## DCPI 1041/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1041 OF 2013

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##### BETWEEN

KUMARA DEBANAMA Plaintiff

### and

LUI PUI WAI 1st Defendant

TAM SHUK BING 2nd Defendant

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 15 – 17 and 29 February and 18 April 2016

Date of Judgment: 29 July 2016

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JUDGMENT

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*INTRODUCTION*

1. This is a personal injury claim brought by the plaintiff arising out of a dog biting incident.

*BACKGROUND*

1. On 24 November 2011, the plaintiff was bitten by a large dog (“the Dog”) owned by the 2nd defendant within the boundary of a fenced off area on a hillside (“the Backyard”) situated at the back of the defendants’ village house at No 43, On Li Sai Village, Lei Yue Mun, Kowloon (“the Village House”). The 1st defendant lived in the Village House with members of his family, which included his father and brother. The 2nd defendant is the partner/girlfriend of the 1st defendant’s father who also lived in the Village House. On the day of the incident, the plaintiff had entered the Backyard with a friend of his by the name of Matuwagala Seewalee Thero (“Thero”). He was bitten severely by the Dog while inside the Backyard and thereby suffered serious personal injury as a result (“the Incident”).

*The undisputed facts*

1. The following facts are not in dispute between the parties:-
   1. The plaintiff was a 38 year old Sir Lankan at the time of the Incident who came to Hong Kong in 2004 and was arrested by the Police in 2006 for overstaying. After his arrest, he made a claim under the Convention Against Torture (“CAT”). His CAT claim was being processed by the authorities at the time when the Incident happened. He was and is still waiting for the result of his application for refugee status. In the meantime, he has been released by the Immigration Department on recognizance until further deportation order and/or settlement.
   2. The defendants resided at the Village House together with other members of the family.
   3. The Village House situates at the hillside of Lei Yue Mun village, famous for its seafood.
   4. The defendants and their family had unlawfully fenced off the Backyard, which was on Government land, for their own private use.
   5. The Backyard ran from the back of the Village House all the way up to the top of the hill with several terraced levels connected by steps.
   6. The defendants had planted a garden within the Backyard with trees, plants and shrubs. Paved ground and concrete steps could be found inside.
   7. The 2nd defendant was the registered owner of the Dog, with a micro chip implanted.
   8. The Dog was a large dog (weighted 40.2 kg) but not a “fighting dog” or “known dangerous dog” within the definition of the Dangerous Dogs Regulation, Cap 167D (“DDR”).
   9. The Backyard was enclosed by fences made of wire mesh and metal poles. There were 3 metal gates, each can be secured with a bolt latch and locked with a padlock (both the bolt latch and the ring for the padlock were located at the back of the gates, ie facing inside rather than outside of the Backyard[[1]](#footnote-1)).
   10. The metal poles and wire mesh, which were used to fence off the perimeter of the Backyard, were about 3 meters in height.
   11. Wooden warning signs displaying the Chinese words in red 「內有惡犬」 (which literally means “Fierce Dog Inside”) were hung on the wire mesh of the fence at eye level next to each of the 3 metal gates. It is not in dispute that there was such a warning sign displayed at Gate B through which the plaintiff had gained access to the Backyard.

* 1. The entrance of the Backyard at the lower level near Gate C[[2]](#footnote-2) could be accessed through a path running up to the top of the hill, situated within the confine of the Backyard.
  2. There was also a footpath running up the hill outside of the wire mesh fences parallel with that running within the fences near Gate B which was situated in the middle of the hill.
  3. An ancestral grave of the defendants’ family could be found outside of Gate A at the top of the hill. Another ancestral grave could be found outside of Gate B in the middle of the hill.
  4. A large kennel/dog house could be found inside the Backyard right behind Gate B as one enters.
  5. The footpath outside the wire mesh fence was quite steep and ragged. It did not seem to be leading to anywhere. There was no road sign, direction sign or any mark or signpost in the vicinity suggesting that the path or the Backyard could lead to anywhere.

1. On the date of the Incident, at about 6:00 pm, the plaintiff was bitten by the Dog while he was found well within the Backyard near to the top of the hill near to Gate A. Thero, the plaintiff’s friend who was with him when the Incident happened, managed to escape outside of Gate A when the Dog was biting the plaintiff.
2. Upon hearing the commotion, the 1st defendant had, together with his youngest brother, run up to the hillside to investigate. The 1st defendant asked the plaintiff and his friend to show their identification documents and claimed that they were trespassing onto their home. Thero, who was still outside Gate A, showed his paper to the brothers.
3. There is no dispute that during the Incident, the Dog has bitten the plaintiff on his leg and hand badly. The plaintiff was bleeding profusely by the time when the 1st defendant and his brother reached him. After the 1st defendant set him free from the Dog, the plaintiff was allowed to leave the Backyard through Gate A and walked down the hillside along the footpath outside of the fences with his friend.
4. After the Incident, the matter was reported to the Police by the plaintiff. Police classified the Incident as a “Dog Bite” case with no further investigation as the Police considered the plaintiff and his friend had trespassed into a private premises.
5. The matter was also reported to the Agriculture, Fisheries and Conservation Department (“AFCD”). Various statements had been taken from the plaintiff, Thero and the 1st & 2nd defendant respectively. After investigations by AFCD, the 2nd defendant was summoned for the offence of keeping the Dog without a licence, contrary to Regulations 20(1) and (2) of the Rabies Regulations (“RR”) under the Rabies Ordinance, Cap 421 (“RO”). The 2nd defendant pleaded guilty to the charge and in mitigation said that she had forgotten to renew the licence after the expiry date. She was convicted of the offence and was fined $700.
6. Other than that, there was no prosecution against the defendants for any other offences under the DDR, RO or Dogs and Cats Ordinance, Cap 167 (“DCO”).
7. After the Incident and as a result of a complaint made on behalf of the plaintiff by his solicitors to the Lands Department, the wire mesh fences and metal gates used to enclose the Backyard were demolished by the defendants. In other words, the Backyard was demolished and the Village House was reinstated to its pre-1976 status.

