# DCPI 921/2017

[2021] HKDC 598

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 921 OF 2017

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BETWEEN

CHAN KIU YEUNG Plaintiff

and

MAK SHUNG WAI Defendant

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Before: His Honour Judge KC Chan in Court

Dates of Hearing: 4, 5 and 7 May 2021

Date of Judgment: 20 May 2021

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JUDGMENT

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1. The plaintiff claims that she was, and the defendant counterclaims that he was, assaulted by the other in the incident described below (“**the Incident**”) and had sustained physical and psychiatric injuries.
2. The Incident arose out of a traffic incident which occurred at about 9 pm on 30 May 2016 on the road within the estate known as Bellagio, Sham Tseng, Tsuen Wan near the entry gate of the Phrase 2 carpark (“**the Road**” and “**the Carpark**”). It involved the plaintiff, who was then 60 years old, her two sons – Chan Tung Sing, who was aged 36 at the time (“**the Older Brother**”) and Chan Tung Sun, who was aged 34 at the time (“**the Younger Brother**”) (together “**the Brothers**”), and the defendant who was aged 49 then. All of them were residents of Bellagio.
3. In relation to the Incident, the Brothers and the defendant were charged and later tried on 12 October 2016 in the Tsuen Wan Magistrates’ Courts for the offence of fighting in a public place (Case No TWCC 1773/2016). The defendant was convicted on his own plea and fined HK$1,000. The Brothers were acquitted after the Magistrate found that there was no case to answer, having heard the only prosecution witness one Mr Wong Man Wai (“**Wong**”).
4. In the Incident, the parties and the Brothers only sustained minor physical injuries. Of the 4 of them, only the plaintiff was hospitalized for a night as her blood pressure was found to be riskily high. Apparently, the defendant was also advised by the Department of Accident and Emergency of Yan Chai Hospital (“**A&E**”) to be hospitalized, but he left A&E of his own accord at about 4:45 am on 31 May 2016.
5. In April 2017, the plaintiff commenced this action seeking damages in the total sum of HK$1,058,521[[1]](#footnote-1). The defendant counterclaimed against the plaintiff for damages in the total sum of HK$587,731[[2]](#footnote-2). I would mention that no claim for damages for assault has been made by the defendant against the Brothers, even though, as will be seen later, according to the defendant’s version of events, the Brothers were the main assailants against him.
6. The plaintiff and the Brothers gave evidence for the plaintiff’s case, while the defendant was the only witness for his case. Both parties were content not to call Wong as her or his witness, but to admit and rely on Wong’s written statement given to the police on the late evening of the Incident[[3]](#footnote-3) and the transcript of the trial before the Magistrate containing his evidence given in that trial[[4]](#footnote-4).

*The Incident before it became physical*

1. Unsurprisingly, the parties’ respective pleaded case and account as to what happened given in the witness statements of the parties’ respective witnesses, even as to how the Incident started, are very different. I think it fair to say that both sides are understating their own side’s uncivility while exaggerating that of the opposite side.
2. The early part of the Incident was recorded by the car camera of the Audi driven by the defendant (“**the Audi**”). The recording, in the form of two short video clips (“**the Video**”), was proffered as agreed evidence and shown in court. As the Video is a piece of objective and reliable evidence, I give greater weight to it concerning the events depicted therein than parties’ own versions.
3. Since both sides are seeking aggravated damages against the other, I find it necessary to describe in more detail as to how the Incident began and make some findings relating thereto.
4. The Road was a two-lane dual carriageway. It ran along Tower 5, then Tower 3 and then turned right to the Carpark, the entrance to and exit of which were respectively controlled by a bar on either side of the dual carriageway. After the said right turn, there was a distance of about 3 private cars’ length before it reached the bar controlling the entrance.
5. It is not disputed that it was not uncommon for residents to stop their cars on the Road next to the entrance of Tower 5 or Tower 3 to alight passengers before they went on to drive their cars onto the Carpark. The defendant added that the Road was not well lit at night and there had been accidents there before.
6. Counsel for both parties agreed (save two matters) that the Video depicted the following.
7. After passing the main gate of Bellagio, the Audi took a slight left through a round-about onto the Road. It was then travelling at maybe slightly more than 20 km/hour. At about 4 to 5 private cars’ length ahead, the plaintiff’s Benz (“**the Benz**”) was seen stationary and blinking its hazard lights. The Audi at that point slowed down a little bit, but not much. The Older Brother began to walk behind the Benz to cross the Road at normal walking speed. The Audi then turned slightly right to change onto the opposite lane but proceeded onwards without slowing down. The Older Brother was then about to walk pass the middle dividing line onto the opposite lane, and he was looking away from the Audi and towards the opposing direction of the Carpark entrance where traffic would usually be coming. The Audi then, proceeding to drive pass without slowing down, honked loudly once. The Audi then was about slightly more than one private car’s length from the Older Brother when it honked. The Older Brother was taken aback, immediately reacted by retracting his last step while trying, and fortunately able to, keep his balance when the Audi drove right passed him. The Audi missed hitting the Older Brother by a distance of less than 2 feet. It is quite clear to this court that it was a close miss.
8. I will pause here to deal with the following.
9. Mr Wong said that the Video might show that the defendant took his foot off the pedal and slowed down a bit right before the Audi passed the Older Brother. I do not agree. I observed from the Video no such slowing down. Also and notably, in the defendant’s own witness statement, he said he slowed down when he observed the Benz with its hazard lights on and right before he switched lane[[5]](#footnote-5) (which as said, this court also observed from the Video), but he did not say he slowed down yet again, or slowed down a second time, when he was about to drove pass the Older Brother.
10. I reject the defendant’s evidence in paragraph 6 of his witness statement that he was only driving at the speed of several km/hour – which was the speed of an average person walking. That was clearly shown by the Video to be wrong, yet he confirmed that as true in his witness statement.
11. I completely reject the defendant’s explanation in oral evidence that it was a measure for safety that he honked loudly. Quite clearly, a reasonably safe driver would appreciate that he was travelling in the opposite direction of the flow of the traffic of the lane and therefore pedestrians might be (as the Older Brother was) looking away at the direction of where the traffic would usually be coming. Also clearly, a reasonably safe driver should foresee that a pedestrian may react unpredictably (like by freezing or dashing forward) to a warning by loud honking and should slow down to a speed sufficiently slow to be prepared to stop in time. From looking at the Video, the defendant kept driving at about 20 km/hour even though he saw the Older Brother crossing the Road in the manner described and when the Audi was so close to him. If the Older Brother did not retract his last step in time and barely kept his balance, he would have been run over by the Audi. It is in my view clear that the defendant was driving carelessly and unsafely, rather than the Older Brother crossing the Road carelessly.
12. It was clear that the defendant was not honking as a measure for safety. Rather, he was honking loudly to say: “I am driving through regardless, get out of **my** way !”. The defendant’s such driving manners left much to be desired.
13. Going back to the Video, after the Audi just drove pass the Older Brother, the Benz also began to move forward. The Audi then switched back to the left lane and followed the Benz and was about to make the right turn. The Video then recorded the audio of the defendant shouting loudly “what (or who) are you fxxking …” apparently in response to someone. It is common ground that at this juncture the defendant was lowering the window next to him. The Benz then stopped in front of the bar, its driver, the Younger Brother, lowered the window to tap the card against the machine to lift the bar. The Audi did not stop immediately behind the Benz but stopped at a private car’s length behind it. The Benz then did not drive on. The Younger Brother opened the door of the Benz and looked back to the Audi and shouted to the defendant. The swearing and arguing between the defendant and someone shouting at a distance continued all along without stopping. A second or two later, there was a loud door slamming sound and the camera shook. It is common ground that at this juncture the defendant got off his car and slammed the car door hard behind him. The Video then ended.
14. I reject the plaintiff’s and the Brothers’ evidence given in their witness statements that the defendant honked continuously after he drove passed the Older Brother. I find they were exaggerating. As said, the Video only recorded the defendant honked once. I do not accept the plaintiff’s oral evidence that at this juncture, the Older Brother was not shouting loudly, but was only “questioning” the defendant’s manner of driving.
15. I do also not accept Ms Lam’s suggestion that the Younger Brother and the defendant shouted more loudly than the Older Brother. Rather, the Video recorded a male voice shouting from a distance, and shouted so loudly as to be able to be recorded by the camera in the Audi. By all accounts, that male voice would be that of the Older Brother’s.
16. Thus, I find the Brothers and the defendant were shouting loudly at the time. It can be heard from the recording, and I find, that the defendant was all along swearing and shouting foul language. The Older Brother in evidence also accepted he was angry and had also used foul language. I so find.
17. Then shortly after, a scuffle took place.

