#### DCPI 2627/2015

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2627 OF 2015

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

BETWEEN

YIP KWOK SHING Plaintiff

and

FUNG CHAU TIM Defendant

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

Before: His Honour Judge Andrew Li in Court

Date of Hearing: 19 June 2017

Date of handing down Decision: 26 June 2017

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

ASSESSMENT OF DAMAGES

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

1. This is an assessment of damages arising out of an assault incident happened on 9 August 2013.
2. Interlocutory judgment on liability has been entered against the defendant on 4 May 2016. Hence, only the issue of quantum remains outstanding.

*BACKGROUND*

*The assault incident*

1. The assault happened in what I would describe as a “storm in a teacup” incident during an owners association’s management committee meeting in a development known as Palm Springs in Yuen Long. The plaintiff was one of the management committee members while the defendant, who was an owner/occupier of one of the houses at the development, attended the meeting as an attendee/observer. The chairperson of the committee apparently was the wife of another attendee who was also present at the meeting.
2. The entire meeting has been recorded by video with very clear visual image and sound recording. The video has been produced as part of the evidence at the hearing. It can be seen from the video that, about half way through the meeting, some trivial matters had led to a bitter exchange of words between the chairperson and the plaintiff. At one point, the husband of the chairperson shouted out something from the back row where the attendees had been sitting (his face was not captured by the video). The defendant then gradually appeared from the back row and walked up to the plaintiff who was then sitting at the conference table with his back facing against the attendees. The defendant stepped forward to the right hand side of the chair where the plaintiff was then sitting. By this stage, the plaintiff had already turned his entire body (including both of his legs) to his right, facing the defendant, albeit still in a sitting position. After a brief but hostile exchange of words, the defendant suddenly used both of his hands to push against the plaintiff’s chest. As a result, the plaintiff fell backwards. It appears that his back first hit part of the chair on his left which another committee member had been sitting on. His lower back/buttocks then landed on the carpeted floor. In any event, the distance from where the plaintiff had fallen from his chair was no more than 2 feet.
3. It can be further seen that as soon as the plaintiff had fallen on the floor, he used his left hand to press against his left lower back area. He also immediately shouted out the words “Call the Police” (「報警」) repeatedly. The plaintiff then slowly tried to get up by himself, first with his knees on the floor. At this juncture, the defendant suddenly picked up the chair the plaintiff was sitting on earlier and appears to want to strike the plaintiff with the chair. However, he was restrained by others who were present at the meeting from doing so. At this point, the plaintiff was seen jumped up very quickly and swiftly moved away from the threat. The plaintiff was then seen walking away with a limp and sat on another chair which was not captured by the video[[1]](#footnote-1).
4. Few things are worth noting at this stage:-
5. almost from the very moment he was being pushed by the defendant, the plaintiff kept on shouting to report the matter to the police;
6. he was able to get up swiftly and moved away from the danger promptly when the defendant tried to strike him with the chair;
7. the plaintiff was seen walking around the conference room (eventhough with his left hand still pressing against his left lower back) during the 20 minutes or so before the police and ambulance crew arrived; and
8. the plaintiff was able to walk by himself to the ambulance without any assistance.
9. Following the incident, the defendant was charged with and convicted of the offence of common assault upon his own plea and admission of facts at the Fanling Magistrates’ Courts in December 2013. He was sentenced to serve 120 hours of Community Service Order.

1. In my view, the above background is important in the context of this case because it shows or tends to show that:-
2. there was clearly bad blood between the plaintiff and the defendant prior to the assault;
3. there was a bitter and heated exchange of words between the plaintiff and the chairperson of the meeting prior to the assault which led to the assault;
4. the assault resulted in a criminal conviction against the defendant;
5. whatever injuries sustained by the plaintiff they could only be described as minor as he could walk away from the danger with ease; and
6. there was every reason for the plaintiff to exaggerate his injuries and tries to obtain a higher award against the defendant.

