#### DCPI 1562/2012

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1562 OF 2012

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| BETWEEN | LO KA YUE | Plaintiff |
|  | and |  |
|  | LEUNG CHUN KIT  LEUNG CHUN HO | 1st Defendant  2nd Defendant |
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Coram: Deputy District Judge Mak in court

Date of Hearing: 1-3 and 8 September 2014

Date of Handing Down Judgment: 6 July 2015

JUDGMENT

*Introduction*

1. Without doubt, the experience of being bitten by a dog in the face in the early hours of 5 February 2011 has a profound effect on the plaintiff. The question remains, however, whether or not she is able to obtain redress from the 1st and 2nd defendants.

*Plaintiff's case*

2. The plaintiff ("P") was born on 11 July 1990. She was a student of the Hong Kong Institute of Vocation Education at the time of the incident.

3. In the evening of 3 February 2011, which was the 1st day of the Lunar New Year, Li Chun Ting ("Li") invited P and her ex-boyfriend, Wong Wai Hang ("Wong") to a party held at Ground Floor, Block 7, Silver Garden, No 150 Tai Tong Road, Shap Pat Heung, Yuen Long, New Territories, Hong Kong ("the premises"). They stayed in the premises from 10 pm until 6 am the next morning.

4. There were 4 dogs in the premises, among them was a golden retriever ("the dog"), which was about 3 foot long (from head to tail) and 2 foot tall.

5. After watching a movie in the afternoon of 4 February 2011, P and Wong were again invited by Li to another party at the premises on that night.

6. P therefore visited the premises for the 2nd time. In the 2nd visit, they drank and played games in the premises. At the same time, the dog together with a smaller dog were also kept therein.

7. In the early hours of 5 February 2011, while P was watching television by herself. After sitting on the sofa for a while, she moved to squat on the floor in front of it. The dog was on her left side less than 1 foot way, lying on the floor. All of a sudden, the dog turned her head and bit P on her left face. She suffered facial injuries as a result.

*1st Defendant's case*

8. The 1st defendant ("D1") is the younger brother of the 2nd defendant ("D2") and was the keeper of the dog. He was a tenant of the premises, which was owned by D2.

9. At the time of the incident, he was not in the premises. Before he left the premises, he had locked the dog in the garden.

10. It is D1's case that he did not know P, nor did he invite P to the premises. He had no knowledge that P was present in the premises.

*2nd Defendant's case*

11. D2 is the elder brother of D1. He is the registered owner of the premises.

12. It is D2's case that he did not know P; he was not living at the premises; he was not present at the time of the incident and he was not the keeper of the dog.

*The defence of volenti non fit injuria*

13. By their amended defence, the defendants pleaded the defence of *volenti non fit injuria*.

14. In his opening submission, Mr Chow, counsel for the defendants, conceded that there was no evidence to support the defence, which was therefore abandoned.

*Issues*

15. The following are the issues for determination by this trial :-

(1) whether P was bitten by the dog at the material time;

(2) if so, whether the dog had a propensity to bite people;

(3) if so, whether such propensity was known to D1 and D2;

(4) whether D1 and D2 were liable under the doctrine of *scienter*;

(5) whether D1 and/or D2 owed P a common duty of care under the Occupiers Liability Ordinance ("OLO");

(6) was there a breach of a duty of care by D1 and/or D2; and

(7) what is the quantum of damage.

*Whether the plaintiff was bitten by the dog at the material time?*

16. It is the plaintiff's case that she was bitten by the dog in the premises. However, this is in contradiction to what she told the police in a Report on Animal Biting or Behaving Suspiciously after the incident that she was bitten by a chow dog at Fung Yau Street South. Further, she told the treating doctor at Pok Oi Hospital that she was bitten by a stray dog in the vicinity of the fire station near Kai Tei (雞地). Mr Chow, counsel for the defendants, submitted that she should not be believed.