*The key factual issues on liability – the 3 attacks*

1. I would now identify the 3 factual matters in dispute regarding liability - what I would conveniently label as the “3 Attacks”.
2. It is not disputed that after the Audi drove passed the Older Brother, he walked towards the Audi and the plaintiff followed behind him and that after the defendant alighted the Audi, he, the Older Brother and the plaintiff were standing at the right side of the Audi, with the defendant on one side and the Older Brother and the plaintiff on the other facing each other. The plaintiff claimed that, shortly then after, the defendant lunged forward and fisted her face once (“1st Attack”). The defendant’s case is that he accidentally and unintentionally touched her face.
3. The defendant and the plaintiff respectively denied that the 2nd Attack or the 3rd Attack happened at all. It is thus not clear from the parties’ respective case, or from evidence, as to which of the two was supposed to occur first in time. They were respectively labelled as the 2nd and the 3rd Attack as a matter of convenience only as they have been so labelled at trial.
4. The plaintiff’s case is that after the initial scuffle stopped and the defendant and the Brothers had been separated by the security guards, the defendant suddenly ran towards her and fisted her at the chest (“2nd Attack”). As mentioned, the defendant completely denies that the 2nd Attack happened at all.
5. In respect of his counterclaim, the defendant only pleaded one instance of assault by the plaintiff against him. His pleaded case on this assault (“3rd Attack”) was that after he “touched” the plaintiff’s face, the Brothers attacked him and restrained him and then “at one moment, the Plaintiff then used her hand to grab the Defendant’s genitalia and curse him by saying in Cantonese: “你打我個仔！我要你絕子絕孫！”. A few security guards then arrived and stopped the parties”[[6]](#footnote-6). As mentioned, the plaintiff completely denies that the 3rd Attack took place at all.

*The defendant’s conviction in TWCC 1773/2016*

1. In her written opening, Ms Lam submitted extensively on how the defendant’s conviction shifted the legal burden under s 62(2) of the Evidence Ordinance Cap 8, and that the defendant shall be taken to have attacked the Brothers and that the conviction is relevant to “demonstrate the likely aggressive behaviour of the defendant”, to “infer the state of mind of the defendant” and to “determine the truthfulness of the defendant’s version of events”.
2. Section 62(2) of the Evidence Ordinance provides:-

“(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in Hong Kong - (Amended 37 of 1984 s. 11)

1. he shall be taken to have committed that offence, unless the contrary is proved; and
2. without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge on which the person in question was convicted, shall be admissible in evidence for that purpose.”
3. The offence the defendant was convicted, however, was fighting in public with the Brothers and not related to assaulting the plaintiff. There was only one mention of the plaintiff in the brief facts agreed to by the defendant under which the defendant was convicted[[7]](#footnote-7), the relevant part of which read thus:-

“在上述日期、時間及地點，被告人2 [Younger Brother] 把車停下來，讓被告人1 [Older Brother] 及他們的母親下車，但被告人3 [the defendant] 認為他們阻塞通道。被告人1 [Older Brother] 及被告人3 [the defendant] 下車，就駕駛態度問題爭吵。在爭吵最激烈期間，他們徒手互相打架，被告人2 [Younger Brother] 其後加入打架。”

