#### DCPI 2733/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO.2733 OF 2012

|  |  |  |
| --- | --- | --- |
| BETWEEN |  |  |
|  | CHONG CHI CHING | Plaintiff |
|  | and |  |
|  | SECRETARY FOR JUSTICE  (for and on behalf of the Government of the HKSAR) | 1st Defendant  (discontinued) |
|  | SOURCES FAME MANAGEMENT LIMITED | 2nd Defendant |

|  |  |
| --- | --- |
| Before: | Deputy District Judge S P Yip in Court |
| Dates of Hearing: | 30 November 2015; 1, 2, 9 & 11 December 2015 |
| Date of Judgment: | 24 October 2016 |

## J U D G M E N T

*BACKGROUND*

1. This is a personal injury claim arising from a slip and fall accident happened to the plaintiff (“P”), when she was using a toilet during work at about 10 am on 24 December 2009. P’s claim against her employer, the 1st Defendant, was wholly discontinued, leaving the claim against the 2nd Defendant (“D2”) on occupiers’ liability and negligence.
2. At the time of the accident, P was a 24-year-old customer service officer, employed by the HKSAR Government on a non-civil servant contract, working at the Government’s integrated call centre, also known as the “1823” call centre, run by the Efficiency Unit of the Government. The call centre was located on the 16th & 17th floors of Chinachem Tsuen Wan Plaza, 455-457 Castle Peak Road, Tsuen Wan. P was assigned to work on the 17th floor and the accident happened when P went to the female toilet on that floor (“the Toilet”). P has received employees’ compensation of HK$590,596.11 arising out of the accident.
3. D2 was the management company of Chinachem Tsuen Wan Plaza. It is not in dispute that D2 was an occupier and P was a lawful visitor of the Toilet.
4. Parties dispute on both issues of liability and quantum. P herself gave evidence in court without calling any other witnesses, while two employees of D2 testified in court. There were two joint medical expert reports compiled by parties’ respective orthopaedic and psychiatric experts adduced as evidence without calling the makers.

*Issues*

1. The issues framed by counsel for D2 are as follows:
2. Whether the accident happened in the manner as alleged by P;
3. Whether D2 was in breach of it duty towards P;
4. Whether P was contributorily negligent and if so to what extent; and
5. The quantum issue if liability is established.

*LIABILITY*

*The Accident*

1. According to P, at the material time of the accident, she found that the floor of the Toilet was wet and slippery and the flushing system of the toilet cubicle that she used was out of order. She then used a water ladle inside a water sink to obtain fresh water from the tap in order to flush the toilet. While she was carrying the water ladle and walking back to the 2nd toilet cubicle, she slipped and fell over because there was water stain on the floor and the floor surface was wet.
2. D2 contended that the flushing system of the Toilet was not out of order and the Toilet floor was not wet and slippery at the material time and it was not a common practice to require toilet users to get water from the water tap to flush the toilet.
3. According to the records of D2’s cleaning contractor, Global Cheer Ltd (“Global Cheer”), the Toilet was cleaned twice at 7:45 am and 1:55 pm on the day of accident and it was inspected at 10:44 am, shortly after the accident, by a staff of D2 called Ms Lam Hing (not a witness). Besides, D2 engaged its contractor Wylie Maintenance and Services Ltd to conduct an annual inspection on the flushing system on 11th December 2009 and the result was normal.

*The Condition of the Toilet Floor*

1. It is the D2’s case that the Toilet floor was not wet and slippery when the accident happened. First of all, D2 attacked P’s evidence on the condition of the toilet floor by criticising P’s failure to give detailed evidence about the following aspects of the floor condition[[1]](#footnote-1):
2. *How wet and slippery the Toilet floor was when P entered into the Toilet;*

*(2) How P noticed that the Toilet floor was wet and slippery;*

*(3) Exactly which part(s) of the Toilet floor was/were wet and slippery;*

*(4) What caused the Toilet floor to be wet and slippery;*

*(5) What kind of shoes P was wearing at the material time; and*

*(6) Whether P had been more careful and walked slowly after knowing that the Toilet floor was wet and slippery*.

1. I think that the first four points of the above are a bit too harsh to P and indeed they are not quite relevant to the issue in dispute as well. As P was not a cleaner or caretaker of the Toilet, she was not obliged to inspect the floor condition and to remember exactly which parts of the floor were wet. If the toilet floor is wet and slippery, it is common sense that one can feel the wet and slippery floor condition once he walks on it, even without looking at it. It is not in dispute that P used the Toilet to answer the call of nature at the material time. Thus it is totally understandable and normal for such toilet user like P to miss out those nitpicking details.
2. Regarding what kind of shoes P was wearing on that day, I think it is not much helpful to assist the court in deciding whether the floor was wet and slippery.
3. It appears to be premature to consider at this stage whether *P had been more careful and walked slowly after knowing that the Toilet floor was wet and slippery*. I shall reserve this question unless and until any liability is established and when it comes to the issue of contributory negligence.
4. Relying on the record of cleaning the Toilet at 7:45 am before the accident and inspection at 10:44 am shortly after the accident, D2 denied that the Toilet was wet and slippery. However, both the cleaner and D2’s staff who inspected the Toilet did not come to court to confirm the toilet cleaning record. As such I do not think the hearsay record should weigh more than P’s *viva voce* evidence which has been tested at the trial. Besides, there was a time gap of 2 hours more between the cleaning and the accident. It is not impossible for the Toilet floor to get wet during such period of time. After weighing all the evidence before the court, I find that D2’s evidence was unable to rebut P’s evidence on the Toilet floor condition. I accept P’s evidence in this regard.

*The Flushing System of the Toilet*

1. D2 denied the flushing system of the Toilet was “out of order” as pleaded in the Statement of Claim as there were no reports of malfunction of the flushing system of the Toilet in that month according to the logbook and the annual inspection of the flushing system of the whole building done on 11 December 2009 with normal results.
2. P in fact did not say the flushing system was out of order in her witness statement but simply stated that the toilet in the 2nd cubicle failed to flush. When she elaborated her evidence in court, she said there was no flushing after she pulled the flush. There could be other possibilities to explain the flushing failure. For instance, the water in that toilet could have been used up by the previous user and the toilet water tank had not yet been refilled when P pressed the button. I do not think I could infer the flushing system of that particular toilet in the 2nd cubicle or the flushing system of the Toilet on that floor or even the whole building was out of order in the circumstances. However, on balance of probabilities I prefer P’s evidence that she found the toilet did not flush when she pressed the flushing button.

