#### DCPI 2390/2011

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2390 OF 2011

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BETWEEN

LEE FU WAH Plaintiff

and

MICHAEL LEE HOFFMAN 1st Defendant

MIU YUK LING 2nd Defendant

FAVOURABLE ISSUE COMPANY LIMITED 3rd Defendant

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Before: His Honour Judge Alex Lee in Court

Dates of Hearing: 3-5 June 2013

Date of Judgment: 25 June 2013

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JUDGMENT

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*INTRODUCTION*

1. This is the plaintiff’s claim for damages for personal injuries allegedly sustained when he fell and rolled down a slope as a result him being chased by a dog said to have been owned by D1 and D2 and kept at the property of D3.

2. The accident was said to have occurred on 31 May 2009. The plaintiff was a decoration worker. At the material time, he was doing water-proofing work with two colleagues at the house owned by D3 at Lot 433 in DD 299, Tsuen Wan, New Territories. D1 and D2 were the shareholders and directors of D3. However, only D2 and her domestic helper were living in the premises, as D2 and D1 separated in 2008 and D1 had since moved out of the place. The dog concerned was a black Tibetan Mastiff of about five-year old at the time weighing about 160 pounds. Its name was “Bruiser”. Bruiser was given to D1 and D2 as a family pet when it was a puppy and was kept at the house.

3. The plaintiff was aged 47 at the time of the accident and is now aged 50. He suffered multiple abrasions over his body and limbs and also head injury. After having been admitted to and treated at the Accident and Emergency Department of Yan Chai Hospital on the day of the alleged incident, he was discharged on the same day and was granted 7 day sick leave from 31 May 2009 to 6 June 2009. The plaintiff suffers no permanent impairment, disfigurement or loss of earning capacity. He resumed work soon after the sick leave.

4. The plaintiff’s cause of action against D1 and D2 is based on common law negligence. The plaintiff also alleges, by way of alternative, against D1, D2 and D3 that they, as occupiers of the property, breached the common duty of care owed to him under the Occupiers Liability Ordinance (“OLO”), Cap 314. Although there is also an allegation that D1 and D2 as the owners of Bruiser were in breach of their statutory duties under s 23 of the Rabies Ordinance, Cap 421, Mr Chiu, counsel for the plaintiff, indicated in court that the plaintiff no longer pursues that cause of action. Mr Chiu also disavowed any no reliance on the scienter rule in the present case.

*THE ISSUES*

5. There is no dispute that the plaintiff suffered injuries. The issues are whether the plaintiff was chased by Bruiser and if so, whether any of the defendants was guilty of negligence or breach of the common duty of care. D1 was not present at the scene and his case is that he had no control over Bruiser and he was not an occupier of the property at the material time. The case of D2 and D3 was that Bruiser was with D2 all along and therefore the incident could not have happened as the plaintiff alleged. In the case of all defendants, it was also argued that the incident, if happened, was not due to any negligence on their part and if the contrary was the case, then the plaintiff was contributory negligent in causing injuries to himself.

6. As there was no eye-witness to the alleged incident apart from the plaintiff, the factual dispute is therefore mainly about the credibility of the plaintiff. In this regard, I bear in mind that the burden of proof is on him and that the standard of proof is balance of probabilities.

*CONSIDERATION OF THE EVIDENCE*

*The property*

7. The site on which the house was built was on a slope with an access road leading to it from the main road lying on its north. At the end of the access road, which ran from north to south, was the entrance to the site where there was an iron gate (“the main gate”). Beyond the main gate was the front yard which was used as a carpark. About ten metres from the main gate into the site, there was another gate which was smaller and of about the same height as a child (“the smaller gate”). One would need to get pass both gates in order to reach the main door of the house. The house consisted of 3 floors and the main door was on the first level. On the ground level of house, the access to which could be gained only through the main door and an internal staircase, there was a light well which could be seen from the first level. There was a pair of mesh wire gates installed at the entrance to the light well on the ground floor. There is evidence that Bruiser was sometimes kept there. On the west side of the premises was the backyard or the garden area.

