days and with each attack lasted for a few minutes. Such symptoms would be aggravated by prolonged sitting for more than one hour, or prolonged standing for over 45 minutes to one hour.
5. Activities of daily living and the use of public transportation were manageable but with some inconvenience as the plaintiff claimed that she would need to use a stick for doing long journeys or journeys with prolonged walking for more than 30 minutes.
6. Having carried out different types of examinations on the plaintiff, the two experts came to somewhat different conclusions and opinions.
7. The more important conclusions and opinions expressed Dr Wong See Hoi can be summarized as follows:-
8. Degeneration is the outcome of a wear and tear process and it is not caused by accident. However, many people with similar radiographic features can remain asymptomatic and lead a normal life like the plaintiff before the alleged accident. Since she had no back or lower limb problem before, the alleged accident was likely the main contributing event that resulted in increasing soft tissue oedema and a mild further prolapse of her intervertebral discs causing lower limb complaint.
9. “The timing and effect relationship strongly suggested that her symptoms were injury induced. Without the said accident, she could probably remain asymptomatic for a long period of time.”
10. Dr Wong opines that the plaintiff’s prognosis is fair.
11. According to Dr Wong, with persistent back pain and radiating left lower limb pain and numbness, though the plaintiff is able to resume her pre-injury work as assistant merchandiser, her work capacity and efficiency is expected to be reduced. Her then occupation as part-time saleslady in boutique is suitable for her.
12. Dr Wong assessed the plaintiff’s Whole Person Impairment at about 6-7% and her Loss of Earning Capacity (“LOEC”) also at 7%.
13. Dr Wong opines that sick leave as awarded by the Board till 5 December 2012 is appropriate and further sick leave is not necessary.
14. The more important conclusions and opinions expressed Dr Wong See Hoi can be summarized as follows:-
15. The plaintiff had chronic pre-existing degeneration of the lumbar spine as shown by the presence of osteophytes over wide areas of the lumbar spine from L2 to L5 levels and the protrusion of multiple discs from L2 to L5. There is no herniation of the discs and the nerve roots in the lumbar spine are not compressed. The plaintiff’s alleged left lower limb numbness cannot be explained by the absence of neurological compression on the MRI scan. Based on the alleged mechanism of the alleged injury, if the injury did occur as the plaintiff described, her back injury was a contusion and possible strain of the muscles of the lower back. The extent of her injury was however limited and did not cause any serious spinal or neurological injury. She was still able to continue with her work after her injury and it was not until 31 July 2011 that she first sought treatment from a bonesetter.
16. The clinical examination showed only tenderness over the plaintiff’s lower back. There was no muscle spasm or guarding. She could sit comfortably, squat down fully and rise up without support and she had normal range of back movement. She had no neurological deficit or objective evidence of muscle wasting in her lower limbs to suggest neurological compression in her lumbar spine. In the absence of abnormal neurological signs and absence of neurological compression in the MRI scan, her left lower limb numbness cannot be explained by her back injury. The objective findings indicate that she does not have a serious back disability. Her alleged back symptoms, if present, should at most be mild.
17. Dr Ho opines that the plaintiff’s prognosis is excellent.
18. Dr Ho is of the view that the plaintiff can resume her normal pre-injury duties with little reduction in her work capacity. She should be able to cope with her job as a merchandiser with very little difficulty.
19. Dr Ho assessed the plaintiff’s Whole Person Impairment, if any, to be less than 1% and the Loss of Earning Capacity also to be less than 1%.
20. Regarding sick leave, Dr Ho opines that it should not be more than one month.