1. That being the case, I do not find the conviction or the admission of the brief facts probative to the determination of the factual issues relating to the 3 Attacks. As will be seen though, they may be relevant to credibility.
2. The defendant’s case about the conviction was that no weight should be put on it as he pleaded guilty because he was ill-advised by the legal team representing him in the criminal trial[[8]](#footnote-8). In October 2018, the defendant formally complained to the Bar Association against the barrister representing him in that criminal matter. He complained, inter alia, the barrister had not proffered the Video as evidence, which he said would show that the incident was caused by the Older Brother crossing the road carelessly and therefore his own innocence, but the barrister instead advised him to plead guilty. As described and analyzed above, the Video showed that the defendant drove carelessly and unsafely, and not the Older Brother crossing the Road carelessly, and that the Video did not at all record the scruffle. Moreover and quite clearly, even if the Older Brother were in the wrong in the manner that he crossed the Road, that afforded no valid defence to the charge of fighting in public, if that was indeed what the defendant did. Rather, such informs this court that the defendant seems to have difficulty in seeing reason in this matter.

*The 1st Attack*

1. The plaintiff’s evidence is that she walked slightly behind the Older Brother when he walked towards the Audi near the entrance to the carpark. The defendant was repeated swearing loudly the Cantonese foul language of “Fxxk your mother …”. She was offended[[9]](#footnote-9). She retorted back words to the effect that “what are you fxxking, his mother ! I am here”. She said that the defendant then suddenly lunged forward and struck her head hard. In evidence, she was unable to say whether the defendant fisted, or slapped or somehow smacked her. She felt pain and dizzy. She said the Older Brother then separated them and tried to restrain the defendant.
2. The full version of the defendant’s pleaded case is this:-

“9. … The Defendant further avers that :

1. After the Defendant got off from the Audi, the Plaintiff and the Elder Son approached him.
2. The Younger Son, the Elder Son and the Plaintiff confronted the Defendant in an aggressive and abusive manner, causing the Defendant to apprehend and fear of inflictions of immediate force and personal harm on him.
3. The Plaintiff dashed towards the Defendant and used her finger trying to prod to the Defendant’s face and eyes, and at the same time shouting at him in Cantonese : “你做乜鬧我個仔”. In response, the Defendant defended himself by parrying the Plaintiff’s hand and hence accidentally and unintentionally touched the Plaintiff’s face.”
4. In his witness statement, the defendant said:-

“19. … 我看到原告人上半身俯前，用右手食指指向我的眉心與鼻樑之間的位置，她的右手食指指尖與我的眉心與鼻樑之間少於一隻手掌、大概只有幾吋的距離，而她的臉與她舉起指向我的手也很近，幾乎是緊貼着。而同時間她辱罵我，而她指向我的右手食指亦同時前後揮動指向我的眉心，我感覺到她的行為非常之不禮貌，又擔心她的手指會觸碰到我的眼睛，於是本能地用左手撥開她的右手。就在我的左手撥開她的右手時，我的左手手掌有成功撥開她的右手，但同時我的左手其中兩至三隻手指不小心接觸到原告人的右邊面部。這完全是意外，我並沒有刻意接觸到她的面部，而我亦非常肯定我的手指只是輕輕接觸到她的面。…”

1. It can be immediately noticed that the above account in the witness statement is clearly different from the pleaded account in that:-
2. the defendant did not say in his witness statement that the plaintiff dashed towards him;
3. the defendant did not say in his witness statement that the plaintiff tried to prod his face and eyes; and
4. the defendant did not say in his witness statement that the plaintiff at the same time shouted “你做乜鬧我個仔”.
5. Further, despite expressly pleaded “the Defendant defended himself by …”, the defendant’s allegation of “self-defence” was expressly retracted in his opening, and it was stated that the only line of defence was that the contact with the plaintiff’s face was accidental.
6. In cross-examination, the defendant maintained that the plaintiff had not extended her arm when she pointed her finger at him (if the plaintiff extended her arm when pointing her finger at the defendant, it would not be possible for the defendant to hit the plaintiff’s face when parrying her hand). The defendant then explained that the plaintiff’s finger was within inches of his face between the eyebrows, while her hand was also within inches of her face. When pressed by Ms Lam that the plaintiff was much shorter in height than the defendant[[10]](#footnote-10) and it was very difficult to point finger at the defendant’s face close to his eyebrows without extending her arm, the defendant then immediately explained that the plaintiff was in fact standing on the side-walk which was inches higher than where he stood, and then said further that there was an island in the middle of the 2 lanes which was raised and so on. Upon viewing the Video again and looking at the plan of Bellagio[[11]](#footnote-11), it can be clearly seen that the island did not extend that far behind to the position next to the Audi. Upon being so confronted, the defendant reluctantly accepted that the Older Brother and the plaintiff in fact were standing on the Road, and more particularly on the opposite lane, which was at the same level as where he stood. In my view, this showed that the defendant was not giving evidence according to the truth as he best remembered them, but was making things up as he went along to further his own version.
7. The defendant then categorically maintained that his fingers just “lightly touched” the plaintiff’s face. The report by New Town Medical Centre (“**NTMC**”) dated 29 September 2016, reporting the result of the physical examination of the plaintiff that took place the next day on 31 May 2016 clearly set out the finding that “[the plaintiff] was noted to have left side face swelling, but there was no bony tenderness”. Thus, this piece of medical evidence, which I accept, clearly showed that the plaintiff was hit quite heavily on the left side of her face sufficient to cause swelling, rather than had been “lightly touched” as alleged by the defendant, which I therefore reject.
8. In all, I find the defendant’s said version(s) to be a pack of lies and I firmly reject them. I find that the defendant out of anger assaulted the plaintiff by either smacking or slapping the plaintiff on her face and that he was the one who started the scuffle by first striking the plaintiff. I find that liability is established against him on the 1st Attack.