*The Water Ladle and the Fall*

1. P asserted that users of the Toilet were used to get fresh water by the ladle provided to flush toilet after use when the toilet failed to flush. Therefore, P followed such practice on that day and used the home-made water ladle in the Toilet to get fresh water to flush the toilet. When she was holding the ladle filled with water with both hands heading towards the toilet, she slipped and fell on to the floor. P marked a cross on photo 4 of Exhibit P2 to indicate the spot where she fell.
2. D2 denied there was such a common practice requiring Toilet users to flush toilets when flushing failed. D2 also disputed that P was holding a ladle of water on her way to flush the toilet when she fell down and cast doubts on P’s attempt to flush the toilet by a ladle of water as alleged, as there was no such common practice in the first place.
3. It is common ground that there was a ladle in the Toilet at the material time, but D2 averred that it belonged to the cleaners for cleaning purpose and it was not supposed to be used by toilet users. No matter there was such a common practice of using the ladle in the manner as alleged by P or not, I do not find it odd or surprising if a toilet user used the ladle to get water to clean the toilet after use when the toilet does not flush as a matter of courtesy to subsequent users. Even if there was no such common practice, P could have intended to do so simply out of consideration for subsequent toilet users. I do not think it is necessary to rule whether there was such a common practice as it is not the issue. The issue is whether P was holding the ladle of water, walking towards the toilet when she fell.
4. D2 submitted the following to challenge P’s evidence in relation of her fall:
5. It was inherently implausible for P to plead that the water stain on the floor caused her to fall, because the water spilled out from the water ladle would have wiped out any water stain on the floor;
6. P has omitted to state in her witness statement that her clothes got wet after she fell down;
7. P failed to tell the precise position of her colleague Ms Ha who was also present in the Toilet at the material time;
8. P said she had passed the spot where she fell for three times at the material time, but she could not explain why she only fell at the third time when she walked past that spot.
9. It is normal for a witness under cross-examination to give more detailed answers than his witness statement, especially when more specific questions were asked in depth. I do not find any significant discrepancies in P’s evidence about the happening of the accident after considering the above submissions and all the circumstances. Indeed, P’s case in relation to her fall is not rebutted by evidence before this court.
10. I am satisfied that P has discharged her burden to prove the happening of the accident. On balance of probabilities, I find that when P slipped and fell, she was holding the ladle filled with water with both hands, walking towards the 2nd toilet intending to flush the toilet, at the spot she marked with a cross on photo 4 of exhibit P2.

*Breach of Duty*

1. After making my findings on the happening of the accident, I now deal with whether D2 should be liable for P’s accident. It is D2’s case that D2 has adopted a reasonable system of cleaning and inspection of the Toilet and thus it has already discharged its common duty of care under the Occupier’s Liability Ordinance (Cap 314) (“OLO”). D2 submitted that in slip and fall cases, when it comes to the issue of steps taken by the occupier, the court is concerned with the question of whether or not the occupier has a reasonable system in place to protect visitors against the type of damage in question that satisfies the standard of care expected of him.
2. D2 relies on its two factual witnesses, Mr Kam, an area manager of D2 overseeing the subject building and Mr Li, an assistant service officer of the building, to give evidence of the cleaning and inspection system, and the gist of their evidence is summarized by D2’s counsel as follows:
3. The cleaning of the toilets of the building was contracted out to Global Cheer;
4. Pursuant to the Chinese contract entered into between D2 and Global Cheer, Global Cheer would clean toilets of all male, female and disabled toilets twice a day;
5. D2’s staff would also conduct cleaning inspection of the toilets twice a day. During the cleaning inspection, the flushing system would also be inspected;
6. Pursuant to the cleaning record, in the morning of the date of accident, it was Lam Hing who patrolled the Toilet at 10:44 am; and
7. If D2’s staff, during patrol, find that the toilets are wet and slippery, they will use walkie-talkies to ask cleaning workers of Global Cheer to clean the scene and will stay at the scene until arrival of the cleaning workers.
8. To elaborate on the inspection conducted by D2’s staff, it is Li’s evidence that on that day, he himself conducted the patrol at 8:30 am and Lam Hing conducted the patrol at the Toilet at 10:44 am;
9. During cross-examination, Li explained under what circumstances a tick or a cross will be put under the column “status” in the cleaning records. Although there are no written criteria, Li testified that they would assess the toilet conditions from the perspective of the toilet users and would also check the flushing system, water basins and taps. If the conditions are not acceptable to the staff responsible for inspection, they will call cleaning workers from Global Cheer to fix the problems.
10. D2 based on the contemporaneous records of the logbook and cleaning records to submit that D2’s system of cleaning and inspection was in place on the day of accident and the cleaning workers of Global Cheer had discharged their work properly on that day.
11. D2 further submitted that although D2 has not called any cleaning worker from Global Cheer to testify at trial, D2 invited the court to draw inference from the following factors that workers of Global Cheer were performing their work properly on the material day:
12. The system of inspection adopted by D2 which was in place on the day of accident;
13. The number of D2’s staff responsible for conducting the inspection on that day; and
14. The contemporaneous documentary evidence, namely the logbook and the cleaning records.
15. D2 also invited the court to draw the inference that Global Cheer was a competent contractor at the material time based on the following facts:
16. Global Cheer had been punctually cleaning the Toilet twice a day between late December 2009 and early January 2010 according to the toilet cleaning record;
17. D2’s staff were satisfied with the conditions of the Toilet upon inspections; and
18. There is also no entry as to abnormal performance of Global Cheer in the logbook.
19. Counsel for P cited the Court of Appeal’s case of *Hsu Li Yun v The Incorporated Owners of Yuen Fat Building* [2000] 1 HKLRD 900, 907 which provides the following test as to whether an occupier can rely on the statutory defence by entrusting the work to a competent independent so as to discharge the occupier’s duty of care owed to his visitors :
20. the occupier had acted reasonably in selecting and entrusting the work to the independent contractor concerned;
21. the occupier had taken reasonable steps to supervise the performance of the work by the contractor; and
22. the occupier had used reasonable care to check that the work undertaken by the contractor had been properly done.
23. P submitted that D2 has failed the test in all aspects. First of all, D2 has failed to act reasonably in selecting and entrusting the work to Global Cheer for the following reasons:
24. There is no evidence on the working experience and competency of Global Cheer and how Global Cheer was selected to perform the cleaning work of the Building;
25. The cleaning contract provides no standard of cleaning to be achieved for the toilets;
26. There were no minimum requirements provided for employing its cleaning staff;
27. There is no minimum requirement of how many cleaning staff would be on duty during service hours;
28. There are no specifications or standards laid down as to the cleaning materials and equipment to be used;
29. Apart from the monthly service fee of HK$51,240, there was no evidence on the selection process.
30. Secondly, D2 has failed to take reasonable steps to supervise the performance of the work by Global Cheer:
31. There is no mention by any of the defence witnesses as to how supervision was made on the carrying out of the cleaning work;
32. The cleaners were required to clean the toilets. There is no evidence before the Court as to how Li supervises Global Cheer in the performance of work;
33. Furthermore, Li had taken no steps to control what kind of materials or equipment would be used by Global Cheer in carrying out the cleaning duties.
34. Thirdly, D2 has failed to use reasonable care to check that Global Cheer has done the work properly:
35. There was no assessment standard or guidelines for checking the cleanliness of toilets laid down either in writing or by oral means;
36. There was no uniform standard common to all the staff assigned to patrol the toilets.
37. I share the view of P’s counsel that D2 lacked evidence on the selection criteria and process of its cleaning contractor but I do not think that such simple manual work like toilet cleaning needs supervision. In fact, the toilet cleaning record seems to suggest such cleaning work is done unsupervised but inspected by D2’s staff afterwards. In my opinion, the most important point is how to ensure that the cleaners of the cleaning contractor do their work properly.
38. The logbook and cleaning records show that the Toilet was cleaned by a cleaner of Global Cheer twice every day at around 0740 – 0750 hours & 1340 – 1355 hours and inspected by a staff of D2 twice every day at around 1030 – 1045 hours & 1530 – 1540 hours. No doubt D2 has a system of cleaning and inspection in place on the day of accident, but the question is whether it is an effective system to ensure the cleaners of Global Cheer have discharged their work properly on that day.
39. Of course, a competent worker must be punctual but the mere fact that cleaners punctually cleaned the Toilet twice a day according to the toilet cleaning record does not mean that cleaners have done their job properly.
40. D2 also relies on the Toilet cleaning record which shows all satisfactory results of inspection by D2’s staff from 23 December 2009 to 5 January 2010. D2’s staff would put a “tick” on the toilet cleaning record when they were satisfied with the conditions of the Toilet upon inspections.
41. The next question is how D2’s staff judge whether a toilet is clean and worth a “tick”. Li of D2 admitted during cross-examination that D2 had no written guidelines for its staff to assess the cleanliness of toilets during inspections. Nonetheless, Li did provide his standard, which was “*from the perspective of the toilet users*” and he would check the flushing system, water basins and taps etc. However, this is only his personal standard. Besides, Li only checked the male toilets but not the Toilet in question, which was inspected on the material day by one Lam Hing who was not called to give evidence. It is unknown as to how Lam Hing inspected the Toilet in general and on the day in question and her standard. Further, there was no evidence of any checklist or guidelines for toilet inspection or any training or instructions in this regard provided by D2 to its staff. P’s criticism of D2’s lack of a uniform standard for its staff to check the cleanliness of toilets is valid.
42. In light of the above shortcoming of D2’s inspection system of its cleaning contractor, I do not put weight on the said cleaning record of the Toilet.
43. Regarding the absence of any unsatisfactory performance of the cleaners in D2’s logbook, I think it is neither here nor there.
44. In the circumstances, I am not with D2’s submissions and unable to draw an inference that the cleaners were competent and performing their work properly on the material day, from the punctuality of the cleaners, the toilet cleaning record and lack of any unfavourable remarks about the cleaners in D2’s logbook, D2’s system of inspection, toilet cleaning record and logbook or from any other evidence not highlighted by D2.
45. Since D2 has failed to establish that Global Cheer was a competent contractor, it has failed to prove that it has engaged a competent cleaning contractor. D2 also failed to institute and enforce a proper system of inspection of the work of the cleaners so as to prevent wet and slippery conditions of the toilet. In view of the above reasons, I find that D2 is liable to P for breach of the common duty of care as well as for negligence.

