## DCPI 1994/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1994 OF 2014

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##### BETWEEN

YU KA YUI (余嘉銳) Plaintiff

and

CHONG CHI FAI (莊志輝) Defendant

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Before: Deputy District Judge Simon Ho in Chambers (Open to Public)

Date of Hearing: 9 September 2016

Date of Decision: 10 February 2017

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DECISION

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*Introduction*

1. By his summons filed on 6 April 2016, the defendant applied to strike out the plaintiff’s claim pursuant to Order 18 rule 19 of the Rules of District Court (Cap 336H Sub Leg) (“the RDC”) on the ground that (1) it discloses no reasonable cause of action, (2) it is scandalous, frivolous or vexatious and/or otherwise an abuse of the process of the Court (“the defendant’s summons”)[[1]](#footnote-1).
2. In the defendant’s summons, he also seeks in the alternative that the plaintiff do pay HK$400,000 into court pursuant to Order 2 rule 3 of the RDC within 14 days, failing which, these proceedings be struck out.

*The procedural history*

1. The present action originated from the plaintiff’s claim brought against the defendant in the Small Claims Tribunal (“SCT”) on 4 June 2013 where he claimed that he had been assaulted by the defendant and his accomplices on 17 June 2010.
2. The original claimed amount was HK$50,000, which was later amended to HK$400,000. Since the amended figure of claim is beyond the jurisdiction of the Small Claims Tribunal, the claim was transferred to the District Court pursuant to the order of Deputy Adjudicator Lee on 30 June 2014 (“the Adjudicator”).
3. After the transfer, the plaintiff had been legally represented by Messrs Lim & Lok (“L&L”) in this action until 23 May 2016. Since then, the plaintiff has acted in person and this remained so at the substantive hearing of the defendant’s summons. On the defendant’s side, Messrs Cheung & Liu has been representing him throughout in this District Court action.
4. On 19 December 2014, the Statement of Claim (“the SOC”) was filed together with the Statement of Damages (“the SOD”). The SOC pleaded that on 17 June 2010, five persons assaulted the plaintiff at the road next to House A38, Maple Garden, Ngau Tam Mei, Yuen Long, New Territories (“the Incident”), and one of the attackers was the defendant. As a result of the Incident, the plaintiff sustained facial and head injury with subsequent loss of consciousness for a few minutes. He was later sent to Tuen Mun Hospital for treatment. Apart from the assault, the SOC also pleaded that the Incident was caused by the negligence of the defendant.[[2]](#footnote-2)
5. On 15 January 2015, the defendant filed his Defence denying the happening of the Incident as alleged. No Reply was filed thereafter.
6. According to para 5(b) of the SOC and para B1 of the SOD, relevant medical reports were supposed to be filed and served together with the SOC at the same time, but this has not been done. The plaintiff’s list of document dated 2 March 2015 (“P’s list of documents”) filed by L&L disclosed no such medical reports either. Basically, it disclosed the plaintiff’s HKID card only.[[3]](#footnote-3)
7. In breach of a discovery order made by Master Chow on 1 September 2015, the plaintiff failed to provide relevant documents supporting his claim of damages as ordered. This prompted Master Chow making an unless order on 12 October 2015 (“the unless order”) granting him a last chance to do so within 14 days, failing which, the plaintiff shall be debarred from adducing any further documentary evidence save for those disclosed in P’s list of documents, viz copy of his HKID card only. Besides, he would also be debarred from filing and serving any Revised SOD (“RSOD”) if he does not do so within 28 days after 12 October 2015.
8. Subsequently, the plaintiff has not complied with the unless order. Neither did he file or serve any RSOD and this eventually brought about the defendant’s summons.

