# DCPI 2723/2018

[2019] HKDC 1745

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2723 OF 2018

---------------------------

BETWEEN

LIU WEIGUANG Plaintiff

and

LI KENG KO 1st Defendant

ALPHA BUILDING CONSTRUCTION LIMITED 2nd Defendant

---------------------------

Before: Her Honour Judge Phoebe Man in Court

Date of Hearing: 6-7 November 2019 and 4 December 2019

Date of Judgment: 14 January 2020

--------------------------

JUDGMENT

--------------------------

*INTRODUCTION*

1. This is the assessment of damages for the plaintiff’s claim for personal injury, loss and damage arising out of the negligence and/or breach of common duty of care and/or breach of statutory duty and/or breach of contract of employment on the part of the 1st and 2nd defendants.
2. Pursuant to a consent order dated 19th June 2017, interlocutory judgment was entered against the 1st and 2nd defendants (“together, the “defendants”) whereby it was adjudged that they were to pay the plaintiff damages to be assessed and costs.

*THE ACCIDENT – THE PLAINTIFF’S CASE*

1. The plaintiff’s case is that at around 10:00 a.m. on 15 September 2015, the plaintiff was working in the course of employment under the 1st defendant at a residential construction site on the Peak in Hong Kong. The 2nd defendant was the principal contractor.
2. There was a lift trough at the construction site. At the material time, there were temporary wooden floorboards placed in the lift trough. The plaintiff was instructed to work with a colleague inside the lift trough. The plaintiff had wanted to go to basement level 1 to check the safety of the temporary wooden floorboards but was told by a supervisor he would check for the plaintiff instead. The supervisor used a flashlight to shine light onto the temporary wooden floorboards and confirmed that they were safe. The plaintiff then proceeded to walk into the lift trough on the ground floor carrying two plastic buckets with concrete weighing around 30 to 40 catties. He was using cement to fill in the gap between the door frame when the temporary wooden floorboards collapsed and the plaintiff fell inside the lift trough down from a platform of the trough of around 9-10 metres and landed on his feet. The plaintiff had lost consciousness temporarily and as a result of the accident, the plaintiff had sustained injuries.
3. Although the defendants had admitted liability, they challenge the following aspects of the accident as they say it goes to the plaintiff’s credibility:
4. The height of the fall; the plaintiff says in his witness statement and in his oral testimony that he fell from G/F to B3 of the lift trough of about 9-10 meters. The defendants rely on the declaration in Form 2, where it was said that the plaintiff fell from a height of 5-6 metres.
5. Whether the plaintiff was carrying 2 buckets of concrete mixture when he fell; the defendants say that this detail was missing from the AED record and Ruttonjee Hospital record as well as the declaration, nor did he mention it during his examination by the joint orthopaedic experts.
6. In the list of issues set out by the plaintiff in his opening, with which the defendants agreed, these were not set out as matters required to be determined by the court. Throughout the proceedings the first time the defendants raised these as issues was during cross-examination of the plaintiff. Ultimately the court assesses the medical evidence and the oral testimony to make a finding on the extent of the plaintiff’s injuries. Whether the plaintiff fell from a height of 9-10 metres or 5-6 metres and what was the plaintiff holding at the time he fell would not be directly relevant to the exercise of assessing the amount of damages and are red herrings. For completeness however, I will make a finding on these two issues as well.
7. There is no challenge to the fact that the plaintiff fell from G/F to B/3. I agree with Mr Cheung, Counsel for the plaintiff, that three storey’s worth of height of a residential house would be more in line with a height of 9-10 meters than 5-6 metres. I also find the plaintiff truthful when he gave evidence and explanation on this issue. The reference to 9 metres could be found in the ambulance record on 16 September 2015 (one day after the accident), a contemporaneous document. I thus reject the suggestion that the plaintiff’s reference to 9-10 metres was a recent fabrication. Insofar as necessary, I find on a balance of probabilities that it is more likely that the plaintiff fell from 9-10 metres of height during the accident.
8. The defendants say that if the plaintiff had been carrying two buckets filled with concrete when he fell, he would have suffered much more serious and possibly life-threatening injuries. As a result, the plaintiff would have mentioned it in the A&E record or the declaration if it did happen. I do not accept the submission. It was never the plaintiff’s evidence nor his case that the buckets fell onto him in the course of the accident, or that the combined weight of the plaintiff and the bucketfuls of concrete led to more serious injuries sustained. There is no medical or expert opinion to suggest that if the plaintiff had been carrying buckets of heavy concrete when he fell, he would necessarily have suffered more serious injuries. There is no basis to suggest that the injuries sustained by the plaintiff are inconsistent with the contention that the plaintiff was holding buckets of concrete. I also find the plaintiff to be truthful when he gave evidence on this aspect of the case. Insofar as it is necessary, I find that the plaintiff was carrying two plastic buckets of concrete weighing around 30 to 40 catties when the accident occurred.
9. The defendant also disputes whether the plaintiff first reported the accident as a hiking accident as instructed by his superior. This issue has no relevance to the assessment of damages and I do not rule on it.

*INJURIES ATTRIBUTABLE TO THE ACCIDENT*

1. Parties disagree on the extent of the plaintiff’s injuries that are attributable to the accident. In the plaintiff’s Revised Statement of Damages, which he adopted in his witness statement and his evidence in chief, the alleged injuries sustained are:
2. A 12 cm-scar at his right shin;
3. Persistent pain, numbness, and stiffness of his lower limbs;
4. Persistent pain and stiffness of his lower back;
5. Persistent chest pain and discomfort;
6. Occasional headache and neck pain;
7. Such pain, stiffness and numbness exacerbates in cold and humid weather, during weather changes, and upon prolonged walking or standing;
8. Such pain causes sleeplessness which affects his temperament, daytime emotion and well-being;
9. Reduced range of movement of his left lower limb;
10. On and off cramping of bilateral lower limbs, especially during sleep;
11. Weakness and reduced mobility;
12. Requires a crutch to assist with walking;
13. Inability to carry heavy objects;
14. Inability to work at heights;
15. Irritability and anxiety;
16. Loss of appetite;
17. Insomnia;
18. Depressive mood;
19. Post-traumatic stress disorder.