*Contributory Negligence*

1. I am again referred to the Court of Appeal case, *Hsu Li Yun* (*supra*) which held that when assessing the issue of contributory negligence, two factors should be taken into account, namely the “causative potency” and the “blameworthiness”.
2. Regarding causative potency, counsel for D2 submitted that if P had not used the water ladle and left the toilet right after using it, P would not have fallen because P had passed the location where she fell three times, and she only fell onto the floor at the third time.
3. Regarding P’s blameworthiness, counsel for D2 submitted that P should be more blameworthy than D2 for taking unnecessary risk to walk on wet and slippery floor with a ladle of water for cleaning the toilet held by her hands, knowing the wet condition of the Toilet floor when she went in.
4. D2 submitted that the extent of contributory negligence of P in the present case is even higher than the plaintiff in *Yau Tsz Hin* *v Broadway Theatre Co Ltd*,[HCPI 674/2010](javascript:judpop1('search_result_detail_frame.jsp?'+temp86444);), Hon G. Lam J, 3 April 2013 in which the plaintiff slipped and fell on the stairs after visiting the lavatory at the cinema of the defendant (the defendant was held not liable, but the plaintiff was held 50% liable as an alternative finding on liability) and P should be held 75% contributorily negligent for her own injuries.
5. P’s counsel mainly relied on the following two cases on contributory negligence:

(1) In *Tse So Kam v Guardian Property Management Ltd*, DCPI 856/2005, HH Judge CB Chan, 25 May 2006, the plaintiff sustained injuries arising from a fall upon entering a commercial building on a rainy day. She slipped upon walking up the steps to the platform at the entrance and alleged the entrance was covered with water, and was wet or was covered with slippery substances. The defendant had control and management of the building. The court noted that the plaintiff had walked on the wet road and she would have been aware that the soles of her shoes were wet. It was held that the plaintiff had the duty to take care against slipping on the surface of the platform by walking slowly or taking smaller steps and pay attention to the surface of the platform so as to walk carefully. She was found to have failed to do so and was liable for 15% contributory negligence.

(2) In *Lai Wai Tan Peter v Secretary for Justice*, DCPI 1469/2006, HH Judge Leung, 9 October 2007, the plaintiff was a senior police constable and claimed damages for injuries suffered as a result of a slip-and-fall accident inside a toilet cum shower room in a police station in 2004. On the plaintiff’s admission that he did not notice the condition of the floor before and after entering the toilet, the court found that he was careless. It was further held that it did not matter whether there was a warning sign and the plaintiff should be able to take the basic care when using the toilet cum shower room which could be wet inside. On the other hand, there was no evidence that the plaintiff walked or behaved in a manner which was unusual immediately before he slipped. The contributory negligence of the plaintiff was found to be 25%.