*Relevant principles on striking out*

1. It is trite law that only in plain and obvious cases that the court would exercise its summary jurisdiction to strike out. The burden of proof rests on the party applying for striking out. It must be impossible, not just improbable for the claim to succeed before the court will strike it out. (Hong Kong Civil Procedure 2017, Vol 1, para 18/19/4)
2. In determining such application, there should be no mini-trial on affidavit. Disputed facts are to be taken in favour of the party sought to be struck out. (See *Ha Francesca v Tsai Kut Kan & Ors* (No 1) [1982] HKC 382, per Silke JA at p 392G) Where legal viability of a cause of action is sensitive to the facts, an order to strike out should not be made. (See *AOF Imagine Technology Limited v Global Industrial Services (HK) Limited and Anor* (HCA 953/2012, 28 Aug 2013) per Mimmie Chan J at paras 1 and 8)

*The defendant’s contention on striking out*

1. Ms Deanna Law, counsel representing the defendant, submits that owing to the plaintiff’s failure to comply with the unless order, he can no longer adduce any evidence to prove his damages at trial. But the element of damages as suffered by the plaintiff is one of the necessary legal ingredients for establishing the cause of action of negligence. Hence, the defendant’s claim based on negligence is bound to fail, and the SOC should be struck out.
2. With respect, I think Ms Law’s submission has conveniently ignored the underlying material facts as pleaded in the SOC. Apart from pleading negligence, the pleader has also pleaded the material facts as would be sufficient for mounting the causes of action of assault and battery against the defendant in the SOC. Paras 1 and 2 of the SOC pleaded that the plaintiff was *assaulted* by the 5 persons and one of them was the defendant. Para 3 pleaded that the plaintiff suffered physical injuries (i.e. facial and head injury) and subsequent loss of consciousness for a few minutes as a result of such incident.[[4]](#footnote-4)
3. In law, assault is an act which causes another to apprehend the infliction of immediate unlawful force on his person. And, the least touching of another in anger is battery. Or putting the latter more generally, the direct imposition of any unwanted physical contact on another person may constitute battery. (See *Clerk & Lindsell on Torts* (21st ed), para 15-09, 15-12). Also of note is that the learned co-editors in *Clerk & Lindsell*, at para 15-12 further commented that in popular language an assault includes a battery, and a person may be liable for an assault without being liable for a battery.
4. In contrast with negligence, the tortious causes of action of assault and battery are actionable per se: viz without the need to prove any ensuing damages suffered by the victim of such torts so long as their necessary legal ingredients are present.
5. Ms Law then seeks to argue that it would serve no good purpose to allow the plaintiff to pursue such causes of action against the defendant when he could not be awarded with any substantial monetary compensation even if either or both of these two intentional torts are established. With respect, I do not accept such submission either. In my view, a victim can legitimately pursue the cause of action of trespass to person (including both assault and battery), which is a well recognised claim in tort, for vindicatory purposes even though substantial damages cannot be established.
6. If any authority is needed in this respect, the majority’s decision in *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 would serve as one. In that case, a police officer in the course of a raid of the deceased’s flat searching for drugs killed the latter. Such police officer claimed to have acted in self-defence. The claimants, being the father and son of the deceased, brought actions as dependents under Fatal Accident Act 1976 and for the benefit of the estate under Law Reform (Miscellaneous Provisions) Act 1934 against the chief constable of the defendant police force for damages for, among other things, assault and battery, negligence and false imprisonment in respect of the planning and execution of the raid. The defendant admitted liability in negligence and false imprisonment and agreeing to pay damages flowing from the incident but resisted the assault and battery claim on the basis that the officer had acted in self-defence and applied for it to be struck out. The majority of House of Lords upheld the Court of Appeal’s majority decision to allow the battery claim to proceed to trial notwithstanding that the chief constable’s concession on damages precluded any additional damages payable.
7. Lord Bingham at para 4 of the judgment said:-