*The evidence on the incident*

8. The evidence of the plaintiff was that he and his two colleagues started the water-proofing work in April 2009. By the time of the alleged incident, he had been working there for about 6 weeks. He worked six days a week from 9 am to 6 pm and rested on Sundays. He was shown a photograph of Bruiser and he identified it as the dog concerned. He said that since the commencement of the work when they were there, Bruiser would be locked in the light well. This part of his evidence is supported by his colleague Tang who also gave evidence. The plaintiff agreed that prior to the incident Bruiser had not been a danger to him.

9. The plaintiff said that on the day in question he worked in the front yard and his two colleagues, Tang and Yu, worked on the rooftop. His job was to load sand onto a container which was from time to time dropped by his colleagues from above. At about 10 am, he was having a break and was standing in front of a pile of sand in the front yard. Suddenly, Bruiser appeared from behind the sand pile and rushed and lunged at him. In order to flee from Bruiser, he sped through the main gate, which had been left ajar, down onto the main road. Bruiser was chasing after him. About 30 seconds later, he fell and rolled down the slope for some distance before he eventually stopped. He did not know what happened to Bruiser then. A passerby found him and called an ambulance for him. Tang and Yu subsequently arrived when the ambulance was already there. D2 also arrived and said that she was willing to pay compensation and asked them not to report the matter to the police. He was then conveyed to the hospital in the company of his colleagues.

10. Tang did not witness the plaintiff being chased by Bruiser. His evidence was that he and Yu were having a break on the rooftop when he saw Bruiser returning from the outside to the house. When it was about time to start working again and the plaintiff was nowhere to be seen, he and Yu went out to look for the plaintiff and eventually found him down the slope. Tang also testified that D2 had promised to pay compensation and asked them not to report the matter to the police.

11. D1 said that Bruiser was given to him and D2 as a family pet when it was only several months old. It was about 160 pounds in weight, 3 feet in height from ground to shoulder and 1 yard and a half in length from head to tail. D1 said that he did not expect it to bite anyone. However, he agreed that he kept Bruiser as a guard and its size could deter strangers. D1 said that Bruiser could run very fast and if it intended to attack the plaintiff, there was little chance that the plaintiff could have escaped without being caught up with by Bruiser.

12. D2’s evidence was that she in fact kept three dogs at the time, ie, Bruiser and two mongrels (which were beige). Bruiser was inside the house the night before the incident and the mongrels were in the light well. She did not know when she woke up on the day in question. It was sometime after 9 am but could be as late as 10 am. She did not know that the workers had arrived. She was walking down from her bedroom on the first floor when she first saw Bruiser that day. Bruiser was then on the kitchen side on the ground floor. While she was having breakfast, Bruiser was beside her. All of a sudden, Bruiser walked up to the first floor and she followed it. There was no one at the main door. She stood there and watched for a few minutes before returning with Bruiser to the kitchen. Down there, she received a call from one of the workers saying that her dog had bitten one of them. She thought that that was impossible as Bruiser had been with her. She asked her maid to lock Bruiser up and she went out to see what had happened. She was told by one of the workers that it was in fact not the case that Bruiser had bitten the plaintiff but that the plaintiff was scared and rolled down the slope. When she saw the ambulance, the plaintiff had already been taken on board and the doors of the ambulance were about to be closed. She said that she had not offered any compensation or asked the workers not to report to the police.

*Assessment of plaintiff’s evidence*

13. Having observed the plaintiff giving evidence in court, he strikes me as a straight-forward and simple man. I have considered all the points raised by the defence in cross-examination and in submissions about the allegedly inconsistencies or improbabilities of his evidence. However, I do not consider that there is anything significant which causes me to doubt his general credibility:

(a) As to whether Bruiser could have come to sand pile from the house without the plaintiff noticing it, I note that he was then having a break. It is therefore possible that he was not paying attention to the surroundings.

(b) As to whether the sand pile was where the plaintiff said it was and whether it could have obstructed his view, D2’s evidence on this was vague and unreliable. At that time, the work on the rooftop required the use of sand. I see no reason why there should not be a high pile of sand in the front yard then.