*ANALYSIS AND FINDINGS - ORTHOPAEDIC*

1. The initial injuries suffered by the plaintiff was recorded in the accident & emergency record dated 15 September 2015. It was recorded that the plaintiff was conscious, there were wounds on the left thigh and right calf and left leg. His chest was not tender. There was a reduced range of movement of the left ankle and the plaintiff complained of left ankle pain. There was deep abrasion of the right medial leg and abrasion of medial left thigh. There were multiple small wounds/abrasions on the left leg. There was painful dorsiflexion of the left ankle. The posterior right shoulder/upper scapula was red. At 15:00 the gait returned to normal and steady. He was discharged on the day.
2. A day later on 16 September 2015, the plaintiff complained of persistent headache and ankle pain and was sent to the A&E Department of Caritas Medical Centre (“CMC”). Examination showed tenderness over the left ankle region. X-ray showed fracture of the left distal fibula and the plaintiff was admitted to the Department of Traumatology afterwards. After admittance, the examination showed his cervical spine to be non-tender with full range of motions. There was a 12 cm longitudinal superficial wound over the right anterior shin with no underlying bone seen. Sensation was found to be intact. CT scan showed no haemorrhage and no focal abnormality. The plaintiff was discharged on 24 September 2015.
3. There is no dispute that no operation was necessary for the plaintiff’s ankle fracture. He was treated with a cast for 24 days from 16 September 2015 to 9 October 2015. The plaintiff had received 27 out of the 33 sessions of out-patient occupational therapy.
4. In the joint orthopaedic report dated 23 February 2018, the agreed findings upon medical examination include:
5. Walked in with the left lower limb limping, no walking aid;
6. When walking with no aid: normal pace and gait;
7. Unable to walk on tiptoes or on heels;
8. Lower right leg abrasion mark, 11 cm x 2cm;
9. Lower left shin: 8 cm scar on the ankle and foot;
10. Normal sensation of the lower limbs;
11. Tenderness reported on the whole of both lower limbs, from the thigh to the feet but most tender at the lateral left malleolus;
12. Motor power of the lower limbs: cogwheel weakness;
13. The experts agree that the multiple abrasions marked on the left thigh & leg/ankle, right leg as presented on 15/9/2015 at the Accident and Emergency Department are compatible with the fall leading to the abrasion wounds.
14. The experts agreed that the plaintiff did not need further orthopaedic treatment (except Dr Fu thinks he may need symptomatic treatment only) and that for the orthopaedic injury the plaintiff has reached maximal medical improvement.
15. The contemporaneous medical records showed consistent and gradual improvement of the plaintiff’s condition:
16. Consultation Summary of Dr Yeung of CMC dated 9 October 2015 (4 weeks after injury) recorded: “*not much ankle pain*”, “*XR ankle today: fracture line not seen*”, “*no spinal tenderness, mainly muscle pain*”.
17. 30 October 2015: “*X-ray today: fracture healed, mortise congruent … still have left ankle pain and foot, walk well with elbow crutch, PT, PT for work hardening*”.
18. Consultation Summary of Dr Chan dated 22 January 2016 (4 months after injury) recorded: “*still complained of significant back pain…neck pain … mid thoracic pain with girdle type radiation, lumbar back pain, bilateral LL numbness over left thigh and right leg…LL power full, UL power full, no myelopathic hand signs … in view of high energy fall, IOD and persistent pain and numbness, offered MRI.*”
19. Consultation Summary of Dr Cheung dated 5 August 2016 (10 months after injury) recorded: “*actually can walk well unaided…ankle movement well…bil LL power 5/5 …sensation intact …explained to him his somatic complaints are not related to the injury … explained to him SL will be stopped next time*”.
20. The plaintiff was discharged from physiotherapy on 26 May 2016 (8 months after injury) with the following findings and comment: “*residual mild swelling only … residual tenderness over malleoli and anterior joint line …walk with single elbow crutch outdoor, can walk unaided with mild limping* …*improved and became static, no further significant change … discontinue physiotherapy with self ex*[ercise].”
21. The defendants had taken surveillance videos of the plaintiff on the following dates spanning from 9 months to 15 months after the accident:
22. 27/06/2016
23. 01/08/2016
24. 19/10/2016
25. 13/12/2016
26. Clips of these videos were shown in court and the plaintiff was cross-examined on them. The plaintiff’s Counsel, Mr Cheung, submitted that the court should be cautious when watching these videos and should bear in mind that these videos had been selected by the defendants and they necessarily would only show those videos that are advantageous to their case.
27. Whilst I agree with the general proposition that surveillance video as a piece of evidence should not be misleading, there was no concrete complaint mounted by the plaintiff that the defendants had edited out parts of the video surveillance which would be favourable to the plaintiff’s case. No application was sought by the plaintiff to seek confirmation from the defendants that the material that had been edited out were immaterial. In these circumstances, I am of the view that the court should be able to rely on such surveillance video evidence.