*DISCUSSION*

*Issues in dispute*

1. Both the issues of liability and quantum are in dispute in this case.
2. On the issue of liability, the following are the issues in dispute:-

(1) Right of entry to a “public place”

1. Was the plaintiff entitled to treat the Backyard as   
    a “public place”?
2. What were the plaintiff’s real intentions in   
    entering the Backyard?
3. Was the gate partially opened?
4. What were the effects of the warning signs?

(2) Duty of care as occupiers

Were the defendants occupiers of the Backyard?

Was the plaintiff a trespasser?

Was a duty of care owed by the defendants to the   
 plaintiff?

If so, was this breached?

Or did the plaintiff voluntarily accept the risks?

(3) Liabilities of the defendants for the injuries sustained   
 in the Incident

Were the 1st and 2nd defendants negligent in their conduct? Did their behaviour in any way contribute to the Incident?

Did the defendants’ behaviour constitute to a breach in any of the statutory duty?

Had the defendants been negligent and/or in breach of their duty of care in:

(i) failing to ensure the Dog was kept secured   
 and did not attack the plaintiff;

(ii) permitting or allowing the Dog to go off   
 leash to attack the plaintiff in a public   
 place; and

(iii) failing to provide adequate warning about   
 the danger of the Dog.

1. On the issue of quantum, almost all the items of the claims made by the plaintiff are disputed by the defendants. They included the extent of the plaintiff’s injuries, the PSLA award, the claim for loss of future earnings and future medical and travelling expenses. The only item which was agreed by the defendants is the $700 for the travelling expenses incurred.

*The plaintiff’s case*

1. The Plaintiff’s primary case is that he was bitten by the Dog while he was in a public place. He claims that at the time of the Incident he intended to go up to the top of the hill with Thero with a view to take some photos of the harbour. He claims that it was not obvious to him that the Backyard was situated within a private premises and he had gained access to the Backyard through a half-opened, unbolted and unlocked gate, ie Gate B. He also claims that the 1st defendant and his brother had deliberately set the Dog on him by releasing the leash when they took the Dog up the hill with the sole purpose of attacking him.

1. The plaintiff says the defendant should be held liable for negligence in failing to control over the Dog as its owner in a “public place”, which would also amount to a breach of statutory duty. The plaintiff further claims that even in the event that the plaintiff is deemed to be a trespasser to the Backyard, the defendants would have breached their common duty of care towards him. In addition, the plaintiff claims that the defendants had not properly secured the Backyard or warned members of the public that it was situated within a private place. In other words, it gave the impression to the general public that it was a public place. The plaintiff claims that was the reason why he had mistaken it as a public place and that the Incident was a result of such negligence and/or breach of duties by the defendants.
2. As a result, the plaintiff is claiming quantum totalling $786,540 due to the attack, including general damages for pain and suffering, alleged loss of future earnings, loss of earning capacity, expenses incurred and future expenses.

*The defendants’ case*

1. In response to the plaintiff’s claim that the 1st and 2nd defendants had (i) failed to ensure the Dog was kept secured; (ii) allowed the Dog to go off a leash in a public place; (iii) failed to warn the plaintiff or other users of the public path of the danger of the Dog, the Defendants raised the following issues: they claim that the Backyard was clearly marked and fenced off to the public and hence the land was in fact firmly established as a private piece of land; and the plaintiff should have known better. Additionally, the 1st and 2nd defendants submit that they had not breached their duty of care towards the plaintiff by failing to take reasonable measures in order to prevent the Incident and did not act negligently. In short, they say that the plaintiff had no right of entry into their Backyard, regardless of whatever reasons which might have led him to believe that he had the right to do so. Thus, they should not be held responsible for the injuries sustained as a result as the plaintiff had voluntarily accepted the risk when he entered the Backyard. The defendants further say that the plaintiff has no factual basis to claim that the defendants had been in breach of any statutory duty.

