#### DCPI 2010/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2010 OF 2012

BETWEEN

FONG YU SUM Plaintiff

and

SAE IA ANGKHANA 1st Defendant

CHENG WORAWAN 2nd Defendant

##### Before: His Honour Judge Ko in Chambers

Date of Hearing: 18 November 2014

Date of Decision: 18 November 2014

## D E C I S I O N

1. This is the pre-trial review of this case, the trial of which is scheduled to take place in mid‑January 2015, with an estimation of 4 days.
2. The defendants have taken the opportunity to present 2 applications. Both are opposed by the plaintiff.
3. First, the defendants apply for leave to amend their Defence.
4. A brief summary of the respective case of the parties is in order to introduce the proposed amendment. The following is derived from the pleadings filed.
5. Put simply, the plaintiff is suing the defendants for assault. It is the plaintiff’s case that she had been permitted by the owner of No 13, Third Lane, San Uk Lane to enter the premises to use the kitchen and toilet there and to store her personal belongings. On 13 December 2010, when she tried to enter the premises, the 1st defendant grasped her dress and pulled her away forcefully. The 2nd defendant then joined in the assault, grasping her hair and slapping her face. The defendants then kicked her body, punched her right shoulder and knocked her onto the ground. She cried for help and managed to escape with bodily injuries.
6. On the other hand, the defendants have pleaded that the owner of the premises is the mother of the 1st defendant, and the plaintiff had no business to be at the premises. When the defendants tried to lock up the premises on that day, the plaintiff tried to stop the 1st defendant by twisting the 1st defendant’s finger and forcefully pushing the 1st defendant at the shoulder, causing the 1st defendant to fall. The 2nd defendant came to the rescue and made a 999 call to the police. The plaintiff then assaulted the 2nd defendant by pushing and slapping her, knocking off her mobile phone. As the 2nd defendant was picking up the phone, the plaintiff pushed her to the ground, sat on her and attacked her. Upon seeing that, the 1st defendant ran towards the plaintiff intending to push her aside. In the midst of the chaos, “The 1st defendant lost balance and fell and knocked forcefully onto the plaintiff, causing the plaintiff to fall on the ground” (see paragraph 5(g)).
7. The defendants deny having assaulted the plaintiff. Their present Defence alleges that “the alleged injuries were probably caused when the 1st defendant lost balance and fell and knocked down onto the plaintiff in the midst of the chaos. The defendants were acting no more than self-defence, or alternatively defending or protecting the 2nd defendant from the attack by the plaintiff” (see paragraph 7).
8. The defendants now seek to add a new paragraph 5A raising (for the first time) the defences of *ex turpi, volenti* and contributory negligence.
9. The plaintiff opposes the application on the ground of lateness.
10. In my view, the proposed amendment should be allowed.
11. Reference is made to the Rules of the District Court Order 20, rule 8:

*“It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made ‘for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings’”* (see Hong Kong Civil Procedure 2015, paragraph 20/8/6).

*“Subject to the condition under rule 8(1A), as a general rule, however late the amendment is sought to be made it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise”* (see Hong Kong Civil Procedure 2015, paragraph 20/8/9).

All these sentiments were expressed before the CJR and should of course now be read subject to it.

1. The defendants have already pleaded the defence of self‑defence. The defence is explained in paragraph 30-02 of *Clerk and Lindsell on Torts*. If the plaintiff succeeds, that will be a complete defence to the plaintiff’s claim as whatever done by the defendants on the plaintiff is considered to be lawful. It is an all or nothing defence.
2. According to Ms Yue, representing the defendants today, the defendants want to put in the “new” defences to guard against the possibility that for whatever reason (such as the use of unreasonable force to counter the plaintiff’s advance) the defendants are unable to establish self‑defence at trial. On the basis of the local authority of *Ng Ching Ying*, unreported, HCPI 173/1998, 12 September 2001, she cited, I am satisfied that such defences are open to the defendants based on the present pleadings.
3. As Ms Yue puts it, the defendants are not alleging any new facts to ground these “new” defences. All are based on the existing pleadings. The plaintiff should already have an opportunity to investigate the relevant factual matrix. What is called for by this amendment is the additional legal analysis at the trial on whether these defences are indeed open to the defendants based on the facts established in evidence. These are legal submissions and can be taken care of by trial counsel. The plaintiff has not advanced any argument that she will be prejudiced by these “new” defences. I am satisfied that the proposed amendment would facilitate the real question in controversy between the parties to be fully argued and determined. I will allow the amendment.
4. Secondly, the defendants ask for leave to put in a supplemental expert report by the orthopaedic experts respectively engaged by the parties to clarify whether the plaintiff’s right shoulder injury is consistent with the way the defendants allege the incident to have occurred.
5. It is common ground that the experts had been asked to comment on, *inter alia*, “whether the injuries allegedly suffered by the plaintiff were all caused by the alleged assault described by the plaintiff, or whether the injuries could be a result of the accidental fall described by the defendants” (see No 5 in enclosure 2 to the joint written instructions dated 22 November 2013). All that the experts came back with is the statements in paragraphs 38, 74 and 77 commenting on the plaintiff’s right shoulder injury vis-à-vis the mechanism of injury as described by the plaintiff.
6. Mr Lam, for the plaintiff, argues that the instructions presented the experts with an either-or scenario. By commenting on the plaintiff’s mechanism, the experts have (so he argues) necessarily discarded the defendants’ version. I do not agree.
7. There is nothing in the report hinting at such an approach. The experts may have simply omitted to comment on the defendants’ version of event. The trial judge will not be in a position to determine for himself whether the plaintiff’s injury is consistent with the defendants’ story without the assistance of the experts. The High Court judge who allowed the defendants’ appeal against their criminal convictions of assault occasioning actual bodily harm against the plaintiff had made similar comment in paragraph 39 of her judgment (see HCMA 723/2011, unreported, 15 March 2010).
8. There is no suggestion that the experts would need another examination for the purpose of the supplemental report. Despite earlier indication to the contrary, the defendants now agree that the preparation of the supplemental report will not affect the scheduled trial.
9. For these reasons, I shall give the parties a chance to adduce a supplemental report on “whether the [plaintiff’s] injuries could be a result of the accidental fall described by the defendants” (using the exact wording of the earlier joint instructions to pre-empt any further argument).

*Conclusion*

1. For the above reasons, I shall allow the amendment application. The defendants are to file and serve the amended Defence within 7 days from today based on the draft submitted at the hearing. In all fairness to the plaintiff, I shall give her leave to file and serve a Reply, if so advised, within 14 days thereafter.
2. I also grant leave to the parties to adduce a supplemental joint expert report on the specific question indicated above. The supplemental report is to be filed within 42 days from today, failing which the parties will be at liberty to call the experts at trial.
3. The application to postpone the trial is not pursued, and I grant leave to the defendants to withdraw paragraphs 3 and 4 of the summons.

(Submissions on costs)

1. Despite their success in the argument, the defendants do not seek costs but ask for costs to be in the cause. That is very generous on the part of the defendants, which is agreed upon by the plaintiff.
2. In accordance with the usual practice, I shall order the defendants to pay the plaintiff the costs of and occasioned by the amendment. Save as to that, the costs of the summons, including the costs of today’s hearing, be in the cause.

(Submissions on certificate for counsel)

1. I grant certificate for counsel to the defendants.

# (Justin Ko)

Acting Chief District Judge

Mr Lam Wing, of Yip, Tse & Tang, assigned by the Director of Legal Aid, for the plaintiff

Ms Percy Yue, instructed by Wan and Leung, for the 1st and 2nd defendants