“4. As to the second issue, the claimants have an arguable claim for battery of the deceased which cannot be struck out as disclosing no cause of action, which has not been the subject of previous adjudication and which can in principle succeed consistently with the acquittal of Police Constable Sherwood at the criminal trial and without throwing doubt on his innocence. Success in establishing this claim will bring the claimants no additional compensation and may expose them to financial risk. But it is ordinarily for the claimant, properly advised of the litigation risk, to decide what claim, being arguable and legally unobjectionable, he wishes to pursue, and case management, legitimately used to ensure that the court’s process is efficiently and justly used, gives no warrant to extinguish the autonomy of the individual litigant. The claimants’ reasons for wishing to pursue their claim in battery are readily understandable, as are the chief constable’s reasons for wishing to resist it, but it is not the business of the court to monitor the motives of the parties in bringing and resisting what is, on the face of it, a well recognised claim in tort.” (emphasis added)

1. Lord Scott of Foscotte at para 22 also had the following to say:-

“The claim forms issued by the Ashleys simply seek damages for the torts giving rise to the deceased Mr Ashley’s death. These torts include, of course, the assault and battery tort. The only legitimate purpose for which Fatal Accident Act damages can be claimed and awarded for this tort is, in my opinion, compensatory. … Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how compensatory damages can could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place. … Damages awarded for the purpose of vindication are essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all. … It is, of course, the case that if self-defence can be established as an answer to the Ashleys’ claims of tortious assault and battery no question of vindicatory damages will arise. But, unless the claim can be said to have no reasonable prospect of success, that is no reason why the assault and battery claim should not be permitted to proceed to a trial.” (emphasis added)

1. In this action, the plaintiff has prepared a witness statement dated 30 September 2015[[5]](#footnote-5) setting out how he was being assaulted by the defendant and his accomplices.
2. When I perused the Court file for the Small Claims Tribunal’s case (“the SCT file”) which was also made available to the District Court at the time of transfer, I found an incident report prepared by the security office of the Maple Garden (碧豪苑in Chinese) (“the security office”) on 18 June 2010, i.e. the very next day of the Incident (“the Incident Report”). The Incident Report was one of those supporting documents produced by the plaintiff as directed by the SCT earlier in that proceedings. In the SCT file, it can also be seen that the defendant likewise produced his own set of documents in defense of the plaintiff’s claim.
3. It appears common ground that both the plaintiff and the defendant are residents of Maple Garden who resided at House No.A38 and House No.9 of華欣閣 respectively. The Incident Report appeared to suggest that a security guard of Maple Garden, Mr Yeung Tat Ping (transliteration only) had eye-witnessed the Incident. His security guard number is AS23771.
4. The original account (in Chinese) as reported therein is quoted below:-

“2010年6月17日19:15，本處接到華欣閣9號屋業戶來電 [] [][[6]](#footnote-6)，本苑有架私家車阻礙其車房出口，本處當值AS23771楊達平往查証實為碧豪苑A38業戶余先生車輛，遂通知余先生改泊其他合適位置，及後至19:42分再接華欣閣9號屋業戶來電稱因有關車輛未有改變停泊位置，故已自行報警求助，本處AS23771與CT274998再往更進時發現A38余先生被華欣閣9號屋業戶及數名疑似其友人之男子聯合圍毆A38余先生，同時間警車AM7989 AM [] [[7]](#footnote-7) AM6618相繼到場並拘捕9號屋業戶回警處協助調查而A38余先生則送院診治，有關情況交警方跟進。”