17. In her witness statement, P said that while she was waiting at the Accident and Emergency Department of Pok Oi Hospital, the elder brother of Li and his girlfriend, Ng Lin Ying ("Ng"), repeatedly requested her not to tell anyone that she was bitten by the dog at the premises. They did not want any trouble. As she was in a panic and did not know how to deal with the situation, she acceded to the request without thinking carefully.

18. Therefore, she did not tell the doctor that she was bitten by the dog at the premises, nor did she cooperate with the Agriculture, Fishery and Conservation Department ("AFCD") later on. However, as she was not contacted any further on the question of compensation, she reported the matter to the AFCD one month later.

19. Under cross-examination, P said it was Wong who told the police that she was bitten by a chow dog at Fung Yau Street South. She told the doctor that she was bitten by a stray dog. She explained that she did so because she knew Li and Ng and they did not want to get into trouble.

20. Wong's evidence is that on the 2nd visit of the premises with P, around 1.00 am on 5 February 2011, he heard P yelled in panic that she was bitten by the dog and covered her left face with her hand. He saw there were a few wounds on her left face which were bleeding profusely. The elder brother of Li and his girlfriend sent P and him to Pok Oi Hospital by car. While waiting at the hospital, the elder brother of Li and his girlfriend repeatedly request him not to tell the doctor that P was bitten by the dog at the premises and not to report the matter to the police. As it was the first time he was faced with such situation, he acceded to the request without thinking carefully. It was him who told the police the location of the biting, which was a street near where his parents lived.

21. On the other hand, Ng told a very different story. She said nothing happened in the premises. It was around 1.00 am on 5 February 2011 when she and her boyfriend left the premises, P and Wong asked them for a lift to Tin Shui Wai. The four of them therefore left the premises together. They walked to Tai Tong Road. She asked P and Wong to wait for them at the entrance of Silver Garden while she and her boyfriend went to fetch the car which was parked at Shum Chung Tsuen some 250 to 300 metres away. On their return 5 to 8 minutes later, she found P was bleeding on her face. P said she was bitten by a stray dog. They therefore took P and Wong to Pok Oi Hospital for treatment. Under cross-examination, she denied that she had requested P and Wong not to tell the doctor and the police that P was bitten by the dog at the premises.

22. Likewise, Li testified that around 1.00 am on 5 February 2011 when P left the premises, she was drunk but nothing unusual had happened to her.

23. Being bitten by a dog in the face must have been a shock to P. It is not in dispute that Ng and her boyfriend, who is the elder brother of Li, took her to the hospital. According to P, Ng requested her not to tell anyone that she was bitten by the dog in the premises. At that juncture, P was faced with the situation that someone who had just helped her was asking her for a favour, which, however, was to withhold the location where she was bitten. Such request was a favour to Ng for obvious reason. It was Ng who invited P and Wong to the premises. If it was disclosed that P was bitten by the dog at the premises, Ng would be blamed for the trouble she caused to D1. In such situation, Ng had a reason to make such request and P had a reason to comply with the request. In my judgment, it is more likely than not that P felt obliged to and did accede to the request.

24. It is Ng's evidence that P was bitten outside Silver Garden when she was with Wong waiting for the car. If that is the case, I see no reason why they were unable to tell the doctor and the police the one and the same location of the biting. Instead, they had given two different locations. In my view, this is consistent with P's and Wong's evidence that they were making up the location of the biting as requested.

25. For the above reasons, I find that the evidence of P and Wong are more credible. Ng's and Li's evidence are less than truthful, I reject their evidence.

26. I find as a fact that P was bitten by the dog at the premises at the material time.

*Whether the dog had a propensity to bite people?*

*If so, whether such propensity was known to D1 and D2?*

27. The doctrine of *scienter* imposes strict liability on the owner or keeper of an animal for any injury it causes if :

(a) the species of animal is classified as dangerous; or

(b) the species of animal is classified as tame but the individual animal has a mischievous propensity known to the keeper and damage is caused by such propensity.