*DISCUSSION*

*The injuries*

1. In my view, by any accounts, the plaintiff’s injuries sustained in the incident could only be described as minor.
2. When he was first admitted to the Department of Accident and Emergency (“A&E”) at Pok Oi Hopsital (“POH”) after the incident on 9 August 2013, he was found to have redness and tenderness over the left lower back region only (which was mistyped by the attending doctor as the *right* region). It was found that his lumbar movement was limited but no neurological deficit was found. X-ray revealed nothing remarkable. The plaintiff was given some analgesic and was discharged. No sick leave was given.
3. The plaintiff re-attended the A&E of POH on 2 further occasions on his own initiative.
4. On 13 August 2013, he complained of increased back pain. He was discharged after given more painkillers. He was given 4 days of sick leave.
5. On 17 August 2013, the plaintiff attended the A&E of POH in the early hours with complaint of increased back pain to his injured site. On this occasion, he was admitted into the Emergency Medical Ward (“EMW”) of the A&E for management. The X-ray studies for chest, lumbar spine and urine test were all unremarkable during the above consultations. He stayed in the EMW for slightly over one day and was discharged in the morning of 18 August 2013. On that occasion, he was given further medications to relieve his pain and was referred to the outpatient physiotherapy department for treatment. He was given 6 days of sick leave on that occasion.
6. In other words, the plaintiff was granted sick leave for a total of 10 days only as a result of the assault.
7. The plaintiff attended a total of 7 physiotherapy treatment sessions from 3 September 2013 to 20 December 2013. He was discharged from the physiotherapy treatment on 8 March 2014 as he had defaulted the follow-up treatment. His last treatment was on 20 December 2013. From the very brief physiotherapy report written by the attending physiotherapist, it did not appear at least on paper that the plaintiff had made any improvement at all during those few months when he was under physiotherapy treatment. This contrasts greatly with what has been captured on video when the plaintiff was able to play basketball freely in November 2013. I note that the medial records/notes of the physiotherapy department had not been released to the plaintiff’s solicitors despite of their requests. Hence, what we have are the “subjective complaints” of pain and disabilities reported by the plaintiff to the treating physiotherapist only.

*The plaintiff’s complaints*

1. In his amended revised statement of damages dated 15 February 2017 (“ARSD”), the plaintiff alleges that he has suffered from persistent back pain despite of the physiotherapy treatment. He claims that he discontinued with the treatment in early 2014 because he considers it was not helpful. What is significant to note here is that the plaintiff also claims in the ARSD that he used to play basketball and football about once in every 1 to 2 weeks prior to the accident. However, after the accident, he claims that he “felt stiffness and pain in his low back particularly when he turned his body to the left”. He claims that he could “no longer enjoyed (sic) playing basketball and football because of the said limitation”. He also claims that he needs to take Panadol a few times a week in order to relieve his back pain.

*The basketball video taken on 18 November 2013*

1. In this case, the defendant was able to produce a video clip taken on a mobile phone showing the plaintiff playing basketball in the basketball court of the estate on 18 November 2013. On that occasion, the plaintiff was being observed by a neighbour (who is not connected with this case) playing basketball for at least 15 minutes. In the video itself, the plaintiff was seen able to move freely on the basketball court. He was able to jump, shoot and run in an agile and very flexible manner with the basketball. He was able to turn and twist his body (including his back) in different directions without any sign of pain or discomfort whatsoever. He was seen sweating, smiling and chatting happily. He was apparently enjoying his game.
2. This independent witness in his witness statement also added that he has seen the plaintiff riding his bicycle around the estate since the incident, a fact that is not denied by the plaintiff in evidence, albeit he denies that he was able to do so in a swift manner.

*The expert evidence*

1. Dr Fu Wai Kee is the single joint orthopaedic expert appointed by the parties to comment on the injuries of the plaintiff. In his report dated 19 September 2016, Dr Fu opined that the plaintiff’s injury was compatible with the diagnosis of soft tissue injury of the back. He also considered that the sick leave of 10 days given by the doctors at the public hospital was appropriate. Dr Fu was of the view that the plaintiff should be able to return to his pre-existing work as a self-employed merchant. He however considered the plaintiff’s efficiency would be mildly reduced due to the back pain. He also thought that the plaintiff may have some pain during manual exertion and long period of travel. Dr Fu opined that the plaintiff should be independent in activities of daily living and should be able to play basketball or football although his performance will be slightly affected by the alleged pain. For the back injuries, Dr Fu found the impairment of whole person and loss of earning capacity both at 1%.
2. I find Dr Fu has been more than generous to the plaintiff in his assessment. Some of the claims made by the plaintiff to him on the date of examination in August 2016 were new and had never been made to any of the treatment doctors or his lawyers before. I shall treat them with caution.