1. The above account of the Incident prima facie tallies with the plaintiff’s case that the defendant together with his accomplices has assaulted him on the material date in Maple Garden as pleaded in the SOC. Apart from the Incident Report, there are also a photo taken at the scene contained in the SCT file showing that the plaintiff’s head was bleeding with bruises at his left eye corner and left temporal region and some marks or pattern appeared on his left cheek resembling those impressed by some kind of object(s).
2. On the other hand, the defendant produced his witness statement, wherein although he said that he saw several men attack the plaintiff at the scene, he denied ever assaulting the plaintiff. He said that before the plaintiff was attacked by these men, the plaintiff had been scolding him and even used his hands to push him. He also produced two witness statements given by his two neighbours in a bid to corrobate his defence.
3. It is not this court’s role to decide who is telling the truth on this occasion. It is trite that in striking out applications, any disputed facts of the subject kind should be assumed in favour of the party sought to be struck out. It is also pertinent to note that all the current striking out grounds as contended by the defendant are directed to plaintiff’s negligence claim but not to his case or evidence on the alleged assault and battery.
4. In light of the aforesaid, it is plain that the defendant’s application seeking this Court’s leave to strike out the SOC in its entirety is misconceived and should be rejected. By reason of the above analysis, the SOC does disclose the reasonable cause of action of assault and battery. On the evidence before this court as discussed above, the plaintiff can also demonstrate an arguable claim on such intentional torts against the defendant. In these circumstances, the other striking out grounds as contained in the Summons are likewise unsustainable.
5. In the course of her submission, Ms Law then invited the court to strike out the averment of negligence against the defendant even if the court is not minded to strike out the whole of the plaintiff’s claim.
6. First of all, it is observed that on the face of the defendant’s summons, it only seeks the court’s leave to strike out the SOC in its entirety. The defendant has not identified in his present summons any particular averment as contained in the SOC that should be struck out.
7. In order for the *lis* in this action to be disposed of fairly, the real point of controversy should be properly laid before the trial judge for his or her determination. If para 4 of the SOC is to be amended by substituting the word “negligence” (which only appeared twice therein[[8]](#footnote-8)) with “assault and battery”, such amendment would be consistent with the plaintiff’s case and evidence on assault and battery as discussed above, and the aforesaid purpose can be achieved.
8. Order 18 rule 19(1) does confer power upon the court either of its own motion or on application to amend instead of to strike out a pleadings. In Hong Kong Civil Procedure 2017, Vol 1, the Practice Note 18/19/4 read thus:-

“…

(2) Striking out or amendment – This rule also empowers the court to amend the indorsement on any writ or any pleadings. If a statement of claim does not disclose the cause of action, an opportunity to amend may be given, even though the formulation of the amendment is not before the court (*CBS Songs Ltd v Amstrad* [1987] R.P.C. 417 and [1988] R.P.C. 429. However, unless there is reason to believe that the case can be improved by amendment, leave will not be given. (*Hubbuck v Wilkinson* [1899] 1 QB 86 at 94) …”

1. In this case, I do consider it just and appropriate to grant leave (and such leave is also hereby granted) to the plaintiff to amend his pleadings in such manner as referred to in paragraph 31 above but not to strike out the averment of negligence having particular regard to the following considerations. First, the plaintiff is acting in person and without any legal representation. He had not lodged with this court any skeleton submission but basing on his oral submission made in court, I understand from the plaintiff that he has been for all practical purposes pursuing his claim against the defendant basing on assault and battery, but not on negligence. In my view, apt assistance in appropriate circumstances may be rendered by the court to any litigant acting in person to rectify some plain and obvious error(s) in the pleadings in order to have the real point(s) of controversy clearly and properly laid before the court for its determination.
2. Second, by looking at the plaintiff’s case set out in the SOC, his witness statement[[9]](#footnote-9) and affirmation filed in opposing the defendant’s summons[[10]](#footnote-10) in these District Court proceedings and in the Claim Form filed in the SCT proceedings, together with other evidence produced by him in both sets of proceedings, it is also beyond doubt that his underlying cause of action is based on the assault (in popular sense) or assault and battery (in legal sense) as committed against him by the defendant and his accomplices in the Incident as pleaded in paras 1 to 3 of the SOC. Such acts of the defendant and his accomplices (if established) are clearly intentional tort as opposed to negligence (which is by legal definition unintentional).
3. Third, particulars (a) and (b) as pleaded under para 4 of the SOC also state that – *“(a) hitting the Plaintiff’s face and/or head by iron bar with unreasonably great force resulting in injuries to the plaintiff’s face and/or head. (b) pushing or causing the plaintiff to fall onto the ground resulting in injuries to the Plaintiff”.* In my view, these particulars which effectively describe in details how the assault (according to the plaintiff’s pleaded case under paras 1 to 3 of the SOC) took place should also be retained in the pleadings for the court’s adjudication on the legal causes of assault and battery. It would neither be just nor make good sense by striking out merely the word “negligence” as appeared in para 4 of the SOC but without making such amendment as discussed above whilst the pleaded material facts supporting the live issues of assault and battery are still there for the court’s determination.