*(d) Surveillance on the plaintiff*

1. Before expressing any views and making any findings on the joint report prepared by the two orthopaedic experts, I would like to turn to the Investigation Report dated 23 June 2012 prepared by a firm of private detectives hired on behalf of the defendant in February 2012 to conduct surveillance on the plaintiff to ascertain her employment status, her physical and mental conditions, her daily activities and whether her behavior is consistent with the injuries allegedly suffered by her. Surveillance operations on the plaintiff were carried out by a private detective on 3 occasions, namely, 21 May 2012, 21 June 2012 and 23 June 2012. Besides the Investigation Report, the defendant has also produced as defence Exhibit D1 a DVD disc containing video recordings taken by the private detective during the surveillance operations and showing the activities of the plaintiff. The video recordings were played back at the trial of this case when the plaintiff was being cross-examined.
2. According to the Investigation Report and based on what could be seen from the video recordings, the plaintiff appeared to be involved in some kind of buying and selling transactions via internet during the surveillance period. On 21 and 23 June 2012, she was seen making transactions with people at a concourse of the Mong Kok MTR station and outside the Sheung Shui train station respectively.
3. It is noted from the video recording that the plaintiff was able to stand, move and walk around normally. She was able to get on and off minibus and buses in apparently manner without any difficulty. Her gait and pace when walking and cross the road also appeared to be perfectly normal. When she was shopping in a market on 23 June 2012, she was seen squatting down and bending her back to pick up some stuff from the ground level in a normal manner without any difficulty and without displaying any sign of having pain in her low back. It is also noted from the video recordings that the plaintiff did not appear to be suffering from any pain or feeling sad or anxious. In fact, she appeared to be rather cheerful and happy in the video recordings.
4. The contents of the Investigation Report and the condition of the plaintiff as revealed in the video recordings are consistent with what the occupational therapist recorded in her report dated 8 November 2012 that when the plaintiff was undergoing the work capacity evaluation in May and June 2012 she expressed that “she anticipated no problem in resuming her work”. These observations are further supported by the assessment conducted by the Assessment Board in July and August 2012. As a result, the Assessment Board issued a Certificate of Assessment on 22 August 2012 certifying the plaintiff’s loss of earning capacity at 2% which was subsequently reduced to 1% in December 2012 upon a review requested by the plaintiff. Taking into account all the evidence available, I find that the low back problem of the plaintiff was not a serious one. Her condition, at least in around and since mid-2012 was generally good and satisfactory.
5. In view of the evidence available and my finding above, I further find that the plaintiff had probably exaggerated her conditions to the two orthopaedic experts when she was jointly examined by them on 15 January 2013. I prefer the opinion of Dr Ho to that of Dr Wong. I therefore find that the Whole Person Impairment of the plaintiff at 1% and her Loss of Earning Capacity also at 1%.

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

1. If the allegations of the plaintiff concerning how the accident happened are accepted, the injury to her back is likely to be some kind of contusion and possible strain of the muscles of her lower back. The likely injury which could have resulted from the accident should not be serious. Most, if not all, of the complaints made by the plaintiff are probably a result of her own chronic pre-existing degeneration of the lumbar spine as shown by the presence of osteophytes over wide areas of the lumbar spine from L2 to L5 levels and the protrusion of multiple discs from L2 to L5. The plaintiff recovered well from the alleged injury and is not suffering from any noticeable disability in her daily life and activities. The plaintiff’s counsel submitted that an award for PSLA of HK$180,000.00 is appropriate (despite the fact that the sum of HK$350,000.00 was pleaded in the plaintiff’s Revised Statement of Damages) whilst it is the submission of the defendant’s counsel that the PSLA award in the present case should not be more than HK$80,000.00. I agree with the defendant’s counsel. In my assessment, an award of HK$120,000.00 with one-third reduction for the plaintiff’s chronic pre-existing degeneration of her lumbar spine is appropriate. Hence, the discounted sum is therefore HK$80,000.00. See: *Sherma Phadindra v Tin Wo Engineering Co Ltd & Anor*, HCPI 32 of 2011 (8 November 2012, Deputy High Court Judge Mayo, unreported); *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd*, HCPI 473 of 2006 (6 June 2007, Saw J, unreported); *Tamang Udas v Global Sunny Engineering Ltd. & Anor*, HCPI 732 of 2011 (Deputy High Court Judge Woo, 7 January 2013, unreported); *Shek Kam Ching v Po Kee Construction Engineering Ltd & Others*, [2002] 3 HKLRD 795 (28 November 2002, Deputy High Court Judge To); *Lee Yuk Lan v Royaltelle International Ltd t/a The Royal Garden*, HCPI 187 of 1995 (Beeson J, 5 August 1999); and *Khan Shafiq v Cheng Hip Ming*, DCPI 1378 of 2007 (2 May 2008, HH Judge Chow).