*LIABILITY*

*(1) The right of entry to a “public place”*

*(a) Was the plaintiff entitled to treat it as a “public place”?*

1. While there is no dispute that the Backyard had been unlawfully built on government land and turned into a private garden -- in what I would describe as a most selfish and arrogant manner -- by the defendants for their own private use, the same had been clearly fenced off with wire and fences, with such a design that the sole purpose was to keep the public out rather than inviting them in.
2. In evidence, the plaintiff has tried to claim that both Thero and him did not know that the Backyard was a privately owned/occupied area, due to a number of factors such as a half-opened gate and a path leading up to the hill which appear to them to be “public”. Those factors, according to the plaintiff, reinforced his belief of his right of entry.
3. I find it difficult to believe that any reasonable person would have come to such conclusions that they would be welcome to enter the Backyard given the layout and barriers created by the high fences and metal gates which clearly delineated the Backyard from the rest of the hill.
4. In *Amrol v Rivera* [2008] 4 HKLRD 110, it clearly states that as long as the private land is open to the public, it becomes a public place. The operative word being “open”.
5. Our present case can also be easily distinguished from the facts in *Wong Wing Ho v The Hong Kong Housing Authority* [2008] 1 HKLRD 352, CA (Rogers V-P, Le Pichon JA and Sakhrani J) which is heavily relied on by the plaintiff’s solicitor. In that case, where the basketball court and the volleyball court were adjourning to each other, and hence it was logical to think that a reasonable man would expect that from time to time basketballs would accidently go over to the volleyball court and a basketball player would want to climb over to retrieve the basketball or vice versa, Thus, in my view, the Court of Appeal was absolutely right in dismissing the defendant’s appeal in that case and held that the defendant had breached the duty of care owed to the plaintiff as a lawful visitor to the basketball court, rather than as a trespass to the adjourning volleyball court. The CA held that the defendant plainly owed a duty to take reasonable care to ensure the safety of such lawful visitor. The operative word being “lawful” here.
6. In our present case, the Backyard was very clearly fenced off, with a padlock on the bolt latch on the metal gate (albeit unlocked). Although it was built on government land, it was treated and presented as a private property by the owners to the outside world. In other words, it was clearly not “open” to the public. As a residing member of the village of more than 3½ years, the plaintiff should have known or have been familiar with the nature in which the village houses are designed and land being occupied by the villagers. In my view, there is no reason at all for him to think that the Backyard was situated in a “public area”.
7. In my judgment, although the Backyard had been built on public land, it does not make it public *per se* once the occupier of the land has clearly fenced it off and excluded entry to the general public. Whether it is lawful or not for the defendants to occupy the land is a matter between the government and the defendants. The relevant authorities or government departments may take appropriate actions to re-claim the public land from the defendant (as it did after complaint was made by the plaintiff’s solicitors after the Incident), it does not entitle a person like the plaintiff and his friend to enter the premises at their free will and treat it as a public area. As such, in my judgment, there is no basis for the plaintiff to claim that he thought he was entering into a public area as the photos produced by the parties at trial clearly show that it was a “private premises” fenced off with high wire mesh fences and metal gates by the defendants. For these reasons, I reject the contention that the plaintiff had a right of entry to the Backyard based on the ground that it was a “public place” and hence he was permitted to enter at will.
8. This brings me to the issue of foreseeability. Was it reasonable for a person to enter the premises as the plaintiff did?
9. Considering the layout of the Backyard and the obstacles put forth to deter entry, I find any reasonable person, given similar life experience as the plaintiff, would realize that the premises was not to be entered into. Further, the purpose of erecting the wire barriers and metal gates with bolt and locks (albeit unlocked on this occasion) were to deter entry. Also, the footpath outside the wire mesh fence was quite steep and ragged which did not seem to be leading anywhere (there was no road sign or any facilities which may suggest desire to enter). Coupled with the warning signs displayed outside the gate (albeit written in Chinese only) and the large kennel placed right behind Gate B when one enters, it must be abundantly clear to anybody from outside that they were entering into a private premises with the possibly of guard dogs roaming freely inside. In this regard, I find that the 1st and 2nd defendants had done everything they reasonably could in deterring trespassers and pedestrians from entering into the Backyard.
10. In my judgment, one very important contemporaneous document which shows that the plaintiff could not have believed he was entering into a “public place’ was when he gave his statement to the AFCD on 29 November 2010 when he failed to put a tick under the “Biting location” as a “public place outside dwellings”[[3]](#footnote-3).

*(b) The plaintiff’s real intentions upon entering the Backyard*

1. The plaintiff claims that he and his friend intended to climb up to the top of the hill in order to take some photographs[[4]](#footnote-4). He had told the AFCD in his statement dated 29 November 2010 that they were “at the hillside enjoying the beautiful scene (sic) of Yau Tong”[[5]](#footnote-5). Although the 2nd defendant’s counsel, Mr Alex Lai, submits that such claim is extremely doubtful for a number of reasons, I am of the view that the real purpose of the plaintiff’s entry into the Backyard is of little relevance in this case unless of course if his activities involves with criminal conducts like burglary or theft. The claims of looting fruits and other unlawful purposes like stealing as suggested by the 2nd defendant are in my view speculative at best as there is no clear evidence to support such claims. However, I have no hesitation to reject the plaintiff’s claim that he was there to “have a view of the sea” and to take photographs of the scenery for 3 reasons. First, they had not carried any camera with them. Second, the only single photograph produced by the plaintiff was an extremely blurry image taken from a mobile phone of the harbour from a distance (not necessary from the top of the hill), indicating someone had taken it either in a hurry or while running. Third, the single photo produced does not support the plaintiff’s claim made in his witness statement that “we took some photographs.”[[6]](#footnote-6) which was in plural form. All the above certainly do not appear to me as someone who had gone up the top of the hill with the sole aim of taking photographs of the “beautiful scene (sic) of Yau Tong” as claimed by the plaintiff in his evidence.