*The defendant’s application for payment into court by the plaintiff under Order 2 rule 3*

1. Order 2 rule 3(1)-(3) of the RDC provides that:-

“3. Non-compliance with rules and court orders (O2 r3)

(1) The Court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule or court order.

(2) When exercising its power under paragraph (1), the Court shall have regard to-

1. the amount in dispute; and

(b) the costs which the parties have incurred or which they may incur.

(3) Where a party pays money into court following an order under paragraph (1), the money is security for any sum payable by that party to any other party in the proceedings.”

1. In relation to the defendant’s application under Order 2 rule 3, Ms Law handed up a skeleton bill for the amount of HK$446,650 being estimate of the costs incurred and to be incurred for work done by the defendant’s legal team (inclusive of counsel fees) up to the conclusion of trial.
2. Ms Law referred this court to two decisions both from Her Honour Judge Marlene Ng: one is *Lee Wai Man v Chan Che Ming* (DCPI 1719 of 2008, 19 August 2009) and another is *Chu Kwok Kee Kookie v Ming Chor Po & Anor* (HCMP 704 of 2015, 12 June 2015) where Her Ladyship sits as Deputy High Court Judge. Basically, the learned judge in both cases affirmed the English court’s approach on r3.1(5)-(6A) of Part 3 of the English Procedural Rules (which are effectively the same as Order 2 rule 3(1)-(3) of the RDC[[11]](#footnote-11)) is equally applicable to its Hong Kong counterpart. I also respectfully agree. According to the authorities, Order 2 rule 3 of the RDC empowers the court to impose conditions on a party in limited circumstances. It is only in exceptional cases where there have been repeated breaches of the rules or court orders or otherwise demonstration of want of good faith on the non-compliant party then the court will consider penalizing the relevant party by making an order for payment into court. On the other hand, in exercising such jurisdiction, the court should be alert and sensitive to the risk of the party concerned being denied the right of access to the court by the making of such kind of order. (see *Lee Wai Man* at paras 58-63, and *Chu Kwok Kee Kookie* at paras 34-42)
3. Ms Law submits that the plaintiff’s repeated and continued uncooperativeness demonstrates that there is clear lack of good faith on his part in prosecuting these proceedings. In this connection, she referred to the plaintiff’s failure to file medical report(s) in support of his personal injuries claim to comply with O18 r12(1A) and para 53 of Practice Direction 18.1. That aside, Ms Law also submits that he has failed to comply with the Master’s discovery order and the subsequent unless order directing him to disclose documentary evidence and to file and serve his RSOD.
4. To deal with the matter of RSOD first, it is up to a plaintiff to decide whether he or she needs to revise his quantum position set out in the earlier Statement of Damages. In this case, leaving the question of substantiating evidence for the moment, although no RSOD has been filed, both parties can still refer to the SOD already filed to prepare for their respective cases for the trial. In fact, it is also anticipated under para 3 of Master Chow’s order of 12 October 2015 that when no RSOD is filed, the defendant would be required to file and serve its Answer to the SOD within a certain time.[[12]](#footnote-12) Viewing thus, the non-filing of the RSOD by the plaintiff in these circumstances do not amount to any breach of Master Chow’s order made on 12 October 2015.
5. I now turn to the plaintiff’s non-compliance with Order 18 rule 12(1A) and the corresponding practice direction for filing and serving the relevant medical report(s) together with the SOC at the same time. Such procedural rule and practice direction can help the court and the defendant to appreciate conveniently the substantiating medical evidence on the nature and extent of the plaintiff’s pleaded injuries at the early stage of the proceedings. On the one hand, these rule and practice direction are meant to be followed but not violated, but on the other the court also needs to be vigilant to the implication of the breach(es) in question in the special context of each case to avoid imposing disproportionate sanction in the circumstances, otherwise injustice may ensue.