*GENERAL DEMEANOUR & CREDIBILITY OF THE PLAINTIFF*

1. I had observed the plaintiff for 1.5 days whilst he was in the witness box and wish to note my impression of the plaintiff as a witness. Whenever the plaintiff was asked difficult questions that he did not have an answer to, he would either say he forgot, or he could not remember or he did not know. He would use these answers interchangeably with no differentiation. This was especially so towards the end of his cross examination, when he was agitated with the fact that the defendants had employed a surveillance team on him and had taken footage to show the court. For the first few times, the court reminded him the difference between these answers and he should answer accordingly. After a few times, it became apparent that this was the mechanism he adopted when he could not provide a satisfactory answer. I find the plaintiff to be evasive, unreliable and dishonest when he gave oral evidence on the extent of his injuries.
2. During cross-examination, the plaintiff claimed that he was walking with a limp in the video. I disagree. All of the surveillance video clips (taken on 27 June 2016, 1 August 2016, 19 October 2016 and 13 December 2016) showed the plaintiff walking with a normal gait with no perceptible limping by the plaintiff. No indication of lower limb weakness was shown in the video clips either, as the plaintiff was walking in a normal pace compared with other pedestrians.
3. Although in one series of the video clips the plaintiff was seen carrying a walking stick, the walking stick did not touch the ground, indicating that during those times he did not require the use of the stick to help with his walking. At that time, the plaintiff was even walking in a fast pace with no difficulty, as it was drizzling but he did not have an umbrella with him. The plaintiff even walked up the stairs to his flat without having to rely on the walking stick or holding onto the handrail. The defendants’ counsel Miss Kwok suggested that the sole reason for the plaintiff to have been carrying a walking stick was because he was keen to portray at a psychologist appointment at CMC that morning, that he had not made good recovery from his injuries. Miss Kwoks said this was reinforced by the fact that the plaintiff left home 7 minutes later, without a walking stick.
4. The plaintiff noticeably became agitated and at times angry when he saw the surveillance videos. He questioned why the defendants filmed him without his permission. At one point he asked the court to stop the defendants from playing the videos in fast motion as he said he could not have been walking that quickly. However, there was no dispute that the videos were shown at the normal speed.
5. The plaintiff claimed that he would always use a walking stick when it was raining as bad weather made his pain worse. However, some of the video clips were taken when it was raining but he was seen walking with a normal gait with no walking stick. He carried an umbrella with him but he did not use the umbrella as a walking aid. Instead, he was carrying the umbrella horizontally and held onto the mid-section of the umbrella. No limping or lower limb weakness was shown. The plaintiff was cross-examined as to why he did not need walking stick in the raining weather. There was no satisfactory explanation. At this point he lost his temper and demanded the defendants to show instead videos of him walking down the stairs and when he fell.
6. The plaintiff was also shown in one of the video clips to be crossing the border to Shenzhen. He explained that he did not bring along a walking stick as he did not want to be looked down by his relatives in China and he did not want them to worry about him. Whilst it might be true that he did not wish to worry his relatives or show that he had a disability, the fact of the matter, as shown from the surveillance video clips on multiple occasions, was that physically he did not need to rely on a walking stick in daily life.
7. The plaintiff’s ability to walk well unaided as shown in the various surveillance videos is consistent with the observations as recorded in the contemporaneous medical records:
8. The plaintiff was discharged from physiotherapy on 26 May 2016 (8 months after injury) with the following findings and comment: “*residual mild swelling only … residual tenderness over malleoli and anterior joint line …walk with single elbow crutch outdoor, can walk unaided with mild limping* …*improved and became static, no further significant change … discontinue physiotherapy with self ex*[ercise].
9. Consultation Summary of Dr Cheung dated 5 August 2016 (10 months after injury) recorded: “*actually can walk well unaided…ankle movement well…bil LL power 5/5 …sensation intact …explained to him his somatic complaints are not related to the injury … explained to him SL will be stopped next time*”.
10. In the joint orthopaedic physical examination carried out on 10 November 2017, the experts recorded that the plaintiff “*walked in with the left LL limping, no walking aid*” … “*walking with the hands on the back and the heel touched the ground*” … “*when walking with no aid: normal pace and gait*” . Dr Chun, the defendant’s expert remarked: “*There is no wasting of the left lower limb muscles to support significant disability of the lower limbs*”. Dr Fu, the plaintiff’s expert on the other hand said: “*The current condition of* [the plaintiff] *is compatible with the residual of the injury he sustained. On the other hand the severity should not be so serious as he claimed. He is diagnosed to have PTSD. It is well known for patients with depressive disorder they are prone to have abnormal response to pain.* [The plaintiff’s] *clinical presentation should be partly caused by his psychiatric problem.*” It thus can be seen that Dr Fu attributes the cause of the plaintiff’s complaints to psychiatric problem, as the residual of the injury should not lead to the severity of the symptoms as claimed by the plaintiff.
11. Taking into account the surveillance video (where the plaintiff was videoed on multiple occasions in different periods of time), the plaintiff’s oral testimony and the medical records (which showed gradual improvement of the plaintiff’s condition), I prefer the expert opinion of Dr Chun over that of Dr Fu. Dr Fu himself is not an expert in psychiatry. Whether the plaintiff’s clinical presentation is caused by PTSD is not within his expertise or discipline.I find that the plaintiff can by now walk unaided with no limp.
12. In relation to the plaintiff’s complaint of ankle pain, Ms Kwok pointed out that it was not listed as one of the complaints during the examination by the joint orthopaedic experts. In fact, Dr Chun had noted that: “*he made no complaint at the ankle at the time of the joint* examination.” The defendants said that the plaintiff was not suffering from ankle pain at the time of the joint examination (2 years after the accident). I agree with the defendants’ submission that if the plaintiff was indeed in severe pain (he said during cross-examination that his ankle was so painful that he wanted to chop off his feet), he would have told the experts during the examination. When the plaintiff was cross-examined on this, again, he became angry and disagreed with the joint expert orthopaedic report. I see no reason why the experts would deliberately leave out a condition if it had been mentioned by the plaintiff, especially when one of the experts was the plaintiff’s own expert. I reject the plaintiff’s claim that he had mentioned about his ankle pain during the joint examination by the experts.