1. Counsel for P submitted that there should be no contributory negligence on the part of P. Alternatively, the percentage of contributory negligence should not be more than 20%.
2. It is common ground in the present case that P was aware of the wet and slippery condition of the toilet floor when she entered into it. P has walked past the spot where she eventually fell for three times. It is not in dispute she fell down on her third round of walk to that spot while she was holding a ladle of water with both hands, with intent to clean the toilet.
3. I do not agree that P should be blamed for volunteering to clean the toilet with a ladle of water when she found the toilet did not flush, because as I said before her act was a courtesy to the next toilet user no matter there was such a common practice or not. Having said that I share the view of D2’s counsel that she should be more cautious and walk more carefully upon realising the toilet floor was wet and slippery and especially when holding a ladle of water. However, there was no evidence to suggest that she has been more cautious, such as by walking more slowly or taking smaller steps, when she proceeded to the toilet for the third time. Therefore, I find that P was contributorily negligent for the above reason. I now consider the appropriate percentage of P’s contributory negligence.
4. The facts of *Hsu Li Yun* case should be distinguished from the present case because the plaintiff in that case was the person who designed and installed the plumbing system and he must have known that it was unsafe. Having considered his negligent design and knowingly failing to take reasonable care for his own safety, the court then arrived at the 75% contributory negligence.
5. The circumstances of *Yau Tsz Hin* case are quite different to the present case. Unlike the present case, *Yau Tsz Hin* case took place at the staircase of a cinema and the evidence of the plaintiff about the happening of the accident was rejected by the court. I find it difficult to compare that case with the present case.
6. The circumstances of *Tse So Kam* and *Lai Wai Tan Peter* are more similar to the present case. Having taken into account the factors of causative potency and the blameworthiness, I find that the degree of contributory negligence of P is between *Tse So Kam* and *Lai Wai Tan Peter* and thus P should be 20% liable.

*QUANTUM*

*Injuries, treatment and disabilities*

1. After the accident P was admitted to Accident and Emergency Department of Yan Chai Hospital, Tsuen Wan (“YCH”). There was tenderness over her low back region and x-ray showed no bone fracture. She was given pain-killer and was discharged home against medical advice on the same date. P continued to suffer from back pain and stiffness after discharge.
2. It is admitted that P then went to Taiwan for a few days with her boyfriend. P explained that the trip was pre-arranged and air tickets bought in advance. P claimed that her pain persisted and she was assisted by her boyfriend in mobility during the trip and she rested in the hotel mostly.
3. P had consulted a private doctor, Dr Tse Chun Man, on 4 occasions and government clinic in Kwun Tong on 9 occasions, during the period between 29 December 2009 and 26 April 2011 to relieve pain and discomfort. But P alleged that such treatments could only alleviate pain for a little while, pain recurred shortly afterwards.
4. According to the medical report prepared by Tong Sheung Chi of the Department of Orthopaedic & Traumatology of UCH dated 14 June 2012, P suffered from symptoms including the following: tenderness over lower lumbar spine; and bilateral hip flexion and knee extension power were limited by back pain.
5. On 5 March 2010, P attended a private Chinese bone-setter, Lai Sing Wah (黎星華跌打醫局) for her back pain and she was treated with plaster. Thereafter, P received on-going follow-up consultations at UCH. According to P, her conditions further deteriorated. Her physical mobility was greatly impaired that she had difficulty in walking and needed to rely on a walking stick. In addition, prolonged standing or sitting would cause back pain and/or weakness and numbness in her lower part.
6. On 5 January 2011, a Magnetic Resonance Imaging (“1st MRI”) was administered on P, it showed desiccation of L4/5 intervertebral disc and mild prolapse (PID) of L4/5 disc. P was then referred to Pain Clinic in UCH for management of her chronic back pain.
7. On 21 June 2011, P sprained her back while doing physiotherapy in UCH, she then had back pain with right lower limb radiation. As such, she was transferred directly from the Physiotherapy Department to the Accident & Emergency Department of UCH for medical treatment until 8 August 2011. Physical examination was conducted and showed decrease in power of both lower limbs, more marked on right side. During her stay in UCH, on 18 July 2011 an urgent MRI lumbosacral spine (“2nd MRI”) was performed for her deterioration in lower limb neurology. The 2nd MRI showed mild PID of her L4/5 disc with no interval change when compared to the 1st MRI.
8. On 8 August 2011, P was discharged from UCH and was transferred to Kowloon Hospital (“KH”) for rehabilitation. According to the medical report prepared by Dr Fung Pui Man of the Department of Rehabilitation of KH dated 14 June 2012, P had been assessed by clinical psychologist with clinical impression of chronic pain disorder with signified impairment in functioning due to pain. She was not able to walk on admission but later could walk with aids and two assistants for a few steps. During the stay in KH, P had the following symptoms: sensational loss in bilateral lower limbs and bilateral lower limb muscle weakness.
9. On 21 August 2011, upon P’s request, she was transferred back to UCH from KH because of increased back pain due to the improper control of wheelchair during transfer by a hospital porter. Physical examination was conducted and showed bilateral lower limb weakness similar to previous admission. On 2 September 2011, P was given epidural injection (“1st injection”) and her pain partially improved and she was able to walk with a frame. P was discharged home on 10 September 2011 and she received follow-up treatments as an out-patient at UCH.
10. On 28 September 2011, P was referred to the Department of Psychiatry of UCH for consultation and treatment. According to the medical report prepared by Dr Sham Kwan Ho of the Department of Psychiatry dated 20 May 2013, P was diagnosed to have depressive disorder. She presented with low mood, irritability, poor concentration, poor sleep and social withdrawal. She was arranged to attend regular psychiatric follow-ups. She received psychiatric treatment for 18 times in psychiatric department of UCH between 2 March 2012 and 8 January 2013.
11. On 24 May 2012 when P was waiting at the dispensary of UCH for collecting medication after consultation, due to the alleged increase of low back pain, she felt dizziness and was transferred to Accident & Emergency Department for treatment. She was discharged home on the same date.
12. On 27 June 2012 while P attended UCH to meet the appointment of work capacity evaluation as scheduled, allegedly by reason of the numbness and weakness of the right leg, drop-foot occurred suddenly. As a result she fell onto the ground and suffered injury. She was then admitted to Accident and Emergency Department of UCH seeking treatment and was subsequently transferred to Orthopaedics & Traumatology ward as in-patient. X ray on LS spine showed that alignment was well. She was discharged on 7 July 2012.
13. On 17 September 2013, P received 2nd Epidural Steroid Injection (“2nd injection”) in UCH. It was about 2 years after the 1st injection. During the 2nd injection process, she felt drastic increase in pressure in skull and the injection stopped. She lost the sense of hearing and felt headache and nausea. She was hospitalized and was discharged on 18 September 2013.
14. According to records, P received physiotherapy in UCH from 2 March 2010 to 21 June 2011 for 9 sessions of treatment. She also attended a number of sessions of physiotherapy treatment in UCH and KH in 2011. From January 2014 onwards, P undertook 20 sessions of physiotherapy from a private institution, Su & Huber Advanced Physiotherapy and Spinal Pain Centre for a sum of $9,000.
15. P was granted intermittent sick leave for the period from 24 December 2009 to 31 October 2015. She received medication treatments on need basis at orthopaedic, psychiatric and pain clinic of UCH.
16. There were 4 subsequent incidents (“the Subsequent Incidents”) whereby P’s low back pain condition deteriorated and allegedly causing more pain than before:
17. 2 March 2010: P slipped without falling inside the bathroom at home and she was admitted to UCH for further medical observation till 5 March 2010. She was given treatment inclusive of physiotherapy;
18. 21 June 2011: P sprained her back while doing physiotherapy at UCH when her legs dropped sideways from the top of a big gymnastic ball;
19. 21 August 2011: increased back pain due to improper control of wheelchair by a hospital porter during the transfer from KH to UCH; and
20. 27 June 2012: on the way to UCH for work capacity evaluation P fell to the ground because of the sudden numbness and weakness of right leg. She was then admitted to A&E Department of UCH, hospitalised in UCH until 7 July 2012.
21. P submitted that it is not open for D2 to rely on the above Subsequent Incidents to raise the *novus actus* defence, as it is not D2’s pleaded case. On the other hand, it is D2’s case that P did not suffer from the pain in the magnitude as portrayed by her because of these Subsequent Incidents. D2 submitted that P has magnified her pain and tended to put the blames on others for her own physical conditions.