See *Tort Law and Practice in Hong Kong*, 2nd Ed at para 8.004.

28. Dogs have been held to be tame: see *Tort Law and Practice in Hong Kong* (*supra*) at para 8.008. P is not seeking to prove otherwise.

29. It is P's pleaded case that D1 and/or D2 knew or should have known that :-

(a) the dog had bitten people on another occasion; and

(b) the dog was a vicious and fierce dog.

Hence, P is relying on the 2nd limb of the doctrine in establishing liability against both defendants.

30. First of all, *scienter* only imposes liability on the owner or keeper of the dog. There is no dispute that D1 was the keeper of the dog whereas D2 was the owner of the premises. Mr Wong, counsel for P, in his closing submission, rightly sought to invoke the doctrine against D1 only.

31. The evidence of P is that in her 2nd visit, someone told her that the dog had bitten people before. She did not identify that person in her witness statement. In her evidence in court, P said that that person was one Andy Poon ("Poon") whom she recognized his face on Facebook. Poon was not called to testify at the trial. When asked why she did not mention his name in her witness statement, P replied that she did not know it was important to do so though she already knew his name at the time of the making of her witness statement.

32. Bearing in mind that there were many people in the premises having drinks and playing games during the 2nd visit, coupled with the fact that P had come across the trauma of a dog bite, I find it hard to believe that P was still able to recognize the face of someone on the Facebook who had spoken to her in relation to the dog on that very night. I am not prepared to accept that that person was Poon as P has claimed.

33. Apart from the testimony of P, the person who allegedly had given her the warning was not called to give evidence at the trial. As such, P's claim is not supported by any other evidence.

34. Even if someone did tell P that the dog had bitten people before, there is no evidence to verify the truthfulness of such statement.

35. Even if such statement was true, it is still too far-fetched to impute such knowledge upon D1.

36. For the above reasons, I hold that on the evidence before me, P has failed to prove that the dog had a propensity to bite people. It follows that the answer to the question of whether D1 knew of such propensity must also be in the negative.

*Whether D1 and D2 were liable under the doctrine of scienter?*

37. Due to my holding at paragraph 36 hereof in respect of D1 and Mr Wong’s concession in respect of D2, P's claim based on *scienter* against both defendants must fail.

*Whether D1 and/or D2 owed P a common duty of care under the Occupiers Liability Ordinance?*

38. As an alternative basis of claim on liability, P relied on the statutory duty of care under OLO.

39. Section 3 of OLO provides :-

"(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

*Was P a visitor?*

40. Put in issue by the defendants is the question of whether or not P was a lawful visitor of the premises.

41. It is not in dispute that P and Wong were invited to the premises by Li. According to Li, the three of them went to the premises because he knew from his elder brother that a party would be held at the premises, which belonged to the aunt of Ng. D1's evidence is that on the night in question, he left the premises around 9.30 pm after having dinner with his family and friends. He returned home around 2.00 am the following day. Under cross-examination, he said when he left the premises, he knew that a party would be held at the premises. Ng would be joining the party. He expected that her boyfriend would come as well though he was not formally invited. When further cross-examined, he said that he would not allow strangers into the premises.

42. It seems to me that D1's claim that he would not allow strangers into the premises was contradicted by his own conduct.

43. If D1 was serious about his restriction, he should have made it known to everyone in his circle, be it his family members, relatives or friends. There is no evidence before me as to what D1 had done to send the message across. According to the evidence of Ng, she saw it fit to bring P and Wong to the premises without first asking for the permission of D1. She well knew that both P and Wong were not known to D1. The message of D1, if any, must not have reached Ng, who is a close relative of him and who used to visit him every Lunar New Year.