(c) As to whether the front gate was left ajar, neither D1 nor D2 had any personal knowledge of its actual state at the material time. D2’s evidence was the main gate was left unlocked when the workers were working.

(d) As to whether the plaintiff had run for 30 seconds and where the exact locations were that he fell down and eventually landed, it is perfectly understandable that the estimates given by him can only be rough ones. One would naturally be nervous if he was chased by a big dog and his perception of time and distance would be affected. However, that does not necessarily mean that the witness had lied in his evidence if the estimates given by him as to time and distance were not entirely accurate.

(e) As to whether the plaintiff could have rolled a long may as he said, although the slope was not a steep one, the distance would also depend on the force with which he rolled.

(f) There are no merits in the point that the pattern of the plaintiff’s injuries was inconsistent with his description of the event. The contention is highly speculative and not supported by any expert medical evidence.

(g) Although the plaintiff and Tang only mentioned the passerby in their evidence in court but not also in their statements, I can see no reason to doubt that there was in fact a passerby who called the ambulance for the plaintiff. Had it been otherwise; it would have been easier for them to say that the ambulance was called by one of the workers. The alleged fabrication about the existence of a passer-by would be wholly unnecessary.

(h) A point was raised in submission that 31 May 2009 was in fact a Sunday and therefore the workers would not have worked on that day. In view of this and coupled with D2’s evidence that she was not aware of the arrival of the workers, it was suggested by Mr Erving for D1, which was supported by Ms Wang for D2, that the whole incident about the plaintiff being chased by Bruiser was made up. The submission was followed by an application from Mr Erving during closing submissions to recall the plaintiff, and perhaps Tang as well, for further cross-examination. Subsequently, that application was, sensibly I would say, withdrawn by Mr Erving after he taken instruction from his client. However, there remained an apparent inconsistency which had to be dealt with. After careful consideration of all the relevant evidence, I have come to the view that this apparent inconsistency does not affect the general credibility of the plaintiff. Firstly, the fact that the day was a Sunday should have but had never been put to any of the witnesses in cross-examination. The Court therefore should not speculate how the question would have been answered. Secondly, D2 said that she met the workers and saw the ambulance on the day. She would also have been aware that the day was a Sunday. If she did not expect the workers to be there, she would have mentioned it in her statement or her evidence in court. However, she did not. To the contrary, Ms Wang who acted for D2 put to the plaintiff in cross-examination that the female owner came and opened the main gate for them in that morning. Therefore, it could not have been D2’s case that the workers were not supposed to work on that day. Furthermore, D1 also said that after he had been informed on the day by D2 about the event, he went back to the house. D1 similarly would have been aware that it was a Sunday. He raised no query either. Thirdly, if the whole incident were staged by the workers, it would make more sense for them to do it on a working day. It was improbable that the workers would have come back on their day-off for the alleged act playing.

(i) There is nothing inherently improbable in the plaintiff’s version as to what he perceived had happened. It would be natural for him to be intimidated by Bruiser if it suddenly appeared before him at close quarters and unrestrained. The plaintiff had said that the dog was normally kept in the light well when they were on the premises. D2’s evidence was that she would not allow her dogs to have contact with strangers. Therefore, the interference to be drawn was that the plaintiff had not been near Bruiser and he had not expected to meet it in the front yard. One has also to bear in mind that Bruiser was an enormous animal having 160 pound in weight and a yard and a half in length. D1 had said that its sheer size could deter people. D2 had said that it could be fierce when approached by a stranger. That is not to say that Bruiser had a propensity to attack people. However, it is possible that it would have felt being challenged and threatened if the plaintiff stared at it in fear. The plaintiff’s turning his back to the dog and trying to run away could also be a recipe for disaster. However, it is possible that Bruiser only intended to drive the plaintiff well off its territories without intending to cause him real harm. That would be consistent with it returning to the house without attacking the plaintiff after he had fallen down.