*Joint Orthopaedic Report*

1. On 19 September 2013, P was jointly examined by her orthopaedic expert, Dr Fu Wai Kee and D2’s expert, Dr Chiang Si Chung Arthur. It is recorded that she attended on wheelchair and could only stand with a pair of crutches.
2. Dr Fu opines that
3. P’s work efficiency would be reduced. She would need frequent rest after prolonged sitting. She should have 5 to 10 minutes rest after one hour of work;
4. the sick leave received by P is appropriate;
5. P’s current impairment would persist and she would need medical treatment when the pain was severe.
6. Dr Chiang disagrees and opines that
7. the absence of symptoms and signs in the lower limbs, such a radiating pain, paraesthesia or weakness, decrease in sensation and motor power, would suggest against the diagnosis of prolapsed lower lumbar disc;
8. the absence of neurological deficits in the lower limbs suggests that the prolapsed lower lumbar disc was a mild prolapse;
9. the marked discrepancy in the sitting and supine lying straight leg raising tests and the positive tests with complaint of pain in the lower back in the simulation tests suggested symptom magnification;
10. symptom magnification is also revealed in the wide area of weakness and sensory loss in both lower limbs.
11. Dr Chiang further opined that P should be able to work in the pre-injury job with a satisfactory capacity. As for sick leave, Dr Chiang opined sick leave should have ended by about mid-2010, ie about 6 – 7 months. As to permanent impairment of the whole person, Dr Fu gave 12% whereas Dr Chiang suggested 4%.

*Joint Psychiatric Report*

1. P’s psychiatric expert, Dr Ho Pang Nin and D2’s Dr Law Wun Tong jointly interviewed and examined P on 4 September 2014. The total duration of the interview together with discussion between the doctors was 2 hours 15 minutes. Both doctors agreed about the diagnosis of P being adjustment disorder with depressed mood; the adjustment disorder was mainly caused by the accident and is consistent with the injury; she could be considered capable of returning to her previous job from a psychiatric respective.
2. In the report, it is recorded that physically P complained of persistent low back pain. She described the character as pulsating that was different from the episodic attacks of pain. She described the character of the latter type of pain as nailing or screwing. The episodic attacks happened daily but varied in frequency and duration. P had lightning pain shooting down her right lower limb 4 to 5 times a week. Each time the pain came in bouts. P had weakness and numbness of her right lower limb, particularly the two toes on the lateral side, her calf and the back of her thigh. Once or twice in a month she had sudden attack of weakness of her right leg and she would kneel down.
3. It is further recorded that P complained of dizziness and dry mouth being the side effects of the medications she received. She stayed home most of the time. On average she saw her friends and her mother once a month. She was seldom visited. She had independent self-care and she went to medical consultation alone. She had private physiotherapy twice weekly.
4. She attempted to go back to work in December 2012. The doctor recommended half-day work but she had to do a full day work that she found herself unable to cope. She had no concrete plan for her future. She thought she could manage half-day work if she returned to her previous job.
5. She did not smoke or drink. She used to enjoy playing guitar in a band and dancing. Her premorbid personality was said to be happy, sociable and extroverted. She denied having any significant stress before the accident. She walked in a slow limping gait supported by an umbrella. She had started psychiatric treatment in September 2011. According to the treating psychiatrist, P presented with low mood, irritability, poor concentration, poor sleep and social withdrawal. She was diagnosed to have depressive disorder.
6. In view of the relatively mild degree of her functional impairment from a psychiatric perspective, apart from receiving treatment in private sector, Dr Ho thought that P could continue to receive the psychiatric treatment provided in the public sector. The duration of further treatment would depend on her progress. In view of her residual symptoms, Dr Ho thought that she would likely need a further period of such treatments for at least 2 years. She would need a sick leave of about 6 months during the period when her mental symptoms were most intense.
7. From the psychiatric perspective alone, she was considered still capable of returning to her previous job or other jobs that her physical ability allows. However there would be some mild impairment of her tolerance, adaptive ability and efficiency at work because of her psychiatric condition. The permanent impairment of the whole person was assessed at 5%. Overall Dr Ho thought that the prognosis was fair to unfavourable.
8. Dr Law was of the opinion that the psychosocial stressors include the unemployment, breaking up with her boyfriend, becoming dependent financially on her parents, change of life-style, and the compensation litigation. It was likely she would continue to suffer from some residual pain. Dr Law considered the major stressors were mild in severity. As for the mood disorder, she had received treatment for nearly 3 years. She had significantly improved.
9. The prognosis of the adjustment disorder was deemed good. With the closure of the compensation litigation, Dr Law believed that it would be a significant perpetuating factor for her mood complaints, her mood would improve further with one major psychosocial stressor removed. The appropriate duration of sick leave for the psychiatric disorder was about 3 months after the first consultation with psychiatrist in September 2011.
10. Dr Law opined that P should be seen for another 6 sessions so that the medications can be gradually tapered off. With the tapering off of the medications, her complaints of side effects will resolve. She should also be encouraged to return to work. The adjustment disorder is mild and the prognosis should be good. P was considered mentally fit to perform all activities of daily living and housework. She did not need to avoid any activities from a psychiatric point of view. The severity of the adjustment disorder with depressed mood that P suffered from was mild. Her work capacity should only be limited by her physical disabilities. Dr Law estimated that the percentage of permanent impairment of the whole person to be 2%.
11. In gist, as to psychiatric aspect, both Dr Ho and Dr Law shared a lot of common views save for the difference in sick leave period 6 months vs 3 months and the permanent impairment of 5% vs 2%. Both doctors considered P could resume work. Dr Law stated that “*her work capacity should only be limited by her physical disabilities*”. Dr Ho stated “*she is still capable for returning to her previous job .... however there would be some mild impairment or her tolerance, adaptive ability and efficiency of work ...*”.