*(c) Was the gate partially open?*

1. The plaintiff also claims that the gate was unlocked and left partially open which enabled him to enter the Backyard freely. It therefore gave him the impression that the Backyard was open to the public. I find this claim preposterous and totally not worth believing, having taken into account of the surroundings and the geography of the location.
2. In my judgment, it is clear that the wire mesh and the metal gates were designed to fence off the Backyard from the public, with the purpose of keeping people out rather than inviting people in. I cannot imagine any reasonable person would perceive the setting as welcoming. Furthermore, to suggest that the defendants, who kept several large fierce guard dogs in the Backyard (which were allowed to roam freely), would leave the gate half open, in my view, is simply ludicrous. To do so not only would allow those large and fierce dogs to freely roam around the hills and the village, it would also allow them to attack any passerby at will. This is simply unbelievable given the circumstances and I have no hesitation to reject the plaintiff’s claim on this, as in other parts of his evidence in relation to the Incident itself.

*(d) The effects of the warning signs*

1. According to the defendants, there were written warning signs placed strategically outside the 3 metal gates so that any passersby would be able to appreciate the presence of fierce dogs inside the Backyard. Being in a very local area of Hong Kong as Lei Yue Mun, it would in my view be unreasonable to expect residents to place warning signs in any language other than Chinese itself. In the context of this case, even if the signs were to contain English wordings, the plaintiff, being a Napalese national who does not read or speak English, would not be able to understand them. Additionally, being a resident in a village full of dogs guarding the village houses and backyards, it would be reasonable to assume that this was not the first warning sign that the plaintiff had come across in the village. In my view, even if the plaintiff might not be able to understand the contents of the warning sign itself (which was written in Chinese only), it must be blatantly clear to him that a sign with red wordings together the presence of a large kennel behind a latched gate could mean there is a high possibility of the presence of dog(s) inside the premises. In the particular circumstances of this case, I find the plaintiff had deliberately chosen to enter the Backyard despite of such clear warning signs. I further find that the warning signs, together with the presence of the kennel, situated within a clearly fenced off area, had provided sufficient notice and warning to any potential trespassers of the presence of dogs inside the Backyard. I would also reject the plaintiff’s claim that he was not able to understand those signs.

32. The plaintiff stated that he did not see the warning sign, let alone has read it before entering through Gate B. I find this completely irrelevant because it is not within the duty of an occupier to give actual notice or warning to a trespasser as long as it is sufficient and reasonable. In my view, placing a sign that was displayed in a prominent position for all passersby to see, in the native language of Chinese in the context of a local village, is more than sufficient notice. The plaintiff cannot use his ignorance eyesight or lack of awareness or blatant disregard of a clear warning sign as an excuse for trespassing into a private premises.

*(2) Duty of Care as Occupiers*

*(a) Were the defendants Occupiers?*

33. The term “Occupier” has been defined by the writers of *Clerk and Lindsell on Torts*, 21st edition, §§12-09 to 12-10 at pp 872-873 as follows:-

“The status of occupier is normally dependent on some degree of actual physical control.

Apart from owners and lessees, a person is likely to be regarded as an occupier if he has a *sufficient degree of control* over premises to be able to ensure their safety, and to appreciate failure on his part to use care may result in injury to person coming on to them. The control need be neither entire nor exclusive. So someone with the immediate supervision and control of premises, such as a builder in de facto control of part of a house, may be an occupier, whether or not he has the power of permitting or prohibiting the entry of other persons to it. Furthermore, it is submitted that someone who have the legal right to invite or permit others to come on them, such as the concessionaire of space at a fairground, will almost certainly be an occupier.

It is submitted that for these purposes the occupier’s control need *not necessarily be lawful*: thus, it is suggested, there is no reason why a squatter should not be liable under the Act.” [emphasis added]

34. Thus, whether a person is an occupier is normally depending on the degree of actual physical control he has over the premises and not whether his occupation is lawful or not. It is my view that, in this case, there is no doubt that the enclosed Backyard was under the *de facto* control of the defendants’ family. Hence, the 1st and the 2nd defendant are both the undisputed occupiers of the Backyard at the time of the Incident.

*(b) Was the plaintiff a trespasser?*

35. As submitted by the 2nd defendant (which I accept), a “lawful visitor” is defined as a visitor invited or permitted by the occupier to be on the premises. Anyone who was not invited or permitted by the occupier to enter the occupier’s premises is not a lawful visitor: see *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.

36. In our present case, no actual invitation was given to the plaintiff because they did not know of his existence. Further, the 2nd defendant was not present at the time of the Incident. She was receiving facial treatment somewhere else at the time. Since the plaintiff and his friend Thero were unknown to the defendants, there is simply no basis for the plaintiff to claim that he would be entitled or permitted to enter the Backyard just because the occupation of the land was unlawful. As said, whether the defendants had occupied the government land unlawfully or not is a matter between them and the Government. With respect, it would not turn an unlawfully occupied area suddenly to become a “public place”, as the plaintiff’s solicitor Mr Burke seems to have suggested. This is particularly so in light of the definition of a “trespasser” as defined in *Robert Addie, supra* as “one who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor, or if known is practically objected to.” Although the plaintiff claims that he had innocently trespassed onto the land, I do not accept his explanations. In my view, innocent or not, it is trespassing nonetheless.