44. More importantly, on the night in question, D1 left home after dinner, leaving his family and friends in the premises and knowing that a party would be held therein. He knew that Ng would come for the party. Her boyfriend, though not invited, would be coming too. If D1 did impose a restriction of no stranger in his house, he should not have acted as he did. He should not have allowed a party to be held in the premises without his presence. In doing so, he was in fact providing the premises as the venue of a party for his friends and relatives which was of no interest to him. In other words, he was not imposing any restriction on who could be invited to the party. So long that the attendees were invited by his relatives or friends, they would be allowed into the premises. That is why the boyfriend of Ng, who was neither his relative nor his friend, was allowed to join. In my view, that is the reason why Ng thought that she could bring P and Wong to the party without seeking the permission of D1.

45. For the above reasons, I hold as a matter of fact that Ng had the permission of D1 to invite guests to the party held at the premises on the night of 4 February 2011. P was one of the invitees of Ng. P was not entering the premises as a trespasser. P was therefore a visitor of the premises for the purpose of OLO.

*Was D2 an occupier of the premises?*

46. There is no dispute that D1 was an occupier of the premises at the material time for the purpose of OLO. The question remains whether D2 was an occupier.

47. D2 was the registered owner of the premises. It is his evidence and that of D1 that the premises were rented to D1 at the monthly rent of $2,500 since 2005. In his evidence-in-chief, D2 explained that prior to 2005, he used the premises as his residence. Since 2005, he commenced his business in China. After renting out the premises to D1, whenever he came back to Hong Kong from China, he lived with his mother in Tin Shui Wai. Due to the fact that they were brothers, they did not enter into a written tenancy agreement. When cross-examined, he said he received the rent in cash; he did not file any returns for property tax; there was no increase of rent between 2005 and 2011.

48. It is true that there is no documentary proof of the tenancy of the premises between the two defendants. However, whether or not the evidence of the defendants should be rejected depends on the circumstances of this case.

49. Under cross-examination, D2 said that when he purchased the premises in 2003, the down payment was paid by his parents. He was required to repay the mortgage in the sum of $5,900 per month. He had not thought of increasing the rent because he could afford to meet the mortgage payment.

50. In view of the fact that the premises were purchased with the help of his parents, I think it is natural that the premises was being used as residence of firstly D2 and then D1. Such arrangement is meant to cater for the need of the family and is not meant for the gain of profits. Trust within the family is involved. In such situation, things tend to be done informally. Therefore, it is not surprising that the rent was set at a low level; there was no increase of rent for 6 years; and no written tenancy agreement and rent receipt was produced.

51. Having said that, however, the crux of the issue remains whether D2 was an occupier of the premises. That involves the question of whether D2 was living in the premises at the material time.

52. It is D2's evidence that since he moved to China to do business in 2005, he would only come back to Hong Kong occasionally. Whenever he came back to Hong Kong, he would stay with his mother in Tin Shui Wai.

53. According to the travel records of D2 between 5 February 2009 and 6 February 2011, the pattern of stay in Hong Kong is as follows :-

Period No of days

2009

7-9/2 2

21-23/2 2

8-10/3 2

13-16/3 3

28-30/3 2

2-3/4 1

6-8/4 2

11-13/4 2

4-6/5 2

20-22/5 2

2-4/6 2

18-21/6 3

24-25/6 1

26-27/6 1

24-27/7 3

1-2/8 1

17-21/8 4

29/8-3/9 5

5-6/9 1

30/9-2/10 2

3-5/10 2

18-19/10 1

24-26/10 2

7-10/11 3

14-16/11 2

24-25/11 1

22-27/12 5

Sub-total: 59

2010

11-16/2 5

17-21/2 4

13-15/3 2

10-12/4 2

24-26/4 2

5-7/5 2

7-13/5 6

21-24/5 3

13-14/6 1

16-17/6 1

3-5/7 2

12-16/8 4

21-22/8 1

28-30/8 2

18-19/9 1

22-23/9 1

26/9-2/10 6

22-24/10 2

6-7/11 1

5-6/12 1

18-23/12 5

28/12-1/1/2011 4

Sub-total: 58

2011

17-19/1 2

1-5/2 4

Sub-total: 6

54. Hence, during the 2-year period, D2 only spent 123 days in Hong Kong, which is less than 17% of the total number of days. Most of the stays were 2 days or less. In other words, D2 spent the majority of his time in China. Effectively, he had moved his home to China. His stays in Hong Kong were temporary. It is more likely than not and I accept that the purpose of his returns to Hong Kong was to visit his mother and he stayed with her in Tin Shui Wai.