6. In this case, it is notable that Master Chow in fact made the unless order pursuant to the terms of sanction as agreed between the parties under a Consent Summons filed on 8 October 2015[[13]](#footnote-13). Although the fact of a litigant already being sanctioned for his prior breach of the court rule and/or order may not prevent the court from imposing further sanction on such litigant under Order 2 rule 3 in appropriate circumstances (or to say the least, this court’s attention is not drawn to any authority suggesting the contrary), the prior sanction under the unless order as imposed upon the plaintiff in this case is in my view certainly a relevant factor which this court should take into account in the balancing exercise. In a way, it is observed that the imposition of the prior sanction under the unless order has already properly addressed the breach of previous discovery order as both parties’ solicitors saw fit at the time and endorsed by the court. And, with such prior sanction in place, this court do not see that the trial would be prejudiced in any material respect; or that the prior defaults of the plaintiff would cause any prejudice to the defendant in his conduct of the trial either. To say the least, there is no submission from Ms. Law arguing to such effect or on other prejudice as may be caused to her client which cannot be compensated by costs. (see : *Mealey Horgan plc v Horgan & Anor*, The Times, 6th July 1999[[14]](#footnote-14))
7. It is not in dispute that the plaintiff had indeed been assaulted by some attackers and suffered physical injuries at the site in question on the material date. The key dispute on liability is only a narrow one: whether the defendant was one of the attackers or otherwise gave orders to any of these attackers to assault the plaintiff.[[15]](#footnote-15) Taking a fair and balanced view of the matter, I do not think the trial court would encounter any problem to adjudicate on the question of liability basing on available materials (including the witness statements from both sides and documents produced herein as well as in the SCT proceedings) even without the medical report(s) in question in light of my observation of the plaintiff’s causes on assault and battery (as opposed to negligence).
8. On the question of quantum, the plaintiff in fact also failed to produce the medical report(s) in question as well as other documents as ordered to be disclosed under the discovery order and unless order to his own disadvantage. For, he can now no longer be able to produce any *further* documentary evidence to substantiate his quantum as pleaded in the SOD. But that does not mean the trial judge would necessarily be precluded from considering the available evidence already disclosed in these proceedings as well as in the SCT proceedings to assess the quantum of the plaintiff’s claim if liability can be established. (see also : paragraphs 46-49 below) Though in that event, whether the trial judge would grant the plaintiff any substantial award of damages or not would be entirely a matter for the trial judge in light of the materials then before him or her. All in all, I do not see that the trial court would have any difficulty to assess the plaintiff’s quantum under these circumstances either.
9. Pausing here, I should also mention for completeness sake that on the available materials before me and, in particular, by viewing the aforesaid photo depicting the plaintiff’s injuries as occasioned by the assault, and given the fact that he was attacked by several men (irrespective whether the defendant was counted as one of them or not), the injuries he sustained on that day appears to be quite serious. It is also the provisional view of this court that there is a real chance that the quantum as may be awarded to compensate his pain and suffering and loss of amenities suffered as a result of the assault and battery (if liability can be established) may exceed HK$50,000, i.e. the jurisdiction of SCT. In that light, the transfer of the case to the District Court also appears to be proper. But as discussed above, even if no substantial damages can be established at the end of the day for whatever reason (which assessment is entirely within the trial judge’s prerogative as pointed out above), the plaintiff is still entitled to pursue this action to vindicate his right to be freed from wrongful bodily interference (let alone injury caused by the alleged wilful vehement attack) which is well recognised by the law.
10. The merit of the plaintiff’s claim on assault and battery is also one of the factors that this court should take into account. What is remarkable in this case is that before this hearing, it had come to this court’s attention that the plaintiff had in fact provided quite of a number of documents to the defendant in the SCT proceedings as contained in the SCT file.
11. Among other things, it is observed that in one handwritten statement (undated) submitted by the defendant in the SCT proceedings, he wrote that he still had not received some of the plaintiff’s documents: C14-070, C77-115. As corresponds to this matter, the relevant part of the Adjudicator’s notes for the hearing of 30 June 2014 has in fact recorded that that hearing had once been stood down to allow the plaintiff photocopy all the outstanding documents to the defendant. And after the adjournment break the defendant confirmed with the Adjudicator that he then received all these documents from the plaintiff (including all the abovementioned once-outstanding documents). According to my perusal of the SCT file, the plaintiff’s supporting documents as contained therein includes but are not limited to the Incident Report (marked as C66), the aforesaid photo showing the plaintiff’s head and facial injuries (C67), some medical records issued by Tuen Mun Hospital recording, among other things, that: ‘acute (illegible) of head injury, assault by blunt object; minor head injury, no loss of consciousness.’ (C12-15); a medical certificate issued by Tuen Mun Hospital issued on 19 June 2010 showing that the plaintiff was hopsitalised between 17-19 June 2010, and was granted sick leave for the period from 17 June 2010 to 25 June 2010 for neurosurgical problem (C107); statements of the plaintiff’s daughter (C71-76) and his wife (C77-81) as given to the police in relation to the Incident, etc..