37. Section 2(6) of the OLO provides that “persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.” This is significant in that it provides that there is a special class of persons who would not be regarded as trespassers even if they entered without the occupier’s permission. This means so long as the person is exercising a right conferred by law, they do not require permission from the occupier to enter the premises. I agree with Mr Lai for the 2nd defendant that as the plaintiff and his friend were not exercising any such right conferred by law, they have no legal excuse to enter the Backyard without the defendants’ permission. Thus, he remained a trespasser in the eyes of the law.

*(c) Was a duty of care owed by the 1st defendant & the 2nd defendant to the plaintiff? If so, was there a breach of such duty?*

38. A trespasser enters at his own risk or peril, unless there are special circumstances which give rise to a duty which, while not amounting to the duty of care which an occupier owes to a visitor, would be a duty to takes steps as common sense or common humanity would dictate: in which steps were to be taken within reason and practicality to reduce unnecessary danger: see *Chan Yan Nam v Hui Ka Ming* [2003] 1HKC 341, at p 348. In *Herrington v British Railways Board* [1972] AC 877, Lord Morris stated that the duty is just to take such steps as common sense or common humanity would dictate. In our context, it means just the very basic minimum level of care that is required for the occupier to treat the trespasser as human.

39. It has further been stated in *Robert Addie, supra* at p 370 that the owner of the property is under a duty not to injure the trespasser willfully; not to do a willful act in reckless disregard of ordinary humanity towards the trespasser. The above trio of cases highlighted the limited circumstances in which a defendant may be held liable towards a plaintiff for the injuries sustained by him whilst trespassing unto the latter’s premises. In my judgment, as occupiers, the defendants have not acted in such manner as having a blatant disregard for the safety of the plaintiff and Thero who are nothing but trespassers. Despite of the fact they had kept a large and fierce dog within the Backyard, precautions had been taken such as the wire mesh fencing, warning signs and a padlock hung on the ring of the bolt latch (situated on the inside of the gate despite it was not locked). Hence, it is my view that the defendants have discharged their duty of care they owed to potential trespassers.

*(d) Trespasser voluntarily accepting risks*

40. I am of the further opinion that the plaintiff has voluntarily accepted the risks when entering the Backyard by firstly choosing to ignore the deterrence which suggests danger or no entry, and then by entering into and remaining inside the Backyard for unnecessary lengthy period of time and for no legitimate reasons at all.

*(3) Liabilities of the defendants*

41. This involves answering the question of whether the defendants had been negligent in their conduct in failing to prevent the accident or in failing to take reasonable preventative measures prior to the Incident. It further involves the question of whether their behavior constituted to a breach of any of the statutory duty pleaded by the plaintiff.

*(a)* *Failure to ensure the dog was kept secured and not attacking the plaintiff*

42. The plaintiff has submitted that the defendants had failed to ensure the Dog was kept secured and did not attack him. The plaintiff has also claimed that as the dog owner, i.e. the 2nd defendant should have ensured that the Dog was not released from the leash, or allowed to roam in the Backyard. For the reasons mentioned above, I do not consider that the defendants had failed to do so. The plaintiff has only himself to blame if he had blatantly disregarded of all the warning signals and physical barriers and went into a fenced off premises with clear signs of the presence of dog(s).

*(b) Permitting or allowing the Dog to go off its leash and attack the plaintiff in a public place*

43. The plaintiff also claims that the defendants were in breach of regulation 9 of the DDR by failing to ensure that the Dog was securely held on a leash when in a public place. The plaintiff claims that the 1st defendant and his younger brother permitted the Dog to be let loose and was deliberately set upon him. As was rightly pointed out the 2nd defendant and the 1st defendant, this is a very serious allegation which had not been mentioned by the plaintiff in his initial statements to the authorities.

44. Further, during the hearing, the plaintiff identified the 1st defendant as the Chinese man who was holding the wooden pole and it was another Chinese man who had released the leash. The Chinese man the plaintiff had identified was the 1st defendant’s younger brother. This contradicts with his previous allegation that it was the 1st defendant who had released the leash and allowed the Dog to attack him deliberately.

45. Given the inconsistent accounts related by the plaintiff, I find his claim that the Dog was deliberately unleashed and set upon him totally unbelievable. My finding is reinforced by the evidence given by the 1st defendant who has denied of any of such wrongdoings. Unlike the plaintiff who is prone to exaggerate and prepared to change his story whenever it suited him, I find the 1st defendant to be a fair and honest witness of whose evidence I would prefer.

*(c ) Would breach of the DDR give rise to a civil right of action?*

46. In any event, even if I were to find as a matter of fact that the 2nd defendant had failed to ensure the Dog was securely held on a leach while in a public place (which I did not), contrary to regulation of DDR, I am of the view that the breach of this particular regulation would not give rise to a civil right of action.

47. I agree with Mr Lai’s submission that a civil right of action would be available where the obligation was imposed by the statutes for the benefit or protection of a particular class of individuals. In order to succeed in claiming damages for breach of statutory duty, the claimant must establish that he came within the calls of persons intended by the statures to be protected: see the leading English authority of *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173.