14. I have also considered whether the plaintiff’s credibility is in any way undermined by the evidence of D2. I come to the conclusion that it is not. In my assessment, the versions given by the plaintiff and D2 are not necessarily inconsistent. I note that accordingly to the plaintiff the incident occurred within a very short time span. On the other hand, D2 agreed that it could be as late as 10 am when she first saw Bruiser that morning. She obviously could not have known what Bruiser had done before that. Therefore, it is possible that Bruiser had been outside and returned. Besides, it is also telling that when D2 was told by a worker that her dog had bitten someone, she immediately assumed that it was Bruiser rather than the mongrels which she said had been kept in the light well.

15. Having considered the plaintiff’s evidence carefully, I have come to the view that although his perception of the event may have to a certain extent been affected by his fear, on the whole I am satisfied that he is an honest and credible witness.

*Assessment of Tang’s evidence*

16. The only other witness called by the plaintiff was his co-worker Tang. However, Tang’s evidence actually adds not very much to the plaintiff’s case.

17. I note that his answers to many of the questions in cross-examination were that he was not clear or that he had no idea. However, I also note that a number of questions asked of him were about minute details of the case of which he cannot reasonably be expected to have any independent recollection. Examples of those included whether the main gate was closed and blotted every time he arrived for work in the morning, who would open it for them and whether a telephone call had to be made to the householder before the main gate was opened for them, how often D1 returned to the house and which type of shoes the plaintiff wore on the day. Nevertheless, it does appear to me that he was not very keen to answer some of the questions or to recollect things when he was asked to do so. I have considered whether this altitude was indicative of evasiveness or dishonesty. Having carefully observed Tang giving evidence in court, I come to the view that he was not being evasive or dishonest. In this regard, I have also taken into account Tang’s background and the fact that the things he testified had happened than 4 years ago.

18. I do not see anything unusual about the workers taking a break at the time they said they did even though they only started the day’s work at about 9:15 am. The evidence was that the weather was hot. The plaintiff had said that he did not wear any upper garment. I note also that their work was hard manual labour which obviously required a lot of energy. It is only reasonable to expect that they would take a water/cigarette break from time to time.

19. The fact that neither Tang nor Yu had not seen the plaintiff being chased by the dog or escaping through the main gate does not cause me to doubt Tang’s or the plaintiff’s evidence. Tang and Yu were on the rooftop resting and smoking cigarette. Their attention could not be always on the plaintiff.

20. A point was made in cross-examination and in submission as to the unlikelihood of Tang and Yu looking for the plaintiff outside the premises rather than checking inside the house. However, Tang’s evidence was that he saw Bruiser returning from outside. He said that when they discovered that the plaintiff was missing, they called out for him and there was no response. He said he then thought that something might have happened to the plaintiff. In my view, in the circumstances there was nothing unusual about the conduct of Tang and Yu. If the plaintiff were in the house, he would have responded when Tang and Yu called out for him. It was therefore logical for them to look for the plaintiff outside the premises instead of searching for him inside the house.

*Assessment of D2’s evidence*

21. As regards D2, as discussed above her evidence as to whether Bruiser could have the opportunity to chase the plaintiff is not necessarily inconsistent with the plaintiff’s version.

22. As to the rest of her evidence, I note, however, that her case contained a major inconsistency as to whether she had arrived at the place where the plaintiff was found. The case as put by Ms Wang to Tang in cross-examination was that D2 had not been to that location. Nevertheless, when D2 gave evidence, she testified to the contrary. She also said that when she arrived the doors of the ambulance were about to be closed. In view of this and having observed D2 giving evidence in the witness box, I reject her evidence that she had not offered to pay compensation to the workers and asked them not to report the matter to the police.

*Findings on the incident*

23. Having considered all the relevant evidence, I make the following findings of facts which I am satisfied on balance of probabilities:-

(a) The plaintiff, Tang and Yu worked on the premises on the day in question.

(b) The plaintiff was scared by Bruiser. His reaction caused the dog to wrongly interpret that it was being challenged. The plaintiff’s turning his back and ran away from it caused the dog to give chase.

(c) The main gate had been ajar at the time and the plaintiff sped through it and ran down onto the road.

(d) As the plaintiff ran, he fell accidently. The force was so great so that he kept rolling down the slope for some distance until he eventually stopped.

(e) Bruiser returned to the house and was seen by Tang.