12. The aforesaid documents as supplied by the plaintiff to the defendant in the SCT proceeding are relevant documents and the defendant is equally under a duty to disclose them in the defendant’s list of documents at the discovery stage of this action and yet he had failed to do so. It is trite that each litigant has a duty to disclose not only those relevant documents which tend to support his own case or attack his opponent’s, but also those which are against himself or in favour of the other side. This court has raised the matter of the defendant’s apparent failure to disclose the aforesaid relevant documents with Ms Law. After taking instruction, Ms Law informed this court that his client has not mentioned to her instructing solicitors about these documents. The relevant part of the Adjudicator’s notes and the aforesaid different categories of documents as contained in the SCT file was also brought to Ms Law’s attention at the hearing. Ms Law did not seek for any adjournment of hearing for her client to comment on these documents, or to provide any reason for his failure to disclose these documents. After taking instruction with her instructing solicitor, she asked this court to rule on this application basing on the materials before it.
13. Although this action was assigned with a different case number after the plaintiff’s claim had been transferred to the District Court, this action is a continuation of the SCT proceedings, not separate and distinct from the latter. Had the plaintiff’s claim been proceeded with in the SCT for trial, the adjudicator would have conducted the trial by hearing the parties’ testimonies as well as considering all the relevant supporting documents as produced by each party, ie those as contained in the SCT file. As such, this court cannot simply shut its eyes to these relevant documents when they had come to its attention even if both parties have failed to properly discharge their duty to disclose them earlier in these proceedings.
14. Taking a fair and overall view of the materials and relevant circumstances before me, I observe that the plaintiff would appear to have provided credible evidence to support his claim of assault and battery by the defendant and his accomplices as originated in the SCT. The available materials before this court also tend to show that the plaintiff does have a will to litigate a genuine claim against the defendant in this action. Under the circumstances of this case, I am not satisfied that there is want of good faith on the plaintiff’s part as the defendant contends. Although the plaintiff cannot offer satisfactory explanations for his breaches of the court rule and orders in question, this is only one of the factors which this court should take into account to balance against the others. However, such breaches in the circumstances do not appear to this Court to be deliberate in the sense of the plaintiff intentionally escalating the costs of these proceedings. In my view, any items of claim as pleaded in the SOD that cannot be substantiated by the plaintiff can also be properly dealt with by way of an appropriate costs order at the end of the day as in other litigations.
15. The aforesaid aside, the evidence before me however suggest that both parties have not properly discharged their disclosure duty, but any potential adverse consequence which might be caused to the conduct of this litigation by the breach of the discovery order on the plaintiff’s part is already contained by the unless order and should not cause any prejudice to the trial or any significant prejudice to the defendant as discussed above. It is not the defendant’s contention that the plaintiff would not be good for paying the defendant’s costs if the plaintiff lost in this litigation at the end of the day. Viewing the matter a whole, imposition of further sanction upon the plaintiff under Order 2 rule 3 would be disproportionate in the circumstances. In particular, this court have also borne in mind Order 1A rule 2(2) of the RDC which provides that the court in giving effect to these procedural rules, it shall always recognise the primary aim in exercising its powers is to secure the just resolution of disputes in accordance with the substantive right of the parties.
16. In the premises, after carefully considering the relevant circumstances and balancing different factors in this case, I do not see it appropriate to exercise my discretion to order the plaintiff to make any payment into court under Order 2 rule 3.