48. I further agree with Mr Lai that the most common and typical examples of statutes which give rise to civil right of action to claim damages as a result of a breach of the duty imposed by statutes are those legislations related to industrial safety. Prime examples of that are the ordinances and the subsidiary legislations enacted for the protection of particular classes of individuals and injured workers under the Factories and Industrial Undertaking Ordinance, Cap 59 (“FIUO”) and the Occupational Safety and Health Ordinance, Cap 509 (“OSHO”). They give rise to civil right of action for the classes of persons or individuals the legislations intended to protect.

49. DDR was a subsidiary legislation of the DCO. The empowering section is section 3 of DCO which empowers the Chief Executive in Council, with the approval of the Legislative Council, to make regulation for the stipulated purposes. The purposes include: to provide for the keeping of any dog or class of dogs under effective control (DCO s.3(1)(f)) and the control of the bringing of any dog or class of dogs into any specified place (DCO s.3(1)(g)) and to create offences in respect of contravention of any regulations (DCO s.3(2)(d)). Regulation 9 of DDR stipulates how a large dog should be controlled when it was permitted to enter or remain in a public place (DDR r.9(1)). A person who breached this regulation commits an offence and is liable to prosecution and sanction (DDR r.9(3)).

50. It should be noted that DCO and DDR were different from FIUO and OSHO. They were enacted to provide for the control of dogs and to provide for the prosecution against those persons who failed to control their dogs in accordance with the legal requirement. They did not stipulate that they aimed to protect any particular class of individuals. In respect of regulation 9 of DDR, it is aimed that the general public in the public place are protected. In my view, the phrase “general public” is so wide that it does not mean only a particular class of persons is protected.

51. In *Amrol v. Rivera* [2008] 4 HKLRD 110, Judge Ko (as the Acting CDJ then was) expressed the view that regulation 9 of DDR is not designed for the benefit or protection of any particular class of individuals and the only remedy afforded for breach of regulation 9 is the criminal process. Regulation 9 does not confer any civil right of action to an injured person who was bitten by a dog. I entirely agree with my learned brother. Accordingly, I find that the plaintiff was unable to bring himself within the class of persons intend to be protected by relying on regulation 9 of DDR.

52. Therefore, I find that regulation 9 of DDR does not confer a civil right of action to an injured person like the plaintiff who was bitten by the Dog even if it happened in a public place.

*Conclusion on Liability*

53. In the aforestated premises, I find that the plaintiff has failed to establish his case against the defendants on the evidence, both as a matter of law and fact. Therefore, I shall dismiss his claim against the defendants accordingly. As such, the issue of contributory negligence does not arise in this case.

*QUANTUM*

54.Despite of my conclusion on liability reached above, for the sake of completeness and in case I am wrong on that issue, I shall briefly deal with the issue of quantum here.

*The Injuries*

55. Upon admission to the A&E of the United Christian Hospital (“UCH”), the plaintiff was found to have laceration wounds over both hands and puncture wounds over the right thigh. On admission to the O&T department of the same hospital, the plaintiff was found to have the following injuries:-

1. 2 deep puncture wounds at left 3rd metacarpal-   
    phalangeal joint with haematoma (bleeding),
2. 1 cm volar wound over left index finger with tendon and   
    neurovascular bundle intact,
3. 3 cm transverse wound over right thenar eminence with   
    partial cut of superficial surface and
4. 2 smaller superficial laceration wounds over volar   
    aspect of 1st web space of right hand.

56. The plaintiff received treatment of wound exploration and irrigation. His right hand was repaired and other wounds were closed. He was hospitalized for 5 days only. After discharge, the plaintiff attended follow-up treatments in outpatient clinic of UCH. There was improvement in both the range of motion of the fingers and wound condition. He was last seen on 30 March 2011 when upon physical examination it was found that he suffered no pain or stiffness over right hand. There was mild residual swelling over the left middle finger at that time. The third MCPJ range of motion was 0-90 degrees. He received 5 sessions of physiotherapy. About 2 months after the Incident, he reported that he had 90% subjective improvement.

57. According to the joint orthopaedic report dated 3 June 2014, both experts agreed that the diagnosis were multiple soft tissue lacerations. There was no tendon or neurovascular injury in the hands. They also agreed that the treatments were standard, appropriate and adequate. They opine that the plaintiff does not require further treatment or surgery.

58. Clinical examinations by the experts revealed full range of movement of all the fingers, multiple well healed scars and absence of muscle wasting in either of his upper limbs. He had numbness over the thenar eminence of his right hand and there was slight weakness of his left hand grip when compared to his right hand. He had no complaints for his right posterior thigh, which indicated that he had recovered fully from the injury to this area. He is right hand dominant.

59. The plaintiff’s own expert Dr Henry Ho considered the plaintiff’s prognosis was fair and the defendants’ expert Dr James Kong considered the prognosis as good. In any event, Dr Ho assessed the whole person impairment and loss of earning capacity at 4% only and Dr Kong assessed both at 0.5% only, indicating that the plaintiff’s injuries are relatively minor.