(f) Later, a passerby found the plaintiff and summonsed the ambulance for him.

(g) Tang and Yu looked for the plaintiff and eventually found him. At the time, the ambulance had already arrived.

(h) D2 also arrived and she spoke to the workers and offered compensation. That was when the ambulance was about to leave for the hospital.

*THE CASE AGAINST D1*

*The evidence*

24. D1 owns one share in D3 and D2 owns the other 999 shares. D1 said that he had separated from D2 and moved out of the property since 2008. He said that he only returned to the house once a week or every two weeks to exercise Bruiser and that was done only at D2’s pleasure. He said that he did not have the keys to the premise. He said that he did not have the “custody” of Bruiser. D1’s evidence in this regard is supported by the evidence of D2.

25. On the other hand, the evidence of the plaintiff and Tang suggests that during the six weeks they were there, D1 had returned to the house more frequently than D1 admitted. The plaintiff even said that he had seen D1 doing garden work in the backyard with a spade.

*Whether D1 was an occupier*

26. D1 was not the legal owner of the premises in question. The ownership belongs to D3. D1 owns one out of a thousand of D3’s share and he is one of its directors. However, that fact alone does not give him any right to or control over the premises or the right to invite or permit others to come on them.

27. Having considered all the relevant evidence, I find that D1 was no longer living at the property at the material time and his visits to the house were occasionally and not frequent. On each occasion that he returned, it was only with the permission of D2 and his capacity was that of a visitor only. I note also that D1 was not present at the time of the incident.

28. Whether a person is an occupier of the premises is a question of fact and therefore case specific: see *Clerk & Lindsell on Torts*, 12th edition, at §12-08 to §12-10. On the facts of the present case, I find that D1 was not an occupier of the premises for the purpose of the OLO. As such, the plaintiff’s case against D1 on occupier’s liability must fail.

*Whether D1 had responsibility for Bruiser*

29. Based on the evidence before me, I find as a fact that D1 had occasional access to Bruiser but only with D2’s permission. Although D2 said that D1 was Bruiser’s licence holder, I find as a fact that D1 had ceased to have possession of it. The fact that he might return occasionally to exercise Bruiser did not, in my judgment, give him possession of or general control over it. I find as a fact that, regardless of any connection he might have with Bruiser prior to his moving out, he could no longer be regarded as its keeper at the material time.

30. Mr Chiu submitted that the mere fact that D1 was the licence holder of Bruiser would be sufficient to make him liable for its act. Mr Erving, on other hand, submitted that D1 was not responsible as D1 had no control over the dog. No authorities had been cited to me by either party.

31. With respect, I am unable to accept Mr Chiu’s submission in this regard. My reasons are as follows:

(a) The mere fact that a dog is registered under one’s name does not give him any proprietary right in or control over the dog. There is no such thing as “registration of title” for dogs in Hong Kong. The legislative purpose of the Rabies Ordinance and the registration scheme under it is for the prevention and controlling of rabies. Although s 20 of the Rabies Regulations imposes a criminal liability on any person who keeps a dog over the age of 5 months without a licence, the word “keeper” is widely defined in s 2 of the Rabies Ordinance and it includes persons who are not the owner.

(b) Even assuming that D1 could still be regarded as an owner of Bruiser, the evidence shows and I have found that he did not have the possession of and general control over the dog. Although in *Knott v London County Council* [1934] 1 KB 126, Lord Hewart CJ said, at p 141, that the “true test of liability” was “that of ownership or possession and control”, his lordship also said earlier, at p 140, that “It is true that the real test of responsibility is not ownership but possession and control; hence in *M’Kone v Wood*,[[1]](#footnote-1) Lord Tenterden in ruling before the jury put as the test whether the defendant was “harbouring the dog*.*” It would appear, therefore, that merely ownership is not sufficient as a basis for liability at common law, if it is not also accompanied by possession and control of the animal.

(c) Even if I were wrong as to whether mere ownership of a dog is sufficient to give rise to civil liability for its activities, it is difficult to see in what way D1 was negligent. He was not living in the property and he had neither possession nor control of Bruiser. It was not for him to direct his estranged wife what she should do with the dog. In fact, he had no right to do anything in the property without D2’s permission. Besides, the workers were not employed by him and he was in no position to give them directions.