55. Mr Wong for P made a point that none of the defence witnesses described the premises as D1's home. Ng described it as her auntie's home. But the witness statements of Wong Tze Hong, Poon Yiu Chung and Lee Sai Kuen (whom were not called to give evidence at the trial) described it as D2's home.

56. Under cross-examination, Ng explained that it was her habit to call the premises as the auntie's home. She was the one who prepared the original defence and witness statements. When she prepared the witness statements, she learnt that D1 was the owner of the dog whereas the house was purchased in the name of D2 in 2003. Therefore, she described the premises as D2's home.

57. Given that the down payment was paid by the parents and at the time of the purchase, D2 was only 21 years old, it is probable that the mother of the defendants would describe that the purchase was made by her. After all, it was an arrangement within the family for which either the defendants or the mother were not obliged to tell their relatives every details. For this reason, it makes sense that Ng described the premises as the auntie's home. When it came to preparation of the witness statements, she found out that the premises were purchased in D2's name. I accept that that was the reason why in the witness statements of said 3 witnesses, it was described as D2's home. Indeed, due to her old impression, she still described it as her auntie's home in hers, her boyfriend's and Li's witness statements. There is nothing unbelievable in the explanation of Ng.

58. Mr Wong submitted that D2 must be living in the premises otherwise Ng would not have described the premises as D2's home. I reject this submission. Ng's description cannot be used as evidence of who was living in the premises at the material time. She is not a witness in this respect. By the same token, her description that the premises was her auntie's home is not evidence that her auntie (ie the mother of the defendants) was living in the premises. As a matter of fact, it is not in dispute that she was living in Tin Shui Wai.

59. For the above reasons, I hold that D2 was not an occupier of the premises at the material time for the purpose of OLO. I further hold that D1 owed P a common duty of care under OLO.

*Was there a breach of a duty of care by D1?*

61. The analysis of the above issues boils down to the final question on liability: had D1 committed a breach of duty of care or common duty of care under OLO to P in relation to the dog?

62. In considering this question, the case of *Draper v Hodder* [1972] 2 QB 556 is a useful starting point. In that case, the defendant was a breeder of Jack Russell terrier. His premises were adjacent to those of the plaintiff. There was no gate or fence between their respective premises. On the day of the incident, 7 of the defendant's Jack Russell terrier puppies suddenly dashed off from the defendant's premises on to the plaintiff's premises thereby attacking and injuring the infant plaintiff. Lord Davies, LJ after reviewing the modern authorities came to the conclusion (at p566D) that an owner or keeper of an animal may, quite apart from the *scienter* rule, be liable for damage done by that animal if the owner or keeper puts it or allows it to be in such a position that it is reasonably foreseeable that damage may result. He added at p567G that,

"These authorities leave no doubt that an owner or keeper of a tame animal may be liable in negligence for damage done by the animal, quite apart from any liability under the scienter rule. But what perhaps is not entirely clear in this connection is what is meant by "special propensity" (*per* Pearson LJ) or "special circumstances" (*per* Lord du Parcq). It is to be supposed that the answer to that question must depend on the particular facts of each individual case"

Lord Roskill, LJ held at p582D that in the context of that case, the plaintiff had to prove on a balance of probabilities a foreseeable risk of a pack of Jack Russell terriers wandering at large biting a child if and when the pack encountered a child. If there was such a foreseeable risk, then clearly the defendant ought to have guarded against it.