*Findings on the plaintiff’s credibility*

1. Having watched the video on the plaintiff’s performance on the basketball court and having heard his evidence in court, I have no doubt that the plaintiff has exaggerated much of his injuries and claims in this case. In my judgment, the physical activities he was able to carry out on the basketball court are completely at odds with the complaints he had been making prior to the basketball video was disclosed to the plaintiff’s solicitors in June 2016. I do not find the plaintiff to be a credible witness at all. Nor do I think that he has been completely truthful with the court when he gave evidence. There are many reasons for me to come to such conclusion.
2. When the writ in this case was first issued on 1 December 2015, the statement of damages (“SoD”), which was accompanied by a statement of truth signed by the plaintiff, stated that, due to “the stiffness and pain in his low back in particular when he turned his body to left”, he could “no longer enjoyed (sic) playing basketball and football because of the said limitation”. The same allegation of not able to play basketball and football was repeated by the plaintiff when he filed the revised statement of damages (“RSD”) on 31 October 2016. Again, a statement of truth signed by the plaintiff was attached to the RSD.
3. We now know that the allegation that he was no longer able to enjoy playing basketball due to the assault incident is completely untrue in the light of the video.
4. In his witness statement filed for the purpose of the present proceedings on 4 July 2016, which was filed after the basketball video was disclosed, the plaintiff repeats his claim that he could no longer enjoy playing basketball and football after the incident. However, he tries to embellish his claim and changed his previous allegation by saying that he had tried to play basketball a few times after the accident but could not move as vigorously as before and could not play for a long time. His back pain would also aggravate after playing. I note that this was not what he said in the SoD and RSD. Further, judging from the video taken by the independent witness, this could not be the case at all. He was seen playing the game in a vigorous and agile manner and apparently was not suffering from any limitation at all.
5. When he attended the examination by Dr Fu in August 2016, the plaintiff tried to change his story regarding his ability to play basketball again. He told Dr Fu that before the injury, he enjoyed “swimming in summer 2 to 3 times a week, playing football once a week, and basketball 2 to 3 times a week”. He claimed that he stopped swimming and playing football after the injury. And his basketball play was mainly confined to practicing on the court and he would avoid joining any matches after injury. He told Dr Fu that he had played less than 5 matches after the injury.
6. In my judgment, this is very different from his initial claims that he could no longer enjoy playing basketball at all after the assault incident. It also differs from what could be seen on the video when he was playing quite vigorously with some young people on the court, albeit not in a competitive match.
7. Further, it is clear that the plaintiff tried to embellish his claim by informing Dr Fu that he still complained of continuous left side low back pain and tightness after injury at the date of the examination. The pain score was claimed to be from 6/10 to 8/10 which was aggravated by weather change, sneezing, full flexion of back and side flexion in left side. He also claimed that he needed to take Panadol 3 to 4 times a week in order to relieve his pain.
8. In view of the video evidence, I do not believe that any of those allegations are true at all. Common sense will tell us that a simple minor soft tissue injury could not have created pain level of that magnitude. Also the claim of having to take Panadol on a regular basis had never appeared in any of the statements prior to the disclosure of the basketball video and, in my opinion, have all the hallmarks of an afterthought.
9. In addition, judging from the mechanism of his injury, ie falling off the chair from the height of 2 feet, even taking into account of the fact that he might have bumped into the chair next to him and landed on his buttocks, it could not have resulted in such serious symptoms as presently claimed by the plaintiff. I accept Dr Fu’s finding that this was a soft tissue injury of the back which the plaintiff has satisfactory recovered from already.
10. I also do not accept any of the new allegations made in the plaintiff’s supplemental witness statement dated 28 October 2016, which was filed uninvited and without prior leave of the court *after* the report of Dr Fu had been disclosed. In this self-serving witness statement, the plaintiff tried to latch on several things mentioned by Dr Fu in his report which had never been mentioned by the plaintiff in any of his previous statements at all. They included the regular taking of painkillers after the accident; the inability of travelling long distance, including taking long-haul flights to the UK to visit his sons and taking long-haul train and vehicle journeys in the Mainland for his business and; inability to climb and to carry heavy weights.
11. All the above complaints in my view have been grossly exaggerated if not fabricated by the plaintiff and were belatedly added to the claim with one single aim in mind only, ie to bolster his claim.
12. In my judgment, it is quite apparent that the plaintiff has recovered substantially, if not fully, from the injury at a very early stage after the incident. Mr Leon Ho, counsel for the plaintiff, accepts in his final submissions that by November 2013, the plaintiff has already *substantially* recovered from the injury. I however find as a fact that, by that date, which was slightly over 3 months after the assault incident, the plaintiff has already *fully* recovered as he was able to fully participate in a very vigorous game of basketball. Any residual pain will be minor and negligible.

*Assessing the damages*

1. At the hearing, the plaintiff only claims damages for (i) pain, suffering and loss of amenities (“PSLA”); (ii) special damages; and (iii) further medical expenses in this case. The claim for past loss of earnings and loss of earning capacity has been sensibly abandoned.