*The 2nd Attack*

1. The plaintiff’s evidence in relation to the 2nd Attack given in her witness statement was in gist the following. After the 1st Attack, the Older Brother separated her and the defendant and also tried to restrain the defendant. The defendant then assaulted the Older Brother, the Younger Brother also came forth to try to restrain the defendant. The security guards also helped, and they successfully separated the defendant who was left to calm himself down. The defendant however continued to swear at them. However, after a short while, the defendant dashed towards her and hit her chest with his fist. She was scared and dodged, but the defendant chased after her to try to assault her. The defendant was then restrained and separated by the Brothers and the security guards.
2. The Older Brother in his witness statement essentially said the same. The Younger Brother in his witness statement adopted the relevant parts of the witness statements of the plaintiff and the Older Brother. However, the Brothers in oral evidence were quick to accept that they had not witnessed the defendant landed his fist onto the plaintiff’s chest. They said their view was blocked by the back of the defendant.
3. The Brothers, however, said firmly that the defendant did dash pass them toward the plaintiff and that the plaintiff did raise her arms in a posture to protect her head and did step back to dodge. I note that in cross examination, the evidence of the plaintiff and the Brothers regarding the defendant so dashing forward towards the plaintiff was not seriously challenged.
4. It seems to me that if the 2nd Attack did happen in the manner described by the plaintiff, she would have been hit in her chest by the defendant with considerable force. She would have felt considerable pain, probably lost balance, if not fell down altogether. However, it is not her evidence (as summarized above) that she felt pain, or lost balance or fell after she was so hit. Rather, she said she was scared and dodged. The Younger Brother further accepted in cross-examination that he did not see the plaintiff lost balance.
5. The report of A&E dated 24 February 2017[[12]](#footnote-12) reported only tenderness on the plaintiff’s anterior chest wall. The NTMC Report stated that on examination the next day “there was **residual** bruises and tenderness at the left 5th rib”[[13]](#footnote-13) (my emphasis). In my judgment, the injury sustained by the plaintiff did not support the manner of the assault as claimed by the plaintiff.
6. Mr Wong further pointed out and submitted:-
7. According to the plaintiff’s allegations, even though there was a scuffle, the 2nd Attack would have been a very distinct event that those present should take note of.
8. There was no record showing that the plaintiff had complained contemporaneously about this 2nd Attack by the defendant.
9. There was no mention of this attack by Wong in his police statement given at about 11 pm the night the Incident happened.
10. Apparently, none of those present, including the plaintiff, reported this 2nd Assault to the police as it was not recorded in the caution statement of the defendant that he was alleged to have assaulted the plaintiff in this 2nd Attack.
11. In the caution statement of the plaintiff recorded on the night of the Incident, and another caution statement made on 19 June 2016, the plaintiff did not deny that she had pushed the defendant but only sought to explain why she pushed him.
12. Therefore, if the plaintiff at some stage had involved herself in the physical action or placed herself so close to the physical action, her minor chest injury might have been caused while she was so involved.
13. As the burden of proof is on the plaintiff, if I do not accept the plaintiff’s account, then the court should hold that the 2nd Attack is not proved on balance of probabilities.
14. While not able to dispute the factual matters pointed out by Mr Wong, Ms Lam submitted that the only reasonable inference in the circumstances was that the plaintiff’s chest injury was caused by the defendant. When pressed by the court, Ms Lam however was not able to substantiate why it was not reasonable or equally probable that the plaintiff might sustain the minor chest injury while she was “involved in the action”. Thus, I do not accept Ms Lam’s said submission.
15. Regarding this 2nd Attack, I do not find myself able to accept the plaintiff’s account, for the following reasons:-
16. As observed above, I note that the plaintiff had a tendency to exaggerate the conduct of the defendant.
17. In coming to my view rejecting her loss of earnings claim, as will be explained later, I find that she was less than honest or reliable in her factual evidence regarding the same with a view to claiming much more than she should be entitled.
18. I thus do not find her generally a reliable and honest witness.
19. Her account was not supported by the extent of her chest injury or her immediate reaction – not losing balance, not fall down, no mention of pain, but scared and dodging.
20. That there was no contemporaneous complaint on her part of the 2nd Attack.
21. Therefore, on the totality of evidence and accepting Mr Wong’s said submissions, I find that on balance of probabilities the plaintiff has failed to prove the 2nd Attack in the manner described and alleged by her.
22. However, I accept the evidence of the plaintiff and the Brothers that the defendant had dashed towards the plaintiff. I accept the Brothers’ evidence that the plaintiff raised her hands in a defensive posture to protect her head and the plaintiff dodged. I thus find that the defendant’s such dashing towards the plaintiff caused her to apprehend the infliction of immediate unlawful force on her person.
23. Since “an assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person”[[14]](#footnote-14) and based on my finding in the preceding paragraph, I find that the defendant had so assaulted the plaintiff, though not battered her as alleged.

*The 3rd Attack*

1. As said, this is the only act of assault complained of in the defendant’s counterclaim.
2. In relation to the 3rd Attack, there was also a lack of contemporaneous complaint in that:-
3. According to the defendant’s allegations, even though there was a scuffle, this 3rd Attack would have been a distinct event that those present should take note of.
4. There was no record showing that the defendant had complained contemporaneously about this 3rd Attack by the plaintiff.
5. Apparently, none of those present, including the defendant, reported this 3rd Attack to the police as it was not recorded in the caution statement of the plaintiff that she was alleged to have assaulted the defendant by grabbing his genitalia.
6. In fact, the only piece of contemporaneous document that had any bearing with this alleged 3rd Attack was the A&E form recording under “triage assessment” and “condition on arrival” the short hand note ”penis pain+”[[15]](#footnote-15). However, later in A&E when the defendant was examined by the doctor for the purpose of filling in the Hong Kong Police Force Medical Examination Form[[16]](#footnote-16), there was not recorded any complaint about penis pain or any complaint that the defendant was assaulted in his genitalia.
7. I find it improbable that had the defendant been so attacked as he alleged, he would not have reported this assault to the police present in the scene or to the doctor in A&E filling in the said form.
8. I turn now to the defendant’s evidence given in his witness statement concerning the 3rd Attack.
9. In his witness statement, he gave the heading “原告人及她的兩名兒子襲擊我的情況” to this part of his account of the relevant events, which began with paragraph 19, a substantial part of which was quoted in paragraph 36 above in relation to the defendant’s explanation of the 1st Attack.
10. He then said that after he “touched” the plaintiff and in less than one second after someone shouted to the effect that he had hit a woman, someone fisted his right forehead hard, that person then grabbed his neck with his right arm from behind, and tightly grabbed his left hand with the other hand. He then said “我感覺到有另一個人用兩個拳頭打我的額頭及頭頂位置”,”前面的人打了我的頭中央附近位置大約十數下”[[17]](#footnote-17). According to him, the one grabbing him from behind was the Older Brother, and the one fisted him on his head over ten times was the Younger Brother.
11. The defendant then described how he managed to free himself and how a security guard restrained the Older Brother by bear-hugging him from behind and how the Younger Brother was pulled away by another security guard. Then he gave the account of the 3rd Attack in paragraph 25 of his witness statement thus:-