63. In *Li Yuk Lan v Lau Kit Ling* [1989] 2 HKLR 128, Cons, VP applying the principle in *Fardon v Harcourt-Rivington* (1932) 146 LT 391 as supplemented by the comment of Lord du Parcq in *Searle v Wallbank* [1947] AC 341 at p360, held at p129I that an owner of a domestic animal is liable for damages caused by the animal, either if the owner knows of some propensity to mischief particular to the animal but not common to the species in general, or if there are particular circumstances which in themselves impose upon the owner a duty to take care. On the basis that there was no evidence of any mischievous propensity of the 2 dogs concerned, or that the defendant knew of such propensity, or that she ought to have known of such propensity and in the absence of any special circumstances, his Lordship held that the defendant was not liable in negligence.

64. In the recent case of *Chiang Ki Chun Ian v Li Yin Sze* [2011] 5 HKLRD 727, the Court of Appeal after reviewing English and Hong Kong authorities including *Fardon v Harcourt*, *Searle v Wallbank* and *Li Yuk Lan v Lau Kit Ling* and others,held at p737 that although the trial judge did not expressly say so, the particular circumstances of the case were such that it could be inferred that the biting of the plaintiff by a dog was reasonably foreseeable. Hence, the defendant was liable in negligence.

65. In this case, there is no evidence that the dog had a history of biting people, nor is there evidence that the dog had a propensity to do mischief.

66. Indeed, it is D1's evidence that the dog, over 10 years of age, had no record of biting or hurting people. The dog was kept in the garden because she was shedding her hair. He put in place a wire mesh between the garden and the house for the purpose of preventing the dog from entering the house, a photograph of which was produced and shown at page 143 of the bundle. The dog would be allowed to move indoor in case of rain. Whenever the dog was allowed to stay indoor, she mingled with the visitors without problem. The dog was calm and gentle and was usually kept in the garden without leash or muzzle. On the night in question, when he left the premises, the dog was in the garden with the iron grille closed.

67. According to P, on her both visits, there were over 10 people attending the parties. The parties were hilarious, people were drinking alcohols, playing games of guessing fingers, dice and poker. There were a lot of fun, laughter and noise. Before the incident, there were village people setting off firecrackers and fireworks. In the 2nd party, the dog and another small dog were kept indoor. During the 2 parties, all dogs were not leashed or muzzled.

68. Mr Wong for P submitted that based on the description of the circumstances in the premises, one can easily imagine that accidents could have happened in this kind of situation resulting in biting. He took the examples that a guest might have accidentally stepped on the dog's tail, or under the influence of alcohol he might have improperly stimulated the dog, or the dog was scared by the sudden and unexpected loud noise. He suggested that the obvious precaution to take was to put the dog in the garden area and locked the iron gate.

69. I think with the benefit of hindsight, it can easily be said that the incident could have been avoided by taking certain precaution. However, the question for this court is not what D1 should have done, but whether special circumstances existed which made the biting of P by the dog reasonably foreseeable.

70. No evidence was adduced by P as to the disposition of the dog. This court is left with the uncontroverted evidence of D1, who said the dog was calm and gentle, with no record of biting and hurting people, and had no problem mingling with people.

71. I note that according to P, the circumstances of the 1st party at the premises were similar to those of the 2nd party. All dogs (including the dog) were not leashed or muzzled. The dog was not found to have displayed any mischievous disposition. In fact, P saw it appropriate to touch the dog on both visits. It seems to me that the description of the dog by D1 as calm and gentle was not an exaggeration. Given the gentle disposition of the dog, I do not think that it was reasonably foreseeable that the dog would bite the guests in the premises. Therefore, by leaving the dog unleashed and unmuzzled when the 2 parties were held at the premises, I do not think that it was negligent on his part.