*Resumption of work*

1. P attempted resuming work on 3 occasions. On 12 August 2010, P worked for one day and could not cope with the duties. P experienced the same problems when she reported to work on 20 April 2011. Then she was given 12 weeks sick leave on such pattern of half day work in the morning and half day sick leave in the afternoon. It was not permitted by her employer. Then most recently on 2 November 2015, P worked for 1.5 day and ended up hospitalization from 3 to 17 November 2015 in PMH. P was further hospitalized from 27 to 30 November 2015.
2. P’s chronic pain and lower limb symptoms could not be explained on good medical grounds. P underwent intrusive treatment procedure to her body. There was the 1st epidural injection on 2 September 2011. Then about 2 years later on 17 September 2013, a 2nd epidural injection was suspended midway when P started to have unfavourable bodily reaction. In the patient information sheet on epidural steroid injections, it is injection of corticosteroids into the epidural space between the dural sac and the bones of the vertebral column. Also there are possible side effect and potential complications set out at the bottom of the sheet.

*PSLA*

1. P’s counsel referred me to the following 6 comparable cases and submitted HK$400,000 as the appropriate PSLA for P’s case:
2. *Yeung Tai Hung v Hong Kong Baptist Hospital Au Shue Hung Health Centre* (2006) 36 HKLJ 650, HCPI 686/2004 (Suffiad J, 20 July 2006) (PSLA: HK$300,000);
3. *Lai Kam Wah v Wing Kwong Co Ltd*, HCPI 1131/2002 (Sakhrani J, 28 November 2003) (PSLA: HK$350,000);
4. *Tang Shau Tsan v Wealthv Construction Co Ltd*, HCPI1092/1998 (Deputy Judge Woolley, 2 December 1999) (PSLA: HK$300,000);
5. *Lai Ching v Wong Chiu Kwai*, HCPI1192/1996, (Suffiad J, 12 June 1998) (PSLA: HK$300,000);
6. *Lam Mui v Kalex Circuit Board (Hong Kong) Ltd* HCPI 1155/1997 (Longley J, 1 December 1999) (PSLA: HK$300,000);
7. *Lauw Ka Fong v Best City Limited* (2005) 35 HKLJ 751, HCPI-436/2004 (Suffiad J, 27 May 2005) (PSLA: HK$300,000);
8. D2’s counsel submitted another 4 cases on PSLA:
9. *Cheng Liu Nei Su v Clare Environmental Services Limited*, DCPI 842/2008, (HH Judge HC Wong, 30 July 2009) (PSLA: HK$150,000)
10. *Poon Yat Chiu v AES Scaffold Engineering Limited*,DCPI 223/2005 (HH Judge Chow, 21 March 2007) (PSLA: HK$180,000)
11. *Shih Pik Nog v G2000 (Apparel)*, HCPI 832/2009 (Deputy High Court Judge Burrell, 25 March 2011) (PSLA: HK$200,000)
12. *Chan Wang Lik Nick v Lai Fook Wah*,HCPI 740/2008 (Master KH Hui, 3 May 2010) (PSLA: HK$180,000)
13. D2 submitted that P’s case is closest to *Shih Pik Nog* case and thus suggested HK$220,000 after taking into account the inflation factor.
14. It is common ground that P’s injury falls below the “serious injuries” category. The main dispute under this head of claim is whether P has exaggerated her pain.
15. Both orthopaedic experts agreed that P suffered from soft tissue injury of back with prolapsed intervertebral disc L4/5 and they are of the view that the “*severe pain and lower limb symptoms cannot be completely explained on medical ground.*” Dr Chiang for D2 further suggested symptom magnification by P based on the results of the Straight Leg Raising test and simulation test. P’s expert Dr Fu was silent on this point.
16. In light of such undisputed expert evidence, it is more likely than not that P has exaggerated the magnitude of pain she was suffering. However, I accept her evidence that Subsequent Incidents have aggravated her pain but not to the extent as alleged.
17. Bearing in mind the above factors, I find that the amount of PSLA for P should be in the HK$220,000 – HK$400,000 range as proposed by the counsel of the parties. I am of the view that P’s injury should be more serious to the plaintiff of *Shih Pik Nog* case, as Ms Shih sustained back injuries by bending her knees and squatting and not slip and fall. Besides, unlike P in the present case, Ms Shih’s injuries were not aggravated by subsequent incidents.
18. I think P’s situation is more similar to *Yeung Tai Hung* case, about a slip and fall accident of a cook in a canteen kitchen. Although D2’s counsel attempted to distinguish *Yeung Tai Hung* case from the present case by the lack of exaggeration of symptoms in *Yeung Tai Hung* case, the unfortunate Subsequent Incidents aggravating P’s suffering did not happen in *Yeung Tai Hung* case.
19. After balancing all the above factors and having taken into account of the inflation factor, I assess the PSLA of P in the sum of HK$330,000.