“接着下來的3至4秒，護衛員似乎已成功控制到原告人的小兒子，我和他沒有任何接觸。突然，原告人衝到我前方，面向我，同時，我感覺到我的下體被她的一隻手用力捏着兩、三秒。同時，原告人哄在我左耳邊說：「你打我個仔，我要你絕子絕孫！」。我的下體非常痛楚。”

1. In paragraph 27 of his witness statement, he explained why the plaintiff was able to so attacked him (bearing in mind the plaintiff was a 60 years old slim build woman and the defendant was 49 years old and 169 cm tall), thus:-

“由於原告人行動迅速，而且我當時剛剛頭部受襲擊有些暈眩及剛成功掙脫她大兒子的控制，所以我來不及作出任何反應阻止原告人襲擊我的下體這行為。”

1. In cross examination, the defendant said that in all these times, he had only used his left hand once to fend off the Older Brother and swung his fist once against the Younger Brother but missed; and that otherwise he had not fought back.
2. To begin with, this court finds the defendant’s said account – namely, that he was first fisted hard on the head by the Older Brother, then was restrained and then fisted by the Younger Brother over ten times on his head, and he only countered twice - highly improbable and incredible. Had he been so fisted on his head for over ten times, he would have sustained much more serious head injuries, and not just tenderness and redness on right forehead[[18]](#footnote-18); and A&E would in all probability have run scans to his head to make sure there was no internal injuries; and he would not have left A&E of his own accord at 4:45 am on 31 May 2016.
3. When pressed during cross-examination as to why he did not do anything to defend himself when he was facing such frontal and vicious attack by the plaintiff for several seconds. He immediately answered that he was restrained. When further asked, he said he was restrained by the security guards.
4. I pause to note that in his witness statement, the defendant never mentioned that he was restrained by the security guards, or was restrained at all, when he was so allegedly attacked by the plaintiff. In fact, he said he just freed himself of the restraint by the Older Brother.
5. Ms Lam then confronted him with what he pleaded in paragraphs 9(4) and (5) of his Defence and paragraph 19(7) of his Counterclaim, that it was the Brothers that had restrained him:-

“9(4) The Elder Son and the Younger Son then attacked the Defendant and constrained (sic) the Defendant’s motion by holding his neck, arms tight and firm.

(5) At one moment, the Plaintiff then used her hand to grab the Defendant’s genitalia and curse him …”

“19(7) The Plaintiff must have known that the Defendant, being constrained (sic) by the Elder Son and the Younger Son, was unable to defend himself and to attack anyone, and hence it was totally unnecessary and unreasonable for her to assault the Defendant.”

1. The defendant then said that he was in any event restrained, whether by the security guards or the Brothers he could not be sure. However and importantly, the reasons given in his witness statement were that (a) the plaintiff moved fast (行動迅速)，(b) he was still dizzy as he just freed himself from the Older Brother (而且我當時剛剛頭部受襲擊有些暈眩及剛成功掙脫她大兒子的控制). Moreover, according to the account given in his witness statement, it was the Brothers who were then restrained by the security guards to stop them from further attacking him, but in the pleading, he said that it was the Brothers who restrained him.
2. Thus, I find that the defendant gave 3 very different versions over very material aspects of this alleged 3rd Attack – in the pleadings, in his witness statement and during his oral evidence - regarding the circumstances of this alleged 3rd Attack.
3. Considering the various instances mentioned above in which I adversely commented on his evidence and particularly all these changes and versions in his evidence regarding this 3rd Attack, I find myself singularly unimpressed with the defendant as a witness and I do not find his evidence regarding this alleged 3rd Attack reliable or credible at all.
4. Also, I consider it inherently highly improbable that the plaintiff would attack the defendant in the manner alleged for the following reasons:-
5. After having been smacked or slapped in the face hard by the defendant in the 1st Attack, the plaintiff in all likelihood would be very wary of further violence committed by the defendant against her. By all accounts, the temper of the defendant was still very flared up. It would have been most daring and risky of the plaintiff to approach the defendant, as he said, from the front and then grabbed his genitalia for seconds and then placed her head close to the defendant’s left ear and murmured the curse. Even if the defendant were held down, the defendant could have kicked her, could have bumped her head hard with his shoulder, could have struggled free to fist or smack her in retaliation and so on. In the circumstance, I find it most hard to believe that the plaintiff would so risk it.
6. By all accounts, at that juncture there were security guards present, and it was not seriously disputed that other onlookers who were probably residents of Bellagio had also gathered around. Bearing in mind that the plaintiff such alleged attack on the defendant’s genitalia would be regarded as a very vulgar move, it would be quite improbable that the plaintiff would do so in the plain sight of very one.
7. According to the defendant’s account, at the time it was the Brothers who were assaulting the defendant quite severely by fisting his head over ten times, it is hard to connect why the plaintiff would murmur 「**你打我個仔**，我要你絕子絕孫！」(my emphasis) as the reason for her alleged attack.
8. As said in paragraph 54 above, there was no contemporaneous complaint of this attack by the defendant.
9. I also note that Wong in his said police statement did not mention that the plaintiff had assaulted the defendant at all. In fact, Wong there in the pen-ultimate paragraph of his police statement said :-

“我見到嗰3男1女都係有輕微受傷，無血流披面，全程我見到都係嗰3個男人有打鬥而個女人全程都係企喺旁邊，無郁過手。”[[19]](#footnote-19)

1. For all these reasons, I reject the defendant’s evidence regarding this alleged attack. I do not find the 3rd Attack established.