*PSLA*

60. The plaintiff claims a sum of $300,000 as damages under this head under the revised statement of damages (“RSD”). Yet the only case relied on is the case of *Lo Ka Yue v Leung Chun Kit & Another* (2015), unreported, DCPI 1562 of 2012 (Deputy Judge Mak; 6 July 2015) where the plaintiff had suffered very severe facial injuries which the judge found “will inevitably have an effect on her psychologically if not socially.” The injuries suffered by the victim in that case are clearly much more serious than those suffered by the plaintiff in our case.

61. Having read the cases of *Tsang Ka Hung Barry v Tang Yuk Ling* (2009), unreported, DCPI 525 of 2007 (Deputy District Judge Marlene Ng (as HH Judge Ng then was); 20 January 2009); *Mujianti v Chong Wai Kwan* (2004), unreported, DCPI 424 of 2003 (HH Judge Wesley Wong; 21 October 2004); *Amrol v Rivera* [2008] 4 HKLRD 110 and *Chiang Ki Lun Ian, a minor suing by his mother and next friend Chow Yuen Man Louise v Li Yin Sze* (2010), unreported, DCPI 2067 of 2009 (Deputy Judge Clement Lee ; 8 October 2010) relied on by the defendants, I consider that an appropriate award for PSLA in this case should be at $80,000.

*Loss of earnings*

62. Mr Patrick Burke, the plaintiff’s solicitor, during the trial confirmed that he is not claiming loss of earnings for his client during the time when he cannot lawfully work due to his status as an asylum seeker in Hong Kong. However, in the RSD, the plaintiff claims loss of earnings at HK$2,000 for 15 years at $360,000 on the basis that his non-refoulement claim should be completed by the time when he is 43 and that he should be able to return to work lawfully.

63. The fallacy of this claim of course is the fact that the plaintiff simply does not know when he will be able to complete his non-refoulement claim. At the time of the Incident, he was 38 years old (born in 1972). He is now 43 years old. Yet there is still no evidence as to when this is likely to happen. In other words, there is simply no evidence to suggest when he is likely able to return to some lawful employment. Further, there is absolutely no evidence to support his alleged income and the likely loss as a result of the injuries.

64. More importantly, there is simply no credible medical evidence to suggest that he will earn less in light of his alleged disabilities when he returns to work. There is also no evidence to support the claim that he will suffer loss at $2,000 per month in future. In this regard, I prefer Dr Kong’s opinion that the plaintiff could take up any job that he wants. I accept that he is able to resume his previous occupation as a lorry driver, farmer or solider. In other words, there is simply no functional limitations. Even Dr Ho is of the view that the plaintiff could be engaged in moderately heavy manual unskilled work. Any claim made by the plaintiff in the witness box to say otherwise in my judgment has been much exaggerated and is totally inconsistent with the medical evidence.

65. In the premises, I reject the plaintiff’s claim that he will suffer any loss of earnings as a result of the Incident.

*Loss of earning capacity*

66. The plaintiff claims a sum of $100,000 under this head for loss of earning capacity / handicap in the labour market.

67. The rationale behind this award of course is to compensate that “where a plaintiff is, at the time of the trial, *in employment*, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be *at a disadvantage in getting another job or an equally well paid job.*”: see *Moeliker v Reyrolle* [1977] 1 WLR 132, at 140 A-C. See also the case of *Chan Wai-Tong & Ano v Li Ping Sum* [1985] HKLR 176 (PC) at 183A-C where the Privy Council had made similar statements.

68. The problem with the plaintiff’s claim for loss of earning capacity is that he was *not* in employment at the time of the Incident. In fact, he has not been since he arrived in Hong Kong and started seeking for refugee status in 2006. He could not be lawfully employed as long as he is having a refugee status in Hong Kong. He will not be in any lawful employment until either he gives up his CAT claim and returns to his home country or until he is settled in a third country. As such, there is simply no evidence to support the claim that there is any substantial or real risk that he will lose his current employment and will suffer a disadvantage in the labour market as a result.

69. In any event, I would prefer the opinion of Dr Kong when he says that the plaintiff can resume his previous job and will suffer no functional limitation at all.

70. In the aforesaid premises, I reject any claim for loss of earning capacity made by the plaintiff in this case.

*Future medical / travelling expenses*

71. Similar to his claim for loss of earnings and loss of earning capacity, there is simply no evidential basis for such claim. To the contrary, the experts both agreed that the plaintiff does not require any further treatment or surgery for his injuries in future.

72. I have no hesitation to dismiss his claim for future medical and travelling expenses.

*Special damages*

73. The only item of special damages for travelling at $700 has been agreed.

*Interest*

74. Had the plaintiff been able to establish liability, there will be interest on the PSLA award at $80,000 and the special damages item at $700 at the usual rates, ie 2% for general damages from date of writ to date of judgment and 4% for the special damages from the date of accident to date of judgment.

*CONCLUSION*

75. In conclusion, for the reasons stated above, I dismiss the plaintiff’s claim against the defendants with costs in this action. The plaintiff will have to pay the costs of the defendants, such costs to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs will be taxed in accordance with the legal aid regulations. The 2nd defendant’s own costs will be taxed in accordance with the legal aid regulations also. The above costs order will be made on a nisi basis and the same will be made absolute unless there is any application to vary the same within 14 days from the date of handing down of this judgment.