*Loss of Pre-trial Salaries*

1. The monthly salary of P was HK$10,290 at the time of accident. After the accident, her employment contract was renewed from time to time with upward adjustments of the basic salary and at 3-month intervals after mid-August 2011.
2. P was initially granted 4-day sick leave by the A&E Department of Yan Chai Hospital on the day of the accident and received further sick leave intermittently up to 31 October 2015 at the time of trial. P’s counsel adopted 14 November 2015 as the notional trial date and claimed for P’s loss of earnings from the date of accident to the notional trial date for the entire pre-trial period of 71 months. P computes the claim under this head by adding up the total salaries according to contract less the total salaries received during that period which arrives at HK$349,437.33.
3. D2’s case is that the orthopaedic sick leave period should be 6 months from the accident up to June 2010 according to the opinion of its expert, Dr Arthur Chiang and the psychiatric sick leave should be 3 months after the first consultation with psychiatrist in September 2011 as per its psychiatric expert, Dr Law Wun Tong. Therefore the total sick leave period is 9 months from the date of the accident.
4. According to paragraph 12 of the D2’s Answer to P’s Revised Statement of Damages, D2 denied P had suffered any loss of earnings and MPF benefits during the 9-month sick leave period as P’s employer had made full payments.
5. The two orthopaedic experts hold different views as to the appropriate sick leave period. Dr Fu for P opines that the intermittent sick leave period up to 16 October 2013, ie 46 months’ time, is appropriate, while Dr Chiang for D2 thinks otherwise that sick leave period should be limited to mid 2010.
6. D2 submitted that its expert opinion should be preferred for the following reasons in D2’s Closing Submissions:
7. The two doctors agreed to limit their views to orthopaedic aspects;
8. Dr Chiang said that sick leave period should be given up to mid 2011. In fact Dr Chiang relied on different medical materials to come to the view that P has acquired a satisfactory state in her lower back in mid 2010;
9. The two doctors agreed that P suffered from a soft tissue injury at her lower back with prolapse of L4/5 disc. Dr Chiang takes the view that the prolapse is a mild one;
10. The two doctors agreed that the severe pain and lower back symptoms cannot be completely explained on medical ground;
11. Dr Chiang has raised the suspicion of symptoms magnification, but Dr Fu did not address this issue in the Joint Medical Report, which should be taken as implied agreement;
12. The two doctors agreed that P is able to return to the pre-accident job;
13. Dr Fu did not give any reason as to why he thought that sick leave period certified so far was appropriate.
14. The psychiatric medical experts also held different views as to the appropriate sick leave period, but the difference is not great. Dr Law for D2 opined that the appropriate duration of sick leave for the psychiatric injuries was about three months after the first consultation with the psychiatrist on 28 September 2011, while Dr. Ho for P said that it was difficult to speculate retrospectively the duration of sick leave required. He suggested six months time during the period when P’s mental symptoms were most intense.
15. Regarding P’s ability to return to her pre-accident work, all four medical experts hold the same view that P is able to return to her pre-accident work. D2’s counsel has drawn my attention to the fact that P had already mentioned to the all medical experts of the nature of her pre-accident job, and her failed attempt to return to the previous job, but all four medical experts still held the view that P is physically able to return to her pre-accident job.
16. Bearing in mind of Dr Chiang’s uncontested opinion of symptom magnification by P and thus the likelihood of exaggeration by P, I am unable to find any reasons to reject the unanimous opinion of all four medical experts of P’s ability to return to her previous job. I therefore reject P’s evidence that she is unable to return to her pre-accident job and accept the experts’ opinion in this regard.
17. Since I find that P is able to return to her previous job, I do not agree that P should be entitled to loss of earnings for the entire pre-trial period of 71 months according to P. I agree with D2 that Dr Fu’s opinion on appropriate sick leave period lacked reasoning. However, I am of the view that Dr Chiang’s view is a bit too harsh to P. In particular, Dr Chiang seems to disregard the aggravating effects of the 4 Subsequent Incidents. Having taken into account of all circumstances and balancing the experts’ views, I think the appropriate sick leave period should cover those Subsequent Incidents. Since about two-month sick leave was granted to P on 27 June 2012 for the last incident, I find that the appropriate sick leave period should be up to September 2012, approximately 33 months.
18. I adopt the salary figures in Table B in paragraph 83 of P’s Closing Submissions to calculate the total amount of salaries receivable according to contract for the allowed period:

|  |  |  |
| --- | --- | --- |
| **Period** | **Amount**  **(HK$)** | **Source** |
| $10,290 × (24.12.2009 to 31.01.2010) | 12,945.48 | Table B |
| $10,390 × (01.02.2010 to 14.08.2010) | 67,032.26 | Table B |
| $11,000 × (15.08.2010 to 31.01.2011) | 60,677.42 | Table B |
| $11,550 × (01.02.2011 to 14.08.2011) | 74,516.13 | Table B |
| $11,840 × (15.08.2011 to 14.02.2012) | 71,040.00 | Table B |
| $12,430 × (15.02.2012 to 14.08.2012) | 74,580.00 | Table B |
| $12,780 × (15.08.2012 to 14.02.2013) | 76,680.00 | Table B |
| $13,520 × (15.02.2013 to 14.09.2013) | 162,240.00 × 7/12 = 94,640.00 | Table B |
| Total: | 532,111.29 |  |

1. The following is the calculation of the total amount of salaries received by P:

|  |  |  |
| --- | --- | --- |
| **Period** | **Amount (HK$)** | **Source** |
| January 2010 to  November 2014 | 436,941.50 | Paragraph 83 of P’s  Closing Submissions |
| Less Oct 2013 | (5,669.68) | Remittance Advice |
| Less Nov 2013 | (2,253.33 × 2 = 4,506.66) | Remittance Advice |
| Less Dec 2013 | (5,233.55) | Remittance Advice |
| Less Jan 2014 | (5,233.55) | Remittance Advice |
| Less Feb 2014 | (5,602.14) | MPF Contributions Report |
| Less Mar 2014 | (5,060.00) | MPF Contributions Report |
| Less Apr 2014 | (6,179.33) | Remittance Advice |
| Less May 2014 | (3,220.00 + 2,300.00  = 5,520.00) | Remittance Advice |
| Less Jun 2014 | (5,228.67) | Remittance Advice |
| Less Jul 2014 | (4,600.00) | Remittance Advice |
| Less Aug 2014 | (2,300.00 + 2,760.00  = 5,060.00) | Remittance Advice |
| Less Sep 2014 | (5,228.67) | Remittance Advice |
| Less Oct 2014 | (5,520.00) | Remittance Advice |
| Less Nov 2014 | (1,901.33 + 2,852.00  = 4,753.33) | Remittance Advice |
| Total: | 363,545.92 |  |

1. Therefore, the pre-trial loss of salaries is assessed at: HK$(532,111.29 − 363,545.92) = HK$168,565.37 rounded up to HK$168,565.

*MPF*

1. It is not in dispute P is entitled to MPF payment during the appropriate sick leave period at 5% of her basic salary. P’s loss of MPF should be HK$168,565.37 × 5% = HK$8,428.27 rounded up to HK$8,428.

*Gratuity*

1. As D2 is prepared to accept that P is entitled to gratuity payment equal to 9.47% of the total basic salary earned by P during the appropriate sick leave period, I award P the following sum as her loss of gratuity payments: HK$168,565.37 × 9.47% = HK$15,963.14 rounded up to HK$15,963.

*Supermarket Cash Coupons*

1. It is P’s case that her employer would hand out supermarket cash coupons of HK$200 per month to her if she did not take casual or sick leave that month. P still received such coupons from her employer after the accident until November 2011. P now claims loss of coupons of HK$200 each month from December 2011 to November 2015 (48 months) totalling HK$9,600.
2. D2 challenged P’s entitlement to such coupons as her employment letter and contract stipulates that P is not entitled to any other bonus or similar payments except for gratuity payment. However, D2 is unable to dispute that P has indeed received such coupons even after the accident as there is evidence before the court in support of such claim, ie, emails from P’s employer notifying P to collect such coupons.
3. I accept P’s evidence she used to receive such coupons being a fringe benefit from her employer. However, I am only prepared to allow damages for such loss from the cessation of handing out of coupons to the end of appropriate sick leave period, ie from December 2011 to September 2012 (10 months) at HK$200 per month, totalling HK$200 × 10 = HK$2,000.

*Loss of Earning Capacity*

1. According to P’s Revised Statement of Damages, a sum in the region of 6 months’ salaries, ie HK$85,000 is claimed under this head. However, P’s counsel submitted a different approach in calculating the claim under this head, departing from P’s pleaded case, which I refuse to follow.
2. I am prepared to accept D2’s alternative submission in this regard, and allow HK$45,000 representing about 3 months’ salaries for the reasons as per D2’s Closing Submissions in paragraph 125 which I repeat as follows:
3. The sedentary nature of the job;
4. The medical opinions that she could return to the pre-accident job;
5. The fact that P holds an associate degree;
6. There should not be lack of vacancies of job in similar nature; and
7. Her disadvantage in the labour market, if any, will only be marginal.