*Production of documents by the defendant*

1. In light of the peculiar circumstances of this case, this court nonetheless see it necessary for the defendant to produce all the documents which he received from the plaintiff in the SCT proceedings (including but not limited to those received by the defendant on the day of the hearing before the Adjudicator on 30 June 2014) in order to enable the court to fairly dispose of the plaintiff’s claim on assault and battery against the defendant.

*Conclusion and Order*

1. Due to the above reasons, I order that the defendant’s summons be dismissed. Leave is granted to the plaintiff to amend para 4 of the Statement of Claim as per paragraph 31 above. Normally costs should follow the event. However, having considered the overall circumstances of this case, in particular, the plaintiff was acting in person at the hearing, I consider it appropriate to make no order as to costs of the defendant’s summons and in relation to the amendment and I make such costs order accordingly.
2. Apart from the aforesaid, this court would also exercise its case management power to make an order nisi pursuant to Order 1B rule 3 and Order 24 rule 12 of the RDC that the defendant do produce the documents (as mentioned in paragraph 53 above) to the Court for the purpose of this action within the next 42 days. Such documents as produced would be included in the hearing bundle for the trial of this action. Unless the defendant takes out any application within the next 14 days to vary the above order nisi (by showing good cause as to why such documents should not be produced to the Court), the order nisi would become absolute at the expiry of the next 14 days.

( Simon Ho )

Deputy District Judge

The plaintiff appeared in person

Ms Deanna Law, instructed by Cheung & Liu, for the defendant

1. A/1-2 [↑](#footnote-ref-1)
2. A/23-25 [↑](#footnote-ref-2)
3. B/98 [↑](#footnote-ref-3)
4. A/23/1-3 [↑](#footnote-ref-4)
5. B/156-162 [↑](#footnote-ref-5)
6. two illegible Chinese characters [↑](#footnote-ref-6)
7. illegible number [↑](#footnote-ref-7)
8. The relevant part of para 4 of the SOC which contains the word ‘negligence’ read thus :

   “4. The Incident was caused fully and wholly by the **negligence** on the part of the Defendant.

   Particulars of **Negligence**” (emphasis added) [↑](#footnote-ref-8)
9. B/156-160 [↑](#footnote-ref-9)
10. A/13-16 [↑](#footnote-ref-10)
11. The difference in wordings between the two sets of rules are highlighted by the learned judge at para.57 of the judgment of *Lee Wai Man*. [↑](#footnote-ref-11)
12. A/64/3 [↑](#footnote-ref-12)
13. A/63 [↑](#footnote-ref-13)
14. *Mealey Horgan* is one of English authorities as considered by M Ng DHCJ in *Chu Kwok Kee Kookie* discussing on criteria that the court should take into account when considering application under the English equivalent of Order 2 rule 3 (see : *Chu Kwok Kee Kookie,* para.36) [↑](#footnote-ref-14)
15. see also : plaintiff’s witness statement, para 5 (B/158/5) [↑](#footnote-ref-15)