*Comments on the preparations of the plaintiff’s case*

76. Before I leave this case, I would like to make a few comments regarding the conduct of the plaintiff’s solicitors, who are assigned by the Director of the Legal Aid, in the preparation of the plaintiff’s case, which might affect the legal aid taxation at the end of the day.

77. First, I note that both the statement of damages (“SOD”) and RSD in this case have been prepared in note form and laid out on a spread sheet format. There are lots of columns and lines with the plaintiff’s pleaded case contained in small boxes. This may be the way the plaintiff’s solicitors are used (or even prefer) to prepare SOD and RSD, it certainly is not how pleadings are normally done and should be done in my view. At best, it contains a great deal of irrelevant information (for example, the life expectancy of the plaintiff in this case) and at worst it is almost impossible to read and extremely difficult to comprehend by other readers.

78. Second, the witness statements of the plaintiff are again made in note form, containing 1 to 2 short sentences per paragraph. They are rather disconcerting to read. More significantly, they contain a lot of totally irrelevant information like the name, age, occupation and health status of the parents, siblings, spouse and daughter of the plaintiff. They are matters which have absolutely no relevance to the plaintiff’s claim in this case and such information should never have found their ways into the witness statements. The inclusion of such information in my view not only is a complete waste of time for the plaintiff’s lawyers but create unnecessary reading materials for the Court and for the defendants’ legal representatives. It only adds unnecessary costs to the litigation and distracts the parties to focus on the real issues in dispute. They all undermine the underlying objectives of the Civil Justice Reform as spelt out under Order 1A of the Rules of the District Court.

79. Third, no list of authorities had been lodged with the plaintiff’s written opening submissions prior to the trial. In fact, only the case of *Chiang Ki Chun Ian, supra* was mentioned in the opening and a copy was supplied to the Court at the hearing only. This is far from satisfactory as the Court will not be able to read into the case and the legal authorities the plaintiff tried to rely on prior to the commencement of the case.

80. Fourth, only the names of 2 text books on the law of tort in Hong Kong and 1 singe local case – without any reference or citation – have been referred to in the plaintiff’s final submissions. When the list of authorities (together with copies of cases) was finally lodged with the Court prior to the hearing of the closing submissions at the end of February, it was found that no page references were given for the texts which the plaintiff’s solicitor was going to refer to at the hearing. At the end, only a short passage was read out from *The law of Tort in Hong Kong* (2nd edition) out of a whole chapter of 14 pages photocopied at the hearing. Also, only 2 short paragraphs were read out of the *Tort Law and Practice in Hong Kong* (3rd edition) out of a whole chapter of 22 pages photocopied. Further, the whole Working Paper No. 52 on Trespassers and Report No.75 of the UK Law Reform Commission (which was dated 3 July 1973) have been photocopied and included in the plaintiff’s list of authorities. They exceeded 130 pages. However, they have not even been referred to once during the plaintiff’s closing submissions nor the Court had been told why a 1973 UK Law Reform Commission Report would have any relevance to the issues in this case. Similarly, a whole chapter on Trespassers had been photocopied from *North on Occupiers’ Liability* (2nd edition) but only 2 pages out of 26 pages have been relied on. Again, this is a complete waste of paper and only adds unnecessary costs to the litigation.

81. Lastly, instead of lodging the list of authorities (together with copies of the cases relied on) in time and in accordance with the directions of the Court and/or practiced directions and provided copies to the opponents, the plaintiff’s solicitors had, on the day of the hearing of the final submissions itself, chose to send in copies of 3 further authorities (containing 81 pages) by facsimile -- both to the Court and to the defendants’ solicitors. In my view, this is totally unacceptable as the plaintiff had had plenty of time in preparing his case and there was simply no good reason why those cases could not be included in the list of authorities submitted. This will not only add to the administrative burden of the Court and the costs of the other parties, it is a practice that should not be encouraged save in very exceptional and urgent circumstances.

82. In my view, all the above unnecessary inclusion of materials and/or documents, which are either not relevant to the issues in the case or relied on by the plaintiff’s solicitors at the trial, amounts to a complete waste of costs and unnecessary time spent in preparing the case and caused extra burdens for the Court and the other parties in reading them. In my judgment, they should not be recoverable on legal aid taxation.

83. I therefore direct a copy of this judgment to be sent to the Director of Legal Aid for his consideration and further action, if any.

( Andrew SY Li )

District Judge

Mr Patrick Burke of Burke & Co., assigned by the Director of Legal Aid, for the plaintiff

Mr Chase CM Pun, instructed by Francis Kong & Co., for the 1st defendant

Mr Alex Lai Sze Wai, instructed by Francis Kong & Co., assigned by the Director of Legal Aid, for the 2nd defendant

1. See photos taken in April 2013 appeared in [B/831] and [B/843] [↑](#footnote-ref-1)
2. See sketch on [A-132] [↑](#footnote-ref-2)
3. See [B/403] [↑](#footnote-ref-3)
4. See P’s witness statement at [A/106] [↑](#footnote-ref-4)
5. See P’s statement to AFCD on [B/401] [↑](#footnote-ref-5)
6. See P’s witness statement at [A/106] [↑](#footnote-ref-6)