*Domestic Helpers*

1. P claimed expenses for hiring a part-time domestic helper to do household chores for 8 times a month with each time of 2 hours costing her about HK$1,440 each month (HK$90/hr × 2 hr × 8 sessions). The period of claim is 51 months up to November 2015 totalling HK73,440.
2. D2 denied this item totally for lack of documentary proof and details of the helpers.
3. In view of the unanimous opinion of both orthopaedic experts that P “*should be independent in activities of daily living*”[[2]](#footnote-2) in view of her physical conditions, I do not agree that P needs domestic helper all along as alleged.
4. Nonetheless, I accept that P should be entitled to engage domestic helper during the 3 months’ time after she was discharged from hospital in September 2011 when she was on wheelchair.
5. The award under this head is: HK$1,440 × 3 = HK$4,320.

*Private Medical & Physiotherapy Expenses*

1. I allow P’s private medical expenses in the sum of HK$2,900 with breakdown as follows:
2. HK$550 for Dr Tse Chun Man’s fees;
3. HK$750 for bonesetter Lai Sing Wah;
4. HK$1,600 for Chinese medicine treatment by Hung Hing Ho.
5. I refuse the claim of HK$9,000 for 20 sessions of private physiotherapy in March 2014 for the reasons given by D2’s counsel as cited below:
6. Both orthopaedic experts agreed that P has reached MMI and does not need further treatment;
7. No supplementary orthopaedic report is commissioned to comment on the reasonableness of this specific set of treatments;
8. P is unable to prove that she had received any further physiotherapy treatments since August 2011;
9. There has been frequent history of P defaulting the occupational therapy;
10. In any event, where further physiotherapy treatments are found necessary, those treatments should be received at a public sector. There is simply no basis to suggest, and in fact it is not suggested that P would be more benefited by receiving private physiotherapy treatments.

*Travelling Expenses*

1. As P had been visiting hospitals and clinics quite often for several years after the accident, I allow the claim of travelling expenses of HK$7,614 in full.

*Tonic Food*

1. P claims HK$12,153 for tonic food, but without particulars and documentary support. Such sum appears to be excessive in the circumstances. I assess this item at HK$5,000 on a broad-brush approach.

*Future Medical Expenses*

1. P claims HK$60,000 for future psychiatric treatment for 2 years from private sector.
2. D2 suggests P could receive such treatment from the public clinic as P has received psychiatric treatment from public clinics.
3. I agree with D2 that there are no reasons why P could not continue her treatment at public clinics.
4. I thus allow a sum of HK$2,400 for this item.

*Other Special Damages*

1. The claim of walking stick in the sum of HK$450 is uncontested and I allow this item in full.

*Deduction of Employees’ Compensation*

1. The corresponding Employees’ Compensation (“EC”) case of P (DCEC 1900/2011) was settled for the sum of HK$590,596.11 which has already been paid to P. It was stated in the paragraph 2(a) of the relevant Consent Order dated 5 June 2015 of the EC case that “*credit be given to the sum of HK$370,596.11* *being the advance payment already received*” byPfrom her employer. There were also payment out of sanctioned payment in the sum of HK$182,700 and a balance payment of HK$37,300.00. Therefore the settlement sum of HK$590,596.11 includes the advance payment of HK$37,300.00 (HK$590,596.11 = HK$370,596.11 + HK$182,700 + HK$37,300.00).
2. P was given sick leave certificates covering 2 years from the date of accident. Form 7 endorsed the period of absence. Therefore the employer was under a legal obligation to pay 4/5th advance periodic payments (“advance payments”) for the 2-year period. P also testified that she was given full pay for 2 years.
3. P submitted that the settlement sum of HK$590,596.11 should not be deducted in full from this award of common law claim as it consists of the advance payment which should not be deducted. P is prepared to adopt 4/5 of HK$370,596 ie about HK$296,477 to be taken out from the EC settlement sum to avoid double deduction. Accordingly, the portion of EC amount to be set off with the common law claim is HK$294,119 (HK$590,596 − HK$296,477). D2 disagreed partial set-off and insisted on setting off the whole sum of EC.
4. As P has already set off the periodic payment with part of her claim for pre-trial loss of earnings, I agree with P that HK$294,119 be deducted from the award herein.

*CONCLUSION*

1. For the above reasons, I enter judgment against D2 in favour of P for a sum of HK$179,993 after taking into account of P’s 20% contributory negligence and deduction of the EC award as follows:

|  |  |
| --- | --- |
| Items | Award Amount (HK$) |
| 1. PSLA | 330,000 |
| 1. Loss of Pre-trial Salaries | 168,565 |
| 1. Loss of MPF | 8,428 |
| 1. Loss of Gratuity Payments | 15,963 |
| 1. Loss of Supermarket Cash Coupons | 2,000 |
| 1. Loss of Earning Capacity | 45,000 |
| 1. Domestic Helpers | 4,320 |
| 1. Private Medical Expenses | 2,900 |
| 1. Travelling Expenses | 7,614 |
| 1. Tonic Food | 5,000 |
| 1. Future Medical Expenses | 2,400 |
| 1. Other special damages | 450  \_\_\_\_\_\_\_\_\_ |
| Gross Total: | 592,640 |
| LESS: 20% Contributory Negligence | (118,528) |
| EC Award | (294,119)  \_\_\_\_\_\_\_\_\_ |
| Net Total: | 179,993 |

*Interest*

1. The interest awarded to P includes:
2. 2% per annum on PSLA from the date of service of the writ to the date of judgment;
3. half judgment rate on special damages from the date of accident to the date of judgment; and
4. post-judgment interest on the whole sum at judgment rate until payment.

*Costs*

1. I make an order *nisi* that the costs of this action be to P, to be taxed if not agreed, with certificate for counsel and such order *nisi* shall become absolute after 14 days from the date hereof, unless parties make any applications to vary it within such time.
2. P’s own costs shall be taxed in accordance with the *Legal Aid Regulations*.
3. Finally, I thank counsel of both sides for their assistance.

# (S P Yip)

# Deputy District Judge

Mr Dennis Law, instructed by Patrick Mak & Tse, for the plaintiff

Mr Herbert Leung & Mr Kelvin Tang, instructed by Tang & Lee, for the 2nd defendant

1. Paragraph 12 of the Closing Submissions of the 2nd Defendant. [↑](#footnote-ref-1)
2. Paragraph 10 on page 19 of the Joint Medical Report dated 18 November 2013 [↑](#footnote-ref-2)