*Pre-trial loss of earnings*

1. It is common ground between the parties that the plaintiff was earning a monthly income of HK$8,500.00 as an assistant merchandiser before and at the time of the alleged accident on 28 July 2011.
2. The plaintiff argues that the reasonable sick leave period should be 16.13 months (or a total of 492 days from 8 August 2011 to 5 December 2012) as certified by the Assessment Board on review requested by the plaintiff and supported by Dr Wong See Hoi, the orthopaedic expert retained on behalf of the plaintiff.
3. The defendant, however, argues that the appropriate sick leave period should not be more than one month as suggested by Dr Ho Ching Lun, Henry, the orthopaedic expert retained on behalf of the defendant. Mr Daniel Chan, counsel for the defendant, further submits that this court is not bound by the sick leave period as assessed by the Assessment Board. He relies on the decision of the Court of Appeal in *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210 in which one of the issues was the reasonable period of sick leave. The plaintiff in the case of *Tam Fu Yip Fip* contended that the doctors issuing the certificates were subject to the code of conduct governing the medical profession and it had to be assumed that when issuing the certificates, the treating doctors were acting in accordance with the requisite standard required of them. In the judgment of the Court of Appeal, Le Pichon JA says in paragraphs 17 and 18 at 215-6 as follows:-

“17. … First, it is the patient who makes the request for a certificate from the doctor. Second, a doctor treating his patient may, consistently with the code of practice, issue the certificate without carrying out any detailed examination since such an examination is not always practicable or necessary. What is quite clear in the present case is that the plaintiff has been found to have grossly exaggerated his complaints. Although the exaggeration took place during the joint examination, plainly it would be open to the Judge not to disregard the possibility of the plaintiff also having exaggerated his symptoms when he saw the treating doctors responsible for issuing the sick leave certificates.

18. Since the plaintiff’s pre-trial loss of earnings is ascertained by reference to the period during which the plaintiff was prevented by the injuries sustained from returning to work, what has to be ascertained and identified is the length of that period. In my view, that is an exercise that would not require evidence to suggest or imply that those who had granted sick leave to the plaintiff did so improperly. Logically, if the finding is that the plaintiff could have gone back to work after three months, that is the period that is relevant to the assessment and award of pre-trial loss of earnings and no other. Sick leave certificates are no more than a piece of evidence that has to be evaluated in the light of all the available evidence including medical evidence before the court. As Rogers V-P observed in: *Choy Wai Chung v Chun Wo Construction & Engineering Co Ltd* (unrep., CACV 172/2004, [2005] HKEC 1077) at para.9, the judge cannot be bound by the mere issue of sick leave certificates: the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiff.”

1. In my judgment, the approach and principle as enunciated by the Court of Appeal are also applicable to the period of sick leave as stated in the Certificate of Assessment and the Certificate of Review of Assessment issued by the Assessment Board. The trial judge cannot be bound by the mere issue of these certificates of assessment. He must evaluate the sick leave period in the light of all the available evidence and that sick leave certificates issued by treating doctors or certificates of assessment issued by the Assessment Board are no more than a piece of evidence that he has to take into consideration. Taking into consideration all the evidence available, in particular the fact that the plaintiff had expressed to the occupational therapist in the work capacity evaluation session resumed on 29 June 2012 that she anticipated “no problem in resuming her work”, I find that the plaintiff should be able to return to work from July 2012 onwards and that the reasonable period of sick leave in the present case should be 11 months from 1 August 2011 to 30 June 2012.
2. Therefore the award for pre-trial of Loss of Earnings is calculated as follows:-

HK$8,500.00 x 11 months = HK$93,500.00

*Pre-trial loss of mandatory provident fund (“MPF”)*

1. If liability is proved, the defendant shall also be liable to compensate the plaintiff for her pre-trial loss of employer’s contribution to MPF which is equivalent to 5% of the plaintiff’s earnings. Therefore, the plaintiff’s pre-trial loss of MPF is: HK$93,500.00 x 5% = HK$4,675.00.