72. The cause of the dog biting P was not known. It must be accepted that a tame animal of mild disposition might do some dangerous act contrary to its ordinary nature. But in the absence of special circumstances, the owner or keeper of the animal cannot be held liable in negligence. This principle can be found in the speech of Lord du Parcq in *Searle v Wallbank* [1947] AC 341 at p360 :

"Nevertheless, Lotd Atkin's proposition will be misunderstood if it is not read as subject to two necessary qualifications: first, that where no such special circumstances exist negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature, and secondly, that even if a defendant's omission to control or secure an animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence."

73. On the evidence before me, I do not find that there are special circumstances which made the biting of P by the dog reasonably foreseeable.

74. For the above reasons, I am driven to the conclusion that there was no breach of duty of care on the part of D1. Therefore, D1 should not be held liable in negligence.

*What is the quantum of damage?*

75. For completeness sake, I shall proceed to consider the quantum of damage.

*Pain, suffering and loss of amenities*

76. P was initially examined at Pok Oi Hospital. She was found to have a 2 cm long laceration lateral to the left eye and four 1 cm lacerations on the left cheek. She was transferred to Tuen Mun Hospital where the wounds were irrigated and cleansed with anti-septic solution and suturing was done. The stitches were removed 5 days later as outpatient. On 8 March 2011, her scars were found to be pinkish in colour and were not elevated.

77. P was examined by Dr Leung Sze Kee on 8 July 2013. Dr Leung observed that at a distance of 3 feet, there were 3 visible scars, one on the left temporal region, hypopigmented and slightly depressed, measuring 2 cm; one below the lateral part of the left eyebrow and was hypopigmented, measuring 0.8 cm; and one on the left upper cheek with no colour change but noticeable depression, measuring 0.4 cm x 0.3 cm. On closer examination at a distance of 1 foot, another scar was found below the outer edge of the left eye, measuring 0.5 cm and was slightly hypopigmented without depression. At a distance of 8 feet, Dr Leung observed the 2 eyelid folds were obviously different on the 2 sides.

78. Mr Wong for P cited the following cases :-

(1) In *Susi Yanti v Chu Shiu Chuen*, HCPI 1176/2000, 2/11/2001 (unreported), the 2nd plaintiff was a 4-year old girl who was attacked by a pack of dogs. She sustained 3 laceration wounds over both thighs and multiple minor bite and scratch marks over her thighs and left arm. About a year later, the doctor observed that there was a faint pale scar over her left shoulder, a slightly noticeable pale scar on her right thigh near the knee region, a raised pale scar on the front of the left upper thigh as well as several barely perceptible bite marks and a slightly pigmented raised irregular laceration scar with 2 noticeable pairs of stitch marks on the back of her upper thigh. An award of $130,000 was made under this head.

(2) In *Chiu Po Ling v Wong Yuen*, DCPI 115/2006, 2222/2/2007 (unreported), the plaintiff was a 10-year old boy. He was bitten by a dog just below his left eye with a wound measuring 1.5 cm x 1 cm. 1.5 year later, the doctor found a 33 mm x 2 mm pale, atrophic scar over the medial aspect of his infra-orbital area causing mal-functioning of his left lower eyelid. An award of $100,000 was made under this head.

(3) In *Chiang Ki Chun Ian v Li Yin Sze*, DCPI 2067/2009, 8/10/2010 (unreported), the plaintiff was a 9-year old boy. He was bitten by a dog on is left face. At the trial, the 2 scars were not noticeable at a distance of 1 foot. An award of $80,000 was made under this head.

(4) In *Tsang Ka Hung Barry v 鄧玉玲*, DCPI 525/2007 (unreported), the plaintiff was bitten by a dog on his left hand. The penetrating wound was about 5 mm in diameter. The abrasion wound was about 2 cm long. An award of $50,000 was made under this head.

79. Mr Chow for the defendants in addition to the above cases further cited *Yu Ka Ki v Chan Wing Sum*, DCPI 1819/2010, 4//11/2011 (unreported) and *Li Chi Lap v Tam Man Kuen*, DCPI 1288/2007, 19/12/2008 (unreported). However, I do not find them helpful.