*(i) PSLA*

1. Mr Ho for the plaintiff referred me to a number of cases and submits in his final submissions that an appropriate PSLA award should be in the region of $100,000, having climbed down from the pleaded figure of $150,000 in the ARSD and the further reduced figure of $120,000 mentioned in his opening. Those cases included *Chiu Man Chi v Motorola Asia Pacific Limited,* unreported,HCPI 150/2011, (Bharwaney J; 16.3.2016); *Luo Xiao Rong v Full Trend Development Limited trading as Banquet Delicious*, unreported, DCPI 2418/2014 (Deputy Judge Kam Cheung; 21.12.2016); *Chu Sio Iong v Cheung Ho Yin*, unreported, DCPI 580/2011 (HH Judge Kent Yee; 7.5.2013); and *Tamang Udas v Global Sunny Engineering Ltd*, unreported HCPI 732/2011 (Deputy High Court Judge Woo; 7.1.2013). In my view, the injuries sustained by the plaintiff in our present case are clearly much less serious than those sustained by the plaintiffs in *Chiu Man Chi* and *Luo Xiao Rong*. They are also less serious than those in *Chu Sio Iong* and *Tamang Udas*.
2. Mr Lai, for the defendant, submits that an appropriate award should be at $50,000 or less. I however do not find the authorities cited by Mr Lai helpful: See *Cheung Yu Tin Alvin v Ho Hon Ka* unreported, DCPI 853/2004, (Deputy Judge W Lam; 9.6.2005); and *Chiu Wing Sze Karby v Chan Ying Wai and Chan Ying Kit*, unreported, HCPI 616/1999 (Deputy High court Judge Muttrie; 2.4.2001). Not only those 2 cases are extremely outdated, the injuries sustained by the plaintiffs are rather different.
3. Having taken into account of the cases referred to by the parties and the matters discussed above, I consider that an appropriate PSLA award in this case should be in the sum of $60,000.

*(ii) Special damages*

1. For special damages, the defendant agrees to the medical expenses incurred at $860.
2. For the tonic food claimed at $200, despite the fact that the plaintiff has made no mention of what food was consumed in the ARSD and witness statement nor has he produced any documentary evidence in support thereof, I am prepared to allow such a nominal sum given the fact that under cross-examination the plaintiff did mention that he was advised by his Chinese medical practitioner to take such tonic food: See *Yu Ki v Chin Kit Lam & Anor*, unrep., HCA 2224/1980 (Roberts CJ; 13.5.1981).
3. As for the travelling expenses claimed at $990, regrettably there is no mention of what mode of transport; frequency of taking such transport and the reasonableness of taking such mode of transport in the ARSD or in his witness statement. All we know is that the plaintiff had attended the A&E at POH on 3 separate occasions (the first time admitted by ambulance) and thereafter attended 7 sessions of physiotherapy. We do not know whether the plaintiff had taken a taxi to the hospital from his home on each of those occasions and, if so, why such was necessary given the relatively minor injuries involved. There is also no explanation as to why a more economic mode of transport like taking a public light bus or public bus could not be taken by the plaintiff. In the absence of such evidence, I would consider that a nominal sum of say $300 would be more appropriate to present travelling expenses in this case.
4. For the claim of purchasing Panadol at $2,000, there is simply no medical evidence to support the need for such drugs to be consumed over such a long period of time. There is also no receipt produced. Given my view of the plaintiff’s propensity to exaggerate, I would disallow such claim.
5. The total special damages allowed is therefore at $1,360.

*(iii) Future medical expenses*

1. The plaintiff makes a claim for future medical expenses allegedly for his “residual pain and disabilities”. It seems to be based on Dr Fu’s opinion that the plaintiff may have “on and off pain that requires symptomatic treatment on the need to basis”. The plaintiff claims a sum of $5,000 under this head. Regrettably, there is simply not a shed of evidence to substantiate this claim. There is, for example, no evidence of what sort of treatment will be required, the frequency of such treatment needed and the cost of such treatment on each occasion. Given my view that the plaintiff has fully recovered from the minor injury within a few months after the accident, I doubt if any will be required. I therefore will dismiss the plaintiff’s claim under this head.

*CONCLUSION*

1. In summary, I would assess damages in this case at $61,360, comprising $60,000 for PSLA and $1,360 for special damages.
2. On top of the above sum, the plaintiff is entitled to interest for both general damages and special damages. There will be interest on the PSLA award at 2% per annum from the date of issue of writ to the date of assessment and thereafter at judgment rate. There will be interest on the special damages at half of the judgment rate at 4% from the date of the accident to the date of the assessment and thereafter at judgment rate.
3. The plaintiff is also entitled to costs of the assessment. I make an order nisi that the defendant should pay the costs of the plaintiff for the assessment, such costs to be taxed if not agreed, with certificate for counsel. The order will become absolute in the absence of any application to vary the same within 14 days from the date of handing down this decision.

# ( Andrew SY Li )

# District Judge

Mr Leon Ho, instructed by ONC Lawyers, for the plaintiff

Mr E Lai, of Lam and Lai, for the defendant

1. The above incident can be seen at 43:45 to 44:00 of the video clip [↑](#footnote-ref-1)