13. Dr Chun noted that during the joint examination, the plaintiff “*exhibited no active movement at the left ankle and resisted passive movement with the left ankle held at 20-degrees plantar flexion but on squatting the ankle could be dorsiflexed to 5 degree (against 10 degree on right side)*. *He had exaggerated his disability at the left ankle although he made no complaint at the ankle at the time of the joint examination.*”
14. When the plaintiff squatted during the joint examination, it was recorded that: “*right lower limb single squatted down full and the left foot off the ground.*”. This showed that he could only squat with the right leg and not the left leg. This contradicts the surveillance video evidence where he was seen to have been able to squat down and stand up with both legs with ease and with no aid. I do not accept the plaintiff’s oral evidence that he was in pain at the time he squatted in the video. Mr Cheung submitted that the court could not rule out that the plaintiff was in pain as the video could not depict the plaintiff’s pain in when he squatted down. I disagree. In the video the plaintiff squatted down swiftly with no hesitation, in a smooth and natural motion. Both his left and right ankles flexed as he squatted. There was no change to his facial expressions as he squatted down. He did not need to hold onto anything as he squatted down and stood back up.
15. No reasonable explanation was given by the plaintiff about the discrepancy between his ability to squat down on 1 August 2016 as shown in the video, and his inability to do so in the joint examination on 10 November 2017.
16. The contemporaneous medical records are also consistent with a healed ankle:
17. Consultation Summary of Dr Yeung of CMC dated 9 October 2015 (4 weeks after injury) recorded: “*not much ankle pain*”, “*XR ankle today: fracture line not seen*”, “*no spinal tenderness, mainly muscle pain*”.
18. 30 October 2015 (7 weeks after injury): “*X-ray today: fracture healed, mortise congruent … still have left ankle pain and foot, walk well with elbow crutch, PT, PT for work hardening*”.
19. In addition, the medical records show that during an occupational therapy assessment at CMC on 24 May 2016, the plaintiff could point his toes upward 8 degrees. At the joint examination on 10 November 2017, the plaintiff made no active movement of the left ankle but could point his toes downward for 5 degrees more than on 24 May 2016. When the plaintiff was examined on 9 March 2018 during an orthopaedic assessment at CMC, his ankle range of movement was recorded to be full. Thus it can be seen that the plaintiff’s ankle movements were both better *before* and *after* the joint examination. This inconsistency points to the plaintiff’s exaggeration of his disability at the left ankle during the joint examination.
20. Having considered the totality of the above evidence, I find that as at the joint examination on 10 November 2017, there was no orthopaedic factor resulting in ankle pain suffered by the plaintiff.
21. In relation to the plaintiff’s complaint of neck and back pain, they do not seem to be supported by the medical records: the medical report of CMC contains no mention of soft tissue neck injuries. On the day of the accident, the A&E notes did not mention any check or back tenderness. The plaintiff reported back pain on 21 September 2015, a few days after the accident. Dr Fu opined that: “*From the mechanism of the injury described, for patients fell from height it is very possible for them to have soft tissue injury of neck and back. From the A&E notes on 16/9/15,* [the plaintiff] *complained of neck and back pain on that day. Therefore he should have sustained soft tissue injury of neck and back on that day.”* However, at the same time he said: “*On the other hand physical examination of neck and back on admission revealed there was no tenderness. X ray and subsequent MRI did not reveal significant pathology. The injury of neck and back should be limited to soft tissue. There is no serious injury such as bony fracture or neurological complication.*”
22. Dr Chun opined that: “*he presented with significant features of non-organic component of back pain.*” Also, “*the x-ray taken on the spine showed pre-existing degenerative changes not caused by or aggravated by the alleged injury. There is a strong possibility that in the absence of the alleged injury, he would/will have neck pain & back pain at any time in any event.* This opinion is supported by the Occupational Therapy Department record from CMC dated 22 March 2016 (6 months after injury): “*mainly reported back soreness but told that this condition actually existed before this episode of injury*”. When the plaintiff was cross-examined on this record, he again became angry and loudly exclaimed that the record was fake. The MRI report was consistent and gave findings of “*mild degenerative changes noted at C4/5, C5/6, and L5/S1 levels*”.
23. Based on the totality of the evidence as set out above, I find that the plaintiff does not suffer from back pain.
24. The plaintiff also complained about neck pain, arms pain and chest pain although he was not injured in these areas. His treating doctors had classified these as somatic complaints in various medical records of the orthopaedic clinic of CMC:
25. On 27 May 2016 (8 months after injury), there were “*multiple somatic complaints including neck, back and chest wall pain*”.
26. On 5 August 2016 (10 months after injury), there were “*still multiple somatic complaints, claimed whole body pain especially feeling ants crawling on chest wall*…. *Explained to him his somatic complaints are not related to the injury*.”
27. On 26 September 2016 (1 year after injury), there were “*multiple psychosomatic complaints* … *explained not related to ankle*”.
28. On 16 January 2017 (1 year 4 months after injury), there were “*multiple psychosomatic complaints*”.
29. On 28 July 2017 (1 year 10 months after injury), there were “*similar complaints, diffusely over chest wall, left ankle, back etc. probably more non-organic in origin as x-ray < scans no gross abnormality*”.
30. Dr Chun in the joint expert report noted that on the day of the accident, redness was noted on the posterior right shoulder region or right upper back region but the chest was found to be non-tender. On the day after the accident the A&E doctor again found no chest tenderness and the back was non-tender as well. Dr Chun is of the opinion that there was no chest wall injury. Dr Chun further opined that the plaintiff’s complaint of whole neck pain and whole back pain was unrelated to the injury. The claim of 24-hour neck and back pain was inappropriate and likely to be an exaggeration. The complaint loss of teeth and chill all over body are unrelated to the injury. Dr Chun’s analysis is supported by the CMC medical records. I accept them. I find that the plaintiff does not suffer from neck pain, arms pain and chest pain. I also find that the loss of teeth was not due to the accident.