80. I consider that the injuries sustained by P are more serious than the cases cited above and the scars are all on her face which will inevitably have an effect on her psychologically if not socially. In my judgment, an award of $300,000 under this head is justified.

*Pre-trial loss of earnings*

81. It is P's case that before the accident, she worked as a part-time sales assistant earning about $3,000 per month. In addition, she also worked as a part-time model and attended private photographic sessions for about 2-3 times each month, earning about $2,000 per month. After the accident, she had stopped working as part-time model and was unable to work as a part-time sales assistant during the sick leave period of 8 days.

82. The problem with this head of claim is that there is a total lack of documentary proof. The only document she produced in support was her HSBC savings account history report covering the period from 5 February 2010 to 4 February 2011. The only salary entry was for the sum of $330 on 8 December 2010. When cross-examined, she said she had quitted the job of part-time sales assistant several months before the incident. It is her evidence that after graduation, she worked for Chow Tai Fook Jewellery Group Limited as a sales person earning $14,500 per month but she quitted the job in mid 2013. She got married in July 2013.

83. P was a student at the time of the incident. On the evidence before me, I do not accept that she was doing any part-time job as alleged. After graduation, she was able to obtain a job in the labour market. There is no evidence that her salary was lower than average due to her injuries. She has not made out a case that she has suffered any loss of earnings as a result of the incident. In mid 2013, she quitted the job with Chow Tai Fook voluntarily, probably due to her imminent marriage.

84. Therefore, I hold that P had not suffered any pre-trial loss of earnings and no award should be made under this head.

*Future loss of earnings*

85. Mr Wong for P based the claim under this head on the assumption that but for the accident, P would work as a part-time model until the age of 35.

86. At paragraph 83 of this judgment, I do not accept that P had worked as a part-time model as alleged. At the trial, she testified that she was not working at the time of the trial.

87. That being so, her claim under this head must fail.

*Loss of earning capacity*

88. This head of damage arises 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 the speech of Lord Browne, LJ in *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132 at p140B.

89. At the time of the trial, P was not working. Furthermore, P had no difficulty in getting a job after graduation. There is no evidence that her salary was lower than average due to the injuries. She is not suffering a disadvantage in the labour market. The fact that she was not working was her own free choice.

90. In the circumstances of this case, I hold that the claim under this head is not made out.

*Future medical costs*

91. Dr Leung opined that the following treatments will be necessary :

(1) Injections of dermal fillers $150,000

(2) Laser therapy $100,000

(3) Blepharoplasty $ 50,000

92. I see no reason not to follow the recommendation of Dr Leung and a sum of $300,000 should be awarded under this head.

*Special damages*

93. Under this head P claims the following special damages :

(1) Medical expenses $ 928

(2) Travelling expenses $ 3,000

(3) Tonic foods $ 3,000

(4) Facial expenses $ 5,000

Total: $11,928

94. I do not see anything unreasonable and a sum of $11,928 should be awarded under this head.

*Interest*

95. Interest on general damage should run at the rate of 2% per annum from the date of writ until the date of judgment.

96. Interest on special damages should run at half judgment rate from the date of accident until the date of judgment.

*Conclusion and order*

97. In conclusion, the plaintiff's claim against both defendants is dismissed.

*Costs*

98. Costs should follow the event. I make an order *nisi* that P shall pay the defendants costs of this action with certificate for counsel, to be taxed if not agreed. The order *nisi* shall become absolute in the absence of any application to vary the same within 14 days from the date of this judgment.

99. P's own costs shall be taxed in accordance with the Legal Aid Regulations.

Brian Mak

Deputy District Judge

Mr Damian Wong, instructed by Cheng & Wong for the plaintiff

Mr Tony Chow, instructed by John W Wong & Co for the 1st and 2nd Defendants