*Dismissing the defendant’s Counterclaim*

1. It follows that I would dismiss the defendant’s Counterclaim. In the circumstances, I do not find it necessary, and do not propose, to give my view regarding what amount of damages the court would have awarded had his claim been upheld.

*The plaintiff’s injuries and treatment*

1. A&E recorded there was tenderness over the plaintiff’s face and chest wall. A&E also found that the plaintiff’s blood pressure jumped to 234/148 mmHg, for which she was hospitalized for observation. She was given 2 days’ sick leave by Yan Chai Hospital. As mentioned, the NTMC reported that the plaintiff was found on 31 May 2016 to have suffered from left face swelling. She was seen by NTMC 2 more times on 3 June 2016 and 31 August 2016. She also received certain medical treatments in the PRC, but no medical report concerning them was proffered.
2. The plaintiff said that she was also injured psychiatrically. She said she was fired by her employer on 30 June 2016, a month after the Incident. I will return to this matter when I consider her claim for loss of earnings.
3. The plaintiff then consulted NTMC again on 20 January 2017. A referral letter issued that day noted that she had headache, high blood pressure and was not sleeping well since the Incident.
4. The plaintiff then saw Dr James Wu on 30 June 2017 who referred her to see a Psychiatrist of the Union Hospital. Since then, the plaintiff had seen Psychiatrist Dr Vivian Leung of Union Hospital on 11 occasions until 5 October 2018.

*Expert Report of Dr Chung See Yuen*

1. The plaintiff was interviewed by the parties’ joint single Psychiatry expert Dr Chung See Yuen on 6 January 2020 and he compiled his report dated 6 February 2020 (“**the Report**”).
2. Dr Chung noted in the Report that the plaintiff previously had good physical and mental health with no family history of mental illness.
3. Dr Chung noted that the plaintiff had the following complaints:-
4. She has mild headache and dizziness occasionally.
5. She is anxious when she sees a white car.
6. She initially had worries about her sons but that decreased after their acquittal from the criminal charge.
7. She is depressed and does not have motivation to go out because she and her sons were beaten and she has lost her job.
8. Her memory was poor and she attributes it to the many medicine she is taking.
9. She cannot sleep well and is sleepy during daytime.
10. Her mental condition was bad for a few months after the Incident, which improved after she received treatment. Her mood got worse after the defendant claimed that she had assaulted him and made him sexually impotent. Her mental condition seems to be normal when she is not reminded of the Incident.
11. Examining her mental state, Dr Chung found her mood was mildly low, though not anxious when recounting the Incident. She was cooperative and forthcoming and had good understanding of her circumstances. Her speech was relevant and coherent. She was oriented to time, place and person. Her intelligence and memory function were normal. Her concentration was not affected. There was no hallucination or delusion.
12. Dr Chung diagnosed her as displaying some symptoms of posttraumatic stress disorder (“PTSD”) only and not PTSD. And the symptoms were wholly caused by the Incident.
13. On the nature and extent of her psychiatric problems, Dr Chung concluded:-
14. She had largely recovered from the symptoms.
15. She is currently manifesting mild residual anxiety and depressive symptoms, but such are subjective.
16. Objective mental state examination findings are mostly normal and do not support her mental complaints.
17. She is mentally fit to perform all activities of daily living and housework.
18. On working capacity and sick leave, Dr Chung opined that:-

“37. I believe she is mentally fit to return to her pre-incident job and persist at the job. Her mild psychiatric symptoms should not prevent her from returning to the pre-incident job. The alleged dismissal from the job cannot be explained from the psychiatric perspective. Any adverse effects of the mental problems on her work efficiency would be slight.

38. … I believe sick leave from the psychiatric point of view is not necessary.”[[20]](#footnote-20)

1. Dr Chung opined that the psychiatric treatment the plaintiff received in the private sector for around one year was appropriate and adequate and no further treatment was needed. Dr Chung found that there was no loss of earning capacity due to the mental problems.
2. As it is a joint report and there is no other dispute about any of Dr Chung’s findings and opinion, I accept them in full.

*Pain, suffering and loss of amenities (“****PSLA****”)*

1. As have seen above, the physical injuries suffered by the plaintiff was slight and psychiatric injuries relatively mild.
2. Ms Lam contended that the appropriate award for PSLA would be HK$200,000. She referred the court to 8 cases in which the PSLA awards ranged from HK$350,000 to HK$100,000. I would only mention the names of those more pertinent cases, namely: *Law Yau Keung v Chu Sai Chuen* HCPI 846/2011, *Chan Chun Wai Jose v Cheung Tak Sing* [2020] 1 HKLRD 595 and *Wong Ka Wai Johnny v Lee Man Wai* DCPI  145/2010.
3. Mr Wong contended that HK$80,000 would be appropriate and cited the following cases, PSLA awards ranged between HK$90,000 to HK$10,000, as comparable: *Wong Ka Wai Johnny v Lee Man Wai* DCPI 145/2010, *Wo Wang Fu v Wong Kwok Hung & Another* HCPI 821/2014 and *Chung Yin Ting v Chan Miranda* HCPI 1008/2015 [2019] HKCFI 270.
4. Without the need to comment on each of the above cases individually, I would just note that most cases cited by the plaintiff involved other more serious physical injuries such as multiple lacerations, soft tissue injuries, multiple contusions and sprains and more serious psychiatric injuries in the form of diagnosed PTSD (though mild). The latter 2 cases cited by Mr Wong were traffic accident cases that I find not as helpful.
5. *Wong Ka Wai Johnny*’s case is comparable and I find myself guided by it. The plaintiff there was a male aged 26 working as a security officer posted at the service counter of the estate known as Manhattan Hill. On an occasion in very small hours, the defendant approached the counter and not finding the morning shift security guard she was looking for, she scolded the plaintiff, smashed two vases and a glass notice board and kicked the plaintiff causing tenderness and bruising on his right knee. Though the experts there agreed on the diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood and PTSD, after a careful analysis HHJ Kent Yee found that the psychiatric injuries were mild. The learned Judge awarded HK$100,000 for PSLA. The award was made in January 2012.
6. A lesser amount should be awarded in this case than that in *Wong Ka Wai Johnny*’s case because (a) the plaintiff there also suffered from the Adjustment Disorder, and (b) sick leave of about 10 months were accepted as appropriate in that case.
7. In the round and allowing some inflation, I think an award for PSLA in the sum of HK$95,000 is reasonable and appropriate.