*ANALYSIS AND FINDINGS - PSYCHIARTRY*

1. According to contemporaneous hospital notes, after the accident, the plaintiff suffered from the following psychological symptoms:
2. Sleep disturbances, sleep latency of 2-3 hours and broken sleep until 8 a.m.
3. Changed into an irritable and agitated person from an easy-going person.
4. Difficulty in concentration and worsened memory.
5. Distressed about heavy medication/
6. Significant weight loss of 30 lbs.
7. One episode of sudden nausea, heavy sweating and fear of death upon awakening.
8. Heightened arousal with increased suspiciousness and perceived social stigma against him.
9. The plaintiff attended various stress management groups and cognitive behavioural therapy groups for insomnia. The treating doctors at CMC closed the case on 8/12/2016 with the plaintiff’s consent when they were of the view that the treatment progress had reached a plateau.
10. The notes of the treating psychiatrist at WKPC noted that since 27/6/2016 when the plaintiff first sought the help of the Mental Health Service, he suffered from poor sleep, preoccupation of images of the injury, heightened physiological arousal, depressed mood. The diagnosis made was PTSD.
11. Upon the joint psychiatric interview conducted on 14/2/2018 for the joint psychiatric report, the plaintiff walked in without walking aid and did not appear to be in pain. He was cooperative. He would become agitated and utter foul language when he talked about his boss whilst he would giggle heartily when he talked about some funny events. He had coherent and relevant speech with no psychotic feature.
12. Both experts agreed that the plaintiff had developed PTSD following the accident, and that the PTSD was attributable to the accident. Both experts also agreed that further evaluation by other specialists are not required.
13. Whilst the plaintiff’s expert Dr Cheung did not find there to be evidence of malingering, Dr Yu, the defendants’ expert was of the view that since the psychologist report dated 19/10/2016 said “rarely had nightmares”, this indicated that the intrusive symptoms which are core PTSD symptoms had almost subsided, and is inconsistent with report of persistent intrusive symptoms up until the time of the joint psychiatric report. Dr Yu also found claims of sleeping only 1 hour per night incredible. Dr Yu also found poor performance during screening tests to be overacting. He also dismissed claims of impaired concentration and memory as the plaintiff was able to recount on details during the assessment.
14. Dr Cheung opined that the PTSD will continue to improve and take its full course in a few more years, depending on the resolution of all the stressors including traumatic nature of accident, physical disability, loss of employment, financial difficulty, family relations etc. Dr Yu was of the opinion that the plaintiff had recovered completely or almost completely by October 2016.
15. Dr Cheung advised of continuation of psychiatric treatment provided by WKPC. Dr Yu was of the view that the plaintiff no longer needed psychiatric treatment.
16. Parties agree on the approach stated in *Loveday v Renton*[[1]](#footnote-1) and adopted in *Wong Siu Wa v Win Sino Engineering Limited[[2]](#footnote-2)* when assessing expert evidence:

“*(a) The mere expression of opinion or belief by a witness, however eminent, does not suffice.*

*(b) The court has to evaluate the witness and the soundness of his opinion.*

*(c)Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by evidence.*

*(d) The weight to be given to the opinion of an expert depends on:*

*(1) the internal consistency and logic of his evidence;*

*(2) the care with which he had considered the subject and presented his evidence;*

*(3) his precision and accuracy of though as demonstrated by his answers;*

*(4) how he responds to searching and informed cross-examination and in particular the extent to which a witness has conceived an opinion and is reluctant to re-examine it in light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held;*

*(5) whether or not a witness is biased or lacks independence.*”

1. Ms Kwok drew the court’s attention to the differences between forensic and clinical evaluation, as discussed in the case of *Wu Leung Kui Jacky v Leung Ming Yun & Ors[[3]](#footnote-3)*:

“… *in clinical situations, there is an underlying trust between the patient and the treating psychiatrist, who share a common goal in that the patient wants to get well and the psychiatrist helps the patient to get well. When the psychiatrist acts as a forensic expert assisting the Court, the psychiatric expert has an obligation to critically evaluate all the sources of information in order to assess the reliability of the plaintiff and his assertions …*”

1. Ms Kwok criticised Dr Cheung’s opinion as he heavily relied on the subjective complaints of the plaintiff without cross-referencing the complaints to the medical reports. Ms Kwok said that he had failed to critically review and assess the history given by the plaintiff and investigate the information and complaints.
2. Ms Kwok also submitted that several mental symptoms as displayed by the plaintiff at the joint psychiatric examination were inconsistent with the medical records:
3. The plaintiff claimed to be fearful when he saw objects placed at about 3 storeys high as it would remind him of the accident. This was not mentioned in any of the clinical psychology records.
4. The plaintiff claimed to have an avoidance tendency when he passed by sites where things might drop down. The clinical psychology records only noted the plaintiff’s fear of being pushed and that he would avoid looking down from height.
5. Plaintiff’s reduction in appetite and weight was only initial – it had arisen back and the plaintiff has in fact gained 4 kg since the injury. Medical records had also noted a normal appetite.
6. The medical reports from 4 July 2016 to 31 December 2018 from the treating doctors seem to suggest that the plaintiff had gradually improved and were mostly in a calm and stable mood, rather than a mixture of low mood and anxious worries as noted in the joint psychiatry examination.
7. The plaintiff was also seen to have gone out on multiple occasions, contrary to the joint psychiatric report’s record of the plaintiff seldom going out. The plaintiff explained during cross-examination that in one of the surveillance videos, he went back to his ancestral home in Huizhou to visit his father and family as the doctors told him to go out more. However, at the appointment with the clinical psychologist that very morning, he reported that he “*wished to go out but had low morale*”. In cross-examination, it was put to him that in fact he could go out and did not have low morale. The plaintiff initially denied he had said that to the clinical psychologist, despite it having been recorded. On re-examination, he claimed that he had forgotten whether he had said that to the clinical psychologist.
8. Whilst I agree with Dr Yu’s opinion that there was malingering on the part of the plaintiff and I agree with Ms Kwok’s analysis of the medical reports, I find it impossible to agree with Dr Yu’s conclusion that the plaintiff has fully recovered. This is because Dr Yu had not mentioned nor dealt with the fact that the plaintiff was referred to Kwai Chung Hospital for psychiatric treatment since June 2016 and such consultations are on-going. During each consultation, the plaintiff was regularly prescribed medication. The latest medical record of 31 December 2018 shows the plaintiff was prescribed with 5 different medications. This does not sit comfortably with Dr Yu’s opinion that the plaintiff has recovered completely or almost completely by October 2016. Although the consultation note says the plaintiff was “euthmic”, ”not suicidal/violent”, there is also no basis for the court to conclude (nor is It Ms Kwok’s submission) that the treating doctors at Kwai Chung Hospital failed to critically examine the plaintiff’s condition and prescribed him with medication for a psychiatric condition which did not exist.
9. On the other hand, I have observed the plaintiff in court for 2 days and he struck me as alert and focused, even under the stressful process of giving evidence and cross-examination. He would only have outburst of temper when he was cross-examined on a difficult topic or when he thought the evidence was not in his favour.
10. Taking into account of the medical records of Kwai Chung Hospital, the joint psychiatric report and the plaintiff’s behaviour in person, I find that the plaintiff still suffers from mild psychiatric symptoms (including nightmares and flash backs) warranting follow-up appointments every year.