*Loss of earning capacity*

1. The plaintiff did not claim any damages for future loss of earnings or future loss of MPF in the plaintiff’s Revised Statement of Damages. However, there is a claim for the plaintiff’s loss of earning capacity. It is argued on her behalf that as a result of her injury and the resulting disabilities, she might lose her employment at some time in the future and that she might suffer a disadvantage in the labour market in getting another job with terms similar to her current job. In the Revised Statement of Damages, the plaintiff’s solicitors claimed the sum of HK$150,000.00 as damages for loss of earning capacity. In his closing submissions, Mr Steven Lau, counsel for the plaintiff, claims the sum of HK$100,000.00 under this head of damage.
2. The principle concerning the claim for damages for loss of earning capacity was considered by Browne LJ in *Moeliker v A. Reyrolle & Co Ltd* [1977] 1 WLR 132 in which it was pointed out at p 142 that the claim for loss of earning capacity should be dealt with in two stages:-

“… 1. Is there a ‘substantial’ or ‘real’ risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff’s chances of getting a job at all, or an equally well paid job.’

1. I notice that the defendant in the defendant’s Answer to the plaintiff’s Revised Statement of Damages had agreed that a lump sum of not more than HK$50,000.00 was recoverable as the plaintiff’s loss of earning capacity notwithstanding the view of the defendant that the plaintiff did not suffer any serious handicap in the labour market. Though I do not consider that there is any “substantial” or “real” risk that the plaintiff will lose her present job at some time in future before the end of her working life, I do not seek to disturb the position adopted by the defendant. I, therefore, find that, if liability is proved, the sum of HK$50,000.00 shall be paid to the plaintiff for her loss of earning capacity as agreed by the Defendant.

*Special damages*

1. In the plaintiff’s Revised Statement of Damages, she claimed special damages in the total sum of HK$18,438.40 which included mainly medical expenses, travelling expenses and spending on tonic food. The amount was agreed by the defendant in the defendant’s Answer to the plaintiff’s Revised Statement of Damages. Hence, if liability is proved, an award of HK$18,438.40 as special damages is made accordingly.

*Credit for EC payment*

1. It is not disputed that the plaintiff should give credit to the sum of HK$135,000.00 already received by her by way of employees’ compensation.

*Interest*

1. The plaintiff claims interest on damages for PSLA at 2% per annum from the date of service of the writ in this action until the date of judgment and interest on award for pre-trial loss of earnings (and MPF) and special damages at half of the prevailing judgment rate from the date of the alleged accident to the date of judgment.
2. The defendant agrees that damages for PSLA carry interest at 2% per annum from service of the writ whereas pre-trial loss of earnings and MPF and special damages, after deduction of the award of employees’ compensation, carry interest at half of the applicable judgment rate from the date of the alleged accident to the date of judgment.
3. The total interest is assessed as HK$12,806.30 calculated as follows:-

(HK$80,000.00 x 2% pa x 3.42 years) + (HK$93,500.00 + HK$4,675.00 + HK$50,000.00 + HK$18,438.40 – HK$135,000.00) x 4% pa x 5.8 years) = HK$12,806.30

*Summary of quantum of damages*

1. To summarise, if liability is proved, the total award shall be calculated as follows:-
   * 1. PSLA HK$80,000.00
     2. Pre-trial loss of earnings HK$93,500.00
     3. Pre-trial loss of MPF HK$4,675.00
     4. Loss of earning capacity HK$50,000.00
     5. Special damages HK$18,438.40

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Sub-total HK$246,613.40

Less : EC compensation paid (HK$135,000.00)

Plus : interest HK$12,806.30

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Total : HK$124,419.70

*CONCLUSION*

1. To conclude, it is the finding of this court that:-
2. despite the breach of duties by the defendant, the plaintiff has failed to prove to the satisfaction of this court on a balance of probabilities that any accident did occur as alleged or at all;
3. there is no contributory negligence on the part of the plaintiff based on the finding of facts already made by this court; and
4. if liability is proved, the quantum of damages after taking into account the amount of EC compensation already received by the plaintiff and the amount of interest is in the sum of HK$124,419.70.
5. In view of my finding on liability, there shall be judgment to the defendant. I also make a costs order nisi that the defendant is entitled to its costs of this action, to be taxed if not agreed, with certificate for counsel and that the plaintiff’s own costs are to be taxed, if necessary and appropriate, in accordance with Legal Aid Regulations.

( Michael Liu )

Deputy District Judge

Mr Steven Lau, instructed by KW Luk & Co. assigned by the Legal Aid Department for the plaintiff

Mr Daniel KK Chan, instructed by TS Tong & Co for the defendant