*Pre-trial loss of earnings*

1. Prior to the incident, the plaintiff worked as the vice general manager in a garment factory in PRC. According to the plaintiff, she was earning a monthly salary of RMB 23,000. She said she was laid off on 30 June 2016. A short letter from the factory[[21]](#footnote-21) was produced in which it said that the plaintiff was dismissed because she was found to be no longer fit to perform her job (“本公司發現陳女士身體狀況不佳，不適合出任現時的職務”).
2. The plaintiff now claims pre-trial loss of income for the 2 days’ sick leave period issued by Yan Chai Hospital and for the period from July 2016 up to 30 October 2018 when she was receiving psychiatric treatment. The plaintiff’s such claim totals to HK$734,070.
3. It is trite that a claim for loss of income is founded on the plaintiff’s inability or unsuitability to work. Almost invariably, this would be established either by the sick leave certificate issued by the treating doctors certifying that medically the plaintiff was unfit to work and/or by the expert opining so. It is also trite that the fact that the plaintiff had been receiving treatment, merely by itself, is not sufficient to show that the plaintiff was unable or unsuitable to work during the treatment period.
4. In this case, it is the plaintiff’s own case that she was only given the sick leave from Yan Chai Hospital from 31 May 2016 to 1 June 2016[[22]](#footnote-22). Moreover, the expert Dr Chung clearly opined, as quoted in paragraph 84 above, that sick leave from the psychiatric point of view was not necessary.
5. I therefore do not find the plaintiff’s loss of income claim regarding the period she received treatment established.
6. Furthermore and for completeness, I would record that I do not find myself able to accept the plaintiff’s evidence that she was laid off on 30 June 2016 as she said.
7. The evidence elicited at trial in gist was this. The plaintiff since quite young had been operating and running a garment factory in Shenzhen named新昇平owned by her husband. She had been the registered legal representative (法人) of新昇平. Her husband also owned and operated another limited company in Hong Kong named冠年that developed and marketed new garment styles and designs (with the assistance of新昇平which would produce the samples) and would solicit and receive orders of them which would be manufactured by新昇平. According to her, 新昇平was later sold to certain senior employees of新昇平and was renamed 駿力. She accepted that the persons who bought 新昇平were trained and raised up by her. It was not at all clear from her oral evidence as to when or for how much新昇平was sold. According to her, after the factory was sold, she worked as an employee occupying the position of vice general manager. 駿力was a sizable operation. It had about 500 employees. As vice general manager, she managed the factory, the workers, and she was the top technical consultant. One of her main responsibilities was visiting factories that supplied the clothes and other materials to ensure that the materials supplied would be up to specifications, standard and quality. She said she drove by herself, without being accompanied by other employees of駿力, to visit these factories. The Older Brother said that when the orders were time-pressed, she would even drive to several factories a day for several days to get things done. The Older Brother since his graduation until now has been working in冠年even after新昇平was so allegedly sold, and he continues to partner with駿力in their business endeavours. As mentioned, the plaintiff only received a monthly salary of RMB23,000 for undertaking the aforesaid duties.
8. The plaintiff said in her witness statement that she was laid off after the Incident because she had failed to control the quality of one lot of denim trousers (10,129 pairs) such that the price the factory received was deducted by 10%, about HK$100,000. When pressed that with 500 workers, the turnover of the factory would be huge and HK$100,000 a comparatively very minor sum in the scheme of things, that therefore it was quite incredible that the factory would fire her over it, bearing in mind her long history with the factory and her great experience and knowledge. The plaintiff then added that the real reason was because she could not drive after the Incident and the factory refused to provide her with a driver. This was not mentioned in her witness statement.
9. I find her story of being so fired by the factory highly inherently improbable and incredible and do not accept them for the following reasons:-
10. She was clearly evasive in answering questions regarding the timing, details and the price that新昇平was sold to駿力. No clear answers were given despite a number of questions from counsel and from the bench trying to elicit clear answers. She was indisputably the person operating, running and managing this sizable factory for decades. She was evidently a very capable person. I find her inability to give clear evidence on these matters unbelievable.
11. It is indisputable that none of the medical reports presented in this trial was available at the time the factory allegedly fired her. Bearing in mind her great experience and knowledge in the trade, and her long history and service with the factory, I find it completely incredible that the factory would fire her over a deduction in price of HK$100,000 on one occasion and based on an unsubstantiated view of her “inability” to perform her duties.
12. I find that her reason given for the first time at trial that she was fired as the factory was not willing to provide a driver an afterthought, and a disingenuous one. I do not believe it at all.
13. Considering that she was the only person entrusted to visit the factories of the suppliers and her willingness to work extra and very hard when the orders were time-pressed, I find that the trust and responsibility that was placed on her by the factory and the effort she was putting in were such that I do not believe she had no stake in the factory’s business and was only an employee receiving a monthly salary of RMB23,000.
14. Save and except two pages of tax record[[23]](#footnote-23) that bear no reference to the factory or any detail of her employment and the short letter mentioned about, there was **no** other documentary proof proffered relating to her employment, the alleged incident when the factory suffered the HK$100,000 deduction and so on.
15. I thus find against her claim for loss of income save that for the two days’ sick leave in the sum of RMB 1,533, equivalent and rounded up to HK$1,900.