*IMPAIRMENT, DISABILITY AND ABILITY TO RETURN TO WORK*

1. Dr Chun was of the view that as the plaintiff is independent and carries on with daily activities without difficulty, he should be able to return to his pre-accident job as a construction worker without limitation. In his opinion, there was no loss of earning capacity whilst the residual scars contributed to 1% whole person impairment. Dr Fu on the other hand said the plaintiff would have difficulty performing tasks which require heavy manual lifting and climbing. Thus he recommended that the plaintiff should change to lighter duties such as security guard or cashier. Dr Fu opined that the impairment of the whole person and loss of earning capacity should both be at 5%.
2. As seen from the analysis above, on the orthopedic front, I prefer Dr Chun’s analysis and find that there is no loss of earning capacity. This view is supported by the occupational therapy reports at CMC 8 months after the accident. The occupational therapy report shows that six to eight months post injury, the plaintiff was capable of lifting weights of 55 – 78 lbs.
3. On the psychiatric side, as to impairment of the whole person contributed by the plaintiff’s psychiatric condition and the loss of earning capacity, Dr Cheung assessed both at 5% and Dr Yu did not think there was any impairment to the whole body or loss of earning capacity.
4. Dr Cheung advised the plaintiff to change to jobs of an unrelated nature to avoid anxiety aroused by the accident, but may require re-employment training, in which the plaintiff was prepared to enrol. Dr Yu’s opinion is that the plaintiff had fully recovered by October 2016 and any residual symptoms would not prevent him from returning to his pre-accident work.
5. As analysed above, I find that the plaintiff is suffering from mild psychiatric symptoms. However, the fact that the plaintiff is still receiving treatment for such mild symptoms does not necessarily lead to the conclusion that he had lost his ability to return to work completely. Dr Cheung said his ability to resume his -re-accident occupation was hindered by his anxiety aroused by reminders of the accident and avoidance of anxiety-provoking situations.
6. In the 13/12/2016 surveillance video, the plaintiff was seen shovelling something in a 3-storey building. The plaintiff said that the house was his ancestral home in China. His father still lived there and he together with his 3 other brothers would live there whenever they went back for visit. At that time, there was a construction project of a pagoda on the roof of the building and he was shovelling and clearing away dust. Upon re-examination, he said that he was in fact clearing away the dried cement bits from the construction. In the video, it seemed that the plaintiff was able to bend down and shovel with ease. The plaintiff explained on re-examination that the shovel was a light one and that the work was not demanding so he could manage. We also saw in the video that someone was moving an aluminum ladder around the construction area of the house. During cross-examination, the plaintiff was evasive and refused to admit that he was the person carrying the ladder around. Upon re-examination, he confirmed that he was the one who carried the ladder, but the ladder was a light one of about 1 meter high, which was why he could manage. On this basis, it was put to the plaintiff that he could in fact return to his old job as a construction worker, as it seemed that he could move around a site with construction with no difficulty. The plaintiff rejected this suggestion, saying that a construction worker would be required to carry and fetch much heavier heavy construction materials.
7. Although I find that the plaintiff is physically able to handle his previous job as a construction worker, I am not convinced that on the psychiatric front he is able to do so. Although his remaining psychiatric symptoms are mild, construction sites are potentially dangerous if one does not have sufficient concentration. As seen from the last few consultation notes from his appointments at Kwai Chung Hospital, the plaintiff still suffers from fluctuating sleep difficulty, flashback and nightmares. Whilst I agree that the plaintiff seemed at ease in the surveillance video, it cannot be denied that the work demands at a construction site would be much greater than a construction project at the plaintiff’s own home. In Hong Kong, constructions projects are often done within a tight fixed time-frame and it is unlikely that any construction worker could work at a leisurely pace. I find that the plaintiff will need to find alternative employment after the accident, by reason of his remaining psychiatric symptoms, however mild they maybe.

*Sick Leave*

1. In assessing what is the appropriate amount of sick leave, I respectfully adopt the Hon. Au-Yeung J’s observations in the case of *Pak Siu Hin Simon v JV Fitness Ltd.[[4]](#footnote-4)*:

“*The Court is not bound by the sick leave certificates as they were issued primarily because of subjective symptoms reported to the doctors by the plaintiff: Tam Fu Yip v Sincere Engineering & Trading Co Ltd [2008] 5 HKLRD 210, §18 by Le Pichon JA; Subba Alvin v Houng Kee (Asia) Limited & Ors, HCPI 154/2010, 16 July 2014, by Master Leong.*

*The fact that the plaintiff suffered pain did not mean that he would be entitled to sick leave. People may suffer pain for all sorts of reason and that would not prevent them from discharging their duties in full. Employees do not go to work only when they are 100% fit and efficient. The remarks of Master Leong in Chan Sze Yuen v Tin Wo Engineering Co Ltd HCPI 427/2008, 5 February 2016 at §§16-21 are illuminating:*

1. *‘I often find the term “reduced work capacity and efficiency” rather vague and meaningless term with regard to actual earning loss.*
2. *We do not go to work only when we are 100% fit and efficient. I cannot imagine that, for example, any professional football player only play matches when he is perfectly fit. Any professional (or even amateur) athletes are likely to be affected all through their careers by various old and new injuries, pains or aches due to training etc..*
3. *Similarly, “general workers” like us are often affected by various minor ailments, coughs and colds, back pains, headaches, tiredness, jet-lags, hangovers etc which may reduce our work capacity and efficiency.*
4. *We all learn to cope and work around such ailments, and still be able to perform at a reasonable level at our work. Our employers do not, in general, deduct our income because we feel jet-lagged returning to work after a holiday and have to drink a few more cups of coffee, or if we have a headache and have to take some painkillers. Thus, any reduction in work capacity and efficiency does not always translate to a loss in income.*
5. *On other occasions, even if we have some long term illness or disabilities, a reasonable attitude to work and a sympathetic work environment might mean that we could still cope with our work: change of work practice, working “around” an injury etc.*
6. *Such situations may depend upon finding a sympathetic employer and work team. These are the occasions when the court needs to consider a claim under “loss of working capacity/ disadvantage in the labour market” on the account that the plaintiff may be at risk to lose his job and then he may take longer than usual to find a new employer.*”
7. Dr Chun recommended sick leave due to orthopaedic injuries be up to October 2015, whereas Dr Fu agreed with the amount of sick leave granted. Dr Cheng found sick leave granted for the psychiatric symptoms to be justified, whereas Dr Yu recommended sick leave due to mental problems from the date of the accident to 19/10/2016.
8. I agree with Dr Yu in his assessment of sick leave, which are consistent with the objective psychiatric medical records, which show the plaintiff’s good recovery. As at October 2016, the Kwai Chung Hospital consultation record already noted that the plaintiff “*sleeps fairly well … calm, settled … denies suicidal idea, no psychotic s/*s” As at 5 August 2016, the treating orthopaedic doctor noted that “*explained to him that his somatic symptoms are not related to the injury…SL will be stopped next time …actually can walk well unaided*”.
9. I thus find that by 19 October 2016, the plaintiff would have been able to return to work, albeit in a different area of work.

*PSLA*

1. The plaintiff claims HK$520,000 under this head. I accept that the plaintiff enjoyed good health prior to the accident. Parties agree on the legal principles concerning an award for PSLA damages.
2. Parties have submitted various cases (in Annexure) for the court’s consideration and comparison. I do not agree with the plaintiff’s submission that the injuries suffered by him fall under the “serious category” The definition of “serious injury” was set out in *Lee Ting-lam v Leung Kam-ming[[5]](#footnote-5)*: “*where the injury leaves a disability which mars general activities and enjoyment of life but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device or bad fractures leaving recurrent pain*”. The plaintiff’s ankle fracture did not require any surgery and I find that his orthopaedic injuries have been largely cured with little residual symptoms. The remaining psychiatric symptoms are mild.
3. Having considered the facts of the cases referred to and the amounts of PSLA awarded, I find the facts, trauma, injuries suffered of the present case are most comparable to the cases of Tamang Tikaram and Law Yau Keung, I consider $250,000 to be an appropriate award for the injuries suffered in the present case for PSLA.

*Pre-Trial Loss of Earnings & MPF*

1. Parties dispute on the average monthly earnings of the plaintiff. The defendants say that it should be calculated by reference to the total of the plaintiff’s wages from February to August 2015 (HK$118,260), dividing it by 7 months, arriving at HK$16,894.29. The plaintiff says since the plaintiff had only worked for 3 days in February, the sum should exclude the income in February, and divide by 6 months (from March to August 2015). This comes to an average monthly income of HK$19,345. I agree with the plaintiff’s method of calculation and adopt HK$19,345 as the pre-accident monthly salary earned by the plaintiff.
2. Parties also differ as to whether the CPI index or the Statistical Tables of Average Daily Wages of Workers Engaged in Public Sector Construction Projects as Reported by Main Contractor (the “Tables”) should be adopted for measuring the increase in salary as a result of inflation. I agree with the plaintiff’s submission that the Tables are more appropriate in measuring the increase in salary than the CPI which reflects consumer price changes on households. The Tables show an increase of about 10% between September 2015 (HK$907.1) and October 2016 (HK$999.3).
3. Thus, the plaintiff’s pre-trial loss of earnings & MPF during the sick leave period (15 September 2015 to 19 October 2016) are
4. 15 September – 31 December 2015 = 108 days