*Aggravated damages*

1. The defendant’s behaviour in my view was egregious. He suddenly lunged forward and smacked or slapped the plaintiff, an aged and dignified old woman, on her face hard. This occurred in a public area of the estate the plaintiff and other members of her family have been residing in for over 10 years. At least one of the security guards (as can be seen in the Video) was present when the 1st Attack took place. There were other onlookers, most likely residents and drivers and passengers of the cars that were blocked by the Benz and the Audi. It was clearly a scene. I accept that the plaintiff has suffered hurt feelings, wound in her dignity and pride, and mental discomfort and distress.
2. This is in my view a clear case to award aggravated damages.
3. Ms Lam submitted that an award of HK$40,000 is appropriate while Mr Wong submitted HK$10,000 is. I have considered the cases they referred me to, namely *Chung Lai Ha v Ching Mei Yee* (DCPI 2755/2012, unrep, 20 January 2014) and *Li Wing Kwai v Chan Hau Yu* (DCPI 673/2013, unrep, 5 September 2014). I bear very much in mind the principle that an award of aggravated damages should be compensatory in nature and should be moderate. In the round, I consider a sum of HK$30,000 fair and reasonable, and I so award.

*Special damages*

1. The medical expenses paid to Yan Chai Hospital and NTMC in the total sum of HK$1,430 was agreed. From the receipts produced[[24]](#footnote-24), I am satisfied that a total sum of HK$30,128 was paid by the plaintiff to Union Hospital for the psychiatric treatment and medications she received from June 2017 to October 2018. Dr Chung opined that such treatment was appropriate and adequate and noted that the plaintiff showed improvement after receiving the same. I would therefore allow this sum. The medical expenses allowed total to HK$31,558.
2. The plaintiff claims expenses for tonic food in the sum of HK$52,000. Two receipts by the same dispensary both dated 2 July 2017 were produced in the respective sums of HK$9,900 and HK$42,100. The receipts just stated “Chinese medicine” as description. Certain illegible prescriptions in Chinese were attached to the receipts. In the plaintiff’s witness statement, there was nothing said about these tonic food/medicine and the expenditure of the said sum of HK$52,000. Evidently, there is no expert opinion proffered supporting that they were related to the plaintiff’s injury caused by the defendant’s assault or that they were necessary and reasonable. I therefore would not allow such sum.
3. The defendant through Mr Wong indicated that he was prepared to accept HK$5,000 as a reasonable amount for tonic food. I think the sum is reasonable and would so award.
4. The claim for photocopying charges of the medical reports was withdrawn. The total amount of special damages awarded therefore is HK$36,558.

*Disposal*

1. In the premises, I give judgment in favour of the plaintiff in the amount of HK$163,458 (HK$95,000 + HK$1,900 + HK$30,000 + HK$36,558) and dismiss the Counterclaim.
2. I award to the plaintiff interest on general damages at 2% per annum from the date of the service of the Writ to the date of this judgment, and interest on special damages at half judgment rate from the date of the Incident to the date of this judgment, and thereafter all sums at judgment rate until full payment.
3. I order on nisi basis that the defendant pays to the plaintiff the costs of this action, including the Counterclaim and all costs reserved, with certificate for counsel, to be taxed if not agreed. This order will become absolute after 14 days from today unless any party applies within that time to vary.
4. I thank Ms Lam and Mr Wong for their assistance.

( KC Chan )

District Judge

Ms Stephanie Lam, instructed by Oldham, Li & Nie, for the plaintiff

Mr Martin Wong, instructed by Ernest Tang, Solicitors, for the defendant

1. By her Revised Statement of Damages dated 6 April 2020 [↑](#footnote-ref-1)
2. By his Further Revised Statement of Damages dated 3 April 2020 [↑](#footnote-ref-2)
3. P 301-303 of the Trial Bundles [↑](#footnote-ref-3)
4. P 324 -336 of the Trial Bundles [↑](#footnote-ref-4)
5. At paragraph 6 of his witness statement at p 137 of the Trial Bundles [↑](#footnote-ref-5)
6. Paragraphs 9(5) and (6) of the Defence [↑](#footnote-ref-6)
7. P 319-321 of the Trial Bundles [↑](#footnote-ref-7)
8. Para 11 of the Defence [↑](#footnote-ref-8)
9. She did not use the word “offended” in evidence, but it was quite clear to this court that that was what she was trying to express. [↑](#footnote-ref-9)
10. The defendant was said to be about 5’7” in height (169cm) while the plaintiff was only of very slim build of about 5’ tall. [↑](#footnote-ref-10)
11. P 283 of the Trial Bundles [↑](#footnote-ref-11)
12. P 156 of the Trial Bundles [↑](#footnote-ref-12)
13. P 154 of the Trial Bundles [↑](#footnote-ref-13)
14. *Collins v Wilcock* [1984] 1 WLR 1172 at 1178; *Clerk & Lindsell on Torts* 23rd ed paras 14-12 [↑](#footnote-ref-14)
15. P 34 of the Agreed Bundle of Medical Records [↑](#footnote-ref-15)
16. P 306-307 of the Trial Bundles [↑](#footnote-ref-16)
17. Para 22 of his witness statement [↑](#footnote-ref-17)
18. P 306-307 of the Trial Bundles and Agreed Brief Facts in TWCC 1773/2016 [↑](#footnote-ref-18)
19. P 303 of the Trial Bundles [↑](#footnote-ref-19)
20. P.188 of the Trial Bundles [↑](#footnote-ref-20)
21. P 212 of the Trial Bundles [↑](#footnote-ref-21)
22. Paragraph 22 of the plaintiff’s Revised Statement of Damages at p 73 of the Trial Bundles [↑](#footnote-ref-22)
23. P 215 & 216 of the Trial Bundles [↑](#footnote-ref-23)
24. P 222-232 of the Trial Bundles [↑](#footnote-ref-24)