HK$19,345 x 108/365 x 12 months x 1.05 = HK$72,122.4

1. 1 January – 19 October 2016 = 293 days

HK$21,279.5 x 293/365 x 12 months x 1.05= HK$215,231.9

Total = HK$287,354.3

*Post-trial Loss of Earnings*

1. As analysed above, I am of the view that the plaintiff would need to find alternative employment as he can no longer go back to his pre-accident job as a construction worker. The plaintiff was 52 years old at the time of the accident and he is 56 years old at present. The plaintiff should be able to continue work until the retirement age of 65.
2. The plaintiff worked as a security guard from March 2019 to 1 October 2019 and his average monthly income was HK$8,742.93. I do not agree this figure should be adopted as the plaintiff’s monthly earnings as a security guard. The figures shown in the Census and Statistics Department reveals that the average monthly salary of a security guard (working 10 hours a day, 26 days a month) in 2019 is HK$13,094. I already found the plaintiff to be physically fit for a job as a security guard. I also found that the plaintiff would be able to resume working as a security guard with his residual psychiatric symptoms. No explanation was given on why the plaintiff would fail to achieve the average income of a security guard. I would therefore adopt HK$13,094 as the figure of what the plaintiff should be able to earn from the date of trial onwards.
3. Both Dr Fu found that the plaintiff had pre-existing anterior osteophytes and Dr Chun found that the plaintiff had pre-existing degenerative changes to the spine. Ms Kwok submitted that the multiplier should be reduced due to the plaintiff’s pre-existing conditions on his left ankle and spine. However, neither Dr Fu nor Dr Chun opined on how the pre-existing condition would have had an adverse impact on the plaintiff’s working life as a construction worker. There is no room for the court to speculate in this regard. I will thus make no reduction to the multiplier of 8.4.
4. Consequently, the plaintiff’s post-trial loss of income is:

(HK$21,279.5 – HK$13,094) x 12 months x 8.4 x 1.05 = HK$866,353.3

*Loss of Earning Capacity*

1. Damages for loss of earning capacity should be awarded if the plaintiff is facing a substantial risk or real risk that he may lose his present employment before the end of the estimated length of his working life because of the disadvantage in finding comparable employment[[6]](#footnote-6). I am not satisfied that a case of economic downturn has been made out in the evidence. In light of my findings above, I am of the view that due to the mild residual psychiatric symptoms, an award HK$20,000 for this head of damage is appropriate.

*Future Medical Expenses*

1. Mr Cheung conceded that the orthopaedic experts were of the opinion that the plaintiff had reached maximum medical improvement, and hence no future medical expenses would be claimed for orthopaedic injuries. As for the remaining mild psychiatric symptoms, it seems that the plaintiff had been going for follow-up appointments 4 times a year. Thus the appropriate award under this head should be HK$200 x 4 x 10 = HK$8,000.

*Special Damages and Expenses*

1. The plaintiff claims HK$8,205 as medical expenses incurred. He was not cross-examined in this regard. Despite the fact that I find the appropriate sick leave should only be given until October 2016, I find that the medical expenses had been incurred and I allow the amount in full. I also allow the travel expenses in the amount of HK$5,000. The plaintiff also claims HK$10,000 as expenses for getting tonic food. I do not think the amount claimed is excessive despite a lack of receipt. I will allow the amount in full.

*Employees’ Compensation*

1. The sum of HK$123,046 will be deducted from the damages as assessed.

*Summary*

|  |  |  |
| --- | --- | --- |
|  |  | HK$ |
|  | PSLA | 250,000.00 |
|  | Pre-trial loss of earnings | 287,354.30 |
|  | Future loss of earnings | 866,353.30 |
|  | Loss of earning capacity | 20,000.00 |
|  | Future Medical Expenses | 8,000.00 |
|  | Special damages | 23,205.00 |
|  | Total | 1,454,912.60 |
|  |  |  |
|  | Less: |  |
|  | Employees’ Compensation | (123,046.00) |
|  |  | 1,331,866.60 |

1. I therefore order the 1st and 2nd Defendants to pay damages in the sum of HK$1,331,866.60 to the Plaintiff.

*Interest*

1. I award interest at 2% p.a. on general damages for PSLA, from the date of service of the writ to the date of judgment, and at half judgment rate on the award of pre-trial loss of earnings and special damages, from the date of the accident until the date of payment of employees’ compensation, and thereafter, on the remaining balance (after the deduction of employees’ compensation) up to the date of the judgment.

*Costs*

1. I make a costs order *nisi* that the 1st and 2nd defendants pay the plaintiff his costs of the action (including all costs reserved, if any) to be taxed, if not agreed, with certificate for Counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
2. I thank Counsel for their assistance.

( Phoebe Man )

District Judge

Mr Lincoln Cheung, instructed by Messrs B. Mak & Co., assigned by the Director of Legal Aid, for the plaintiff

Ms Vanessa Kwok, instructed by Messrs Au & Associates, for the 1st and 2nd defendant

APPENDIX

Cases referred to on PSLA

1. *Lau Che-Ping v Hoi Kong Ironwares Godown Co. Ltd.* [1988] 2 HKLR 650
2. *Yip Chung Man v Secretary for Justice* (unrep. HCPI 485/2001, 13 April 2010)
3. *Lam Kam Fai v Yau Shing Scaffolding Co. Ltd & Anor.* [2014] 2 HKLRD 448
4. *Chan Mok Yau v 黃吉利* & Anor [2018] HKCFI 1084
5. *Tamang Tikaram v Tong Kee Co Ltd & Anor* (unrep. HCPI 19/2013, 1 April 2015)
6. *Wong Ka Pang v Wong Chun Wang* (unrep. HCPI 644/1998, 19 October 1999)
7. *Dhillon Chamkaur Singh v Yiu Sze Yuan* (unrep. DCPI 473/2018, 19 October 2019)
8. *Tamang Tikaram v Tong Kee Company limited & Ors* (unrep. HCPI 19/2013)
9. *Li Chi Sing v Equal Link Ltd* (unrep. DCPI 1930/2011, 6 March 2013)

1. [1989] 1 med LR 117 (at 125) [↑](#footnote-ref-1)
2. Unrep. HCPI 571/2016, Deputy High Court Judge Raymond Leung SC, 3 August 2018 [↑](#footnote-ref-2)
3. DCPI 1154/2008, *unrep.* HH Judge Mimmie Chan, 7 March 2011 at §62 [↑](#footnote-ref-3)
4. HCPI 574/2014, *unrep.,* 15 May 2017, §74-77 [↑](#footnote-ref-4)
5. [1980] HKLR 657 [↑](#footnote-ref-5)
6. *Moeliker v Reyrolle and Co Ltd* [1977] 1 WLR 132 at 142A – C [↑](#footnote-ref-6)