32. Based on the above, I conclude therefore that the plaintiff’s cause of action against D1 at common law also fails.

*THE CASE AGAINST D2*

*D2 as owner and keeper of Bruiser*

33. There is no dispute that D2 was at the material time both the owner and keeper of Bruiser. The plaintiff does not bring his claim under the doctrine of scienter, which requires proof of knowledge of the animal's propensity to attack, but relies on common law negligence. There can also be doubt, however, that D2, as the keeper of the dog, owed a duty of care to the workers who were present on the premises as her invitees. In *Chiang Ki Chun Ian v Li Yin Sze* [2011] 5 HKLRD 727, Bharwaney J, who gave judgment of the Court of Appeal, said at 736 of the judgment:-

“The common thread which runs through the law of negligence, and in its application to various and diverse factual situations, is that a neighbour must refrain from an act or omission (in those cases where he is charged with a positive duty to act) if he reasonably foresees a real, as opposed to a fanciful, risk of harm to his neighbour from his act or omission. The court must assess whether the risk of harm was real or whether it was fanciful and the court must do so by assessing the likelihood of the risk materialising on the specific facts and circumstances of the case before it, and by balancing the likelihood of the risk materialising against the severity of harm, were it to materialise, the cost and practicality of precautions, and the utility of the activity in question.”

Given my findings on the incident at paragraph 23 above, the question then is whether D2 is guilty of negligence by breaching her duty of care owed to the plaintiff.

*Whether D2 was negligent*

34. As to where Bruiser was normally kept when the workers were present on the premises, both the plaintiff and Tang said in their statements that it would normally be locked in the light well. I note also that this part of their evidence was not challenged by Ms Wang. Besides, D2 in her evidence also said that if there was any stranger, Bruiser would be kept in a bedroom or in the light well.

35. D2’s evidence was that the dog was inside the house the night before the incident. She said that she woke up late in the morning and saw Bruiser on the kitchen side on the ground floor. There was no evidence as to where the domestic helper was. The inference is that at the time Bruiser had been left unsupervised in the house and unchained.

36. The incident could not have happened if the main door of the house and the smaller gate had been kept shut. However, there is evidence that the main door had been left open that morning. In this regard, D2 said in her statement that:-

“I recall the dog walking up to the first floor at normal pace after a while when my breakfast was nearly finished. … After reaching the 1st floor of the House, the dog approached the door leading to the outside area of the house which was opened at the time and remained positioned there.”

Based on the above, I am satisfied that the door was open at the material time.

37. As regards the smaller gate, D2 was vehement that it was closed and bolted. However, the basis for her to say this was that she had given instruction to her domestic helper and the workers that the smaller gate should be kept bolted. Nevertheless, she admitted in cross-examination that she did not check the smaller gate every day.

38. I accept D2’s evidence that she had told the workers to keep the small gate shut. That was also the evidence of the plaintiff and Tang in cross-examination by Mr Erving, although Tang backtracked on this when he was cross-examined by Ms Wang by denying that there was such an instruction. He said that the smaller gate had to be left open so that they could go in and out during work. I find as a fact that despite what she had told the workers to do, the smaller gate was left open at the material time. I do not accept D2’s evidence that she knew as a fact that the small gate was bolted at the time.

39. Was D2 negligent in the present case? On the evidence before me, I have come to the conclusion that she was. My reasons are as follows:-

(a) D2 said in cross-examination that Bruiser was protective of her family. D2 said that Bruiser could be fierce when approached by strangers, although she also said that it would not behave that way in the house “when she was there”. She also said that she would prevent any unnecessary contact between any of her dogs and strangers. This shows therefore that she reasonably foresaw a real risk of harm to the workers if Bruiser was left at large with them.

(b) On the day in question, the workers had started the day’s work on the rooftop. In order for them to reach the roof, they had to get through the main door of the house and used the staircase inside. Bruiser, however, had been left at large inside the house. As such, neither D2 nor her domestic helper as her agent had done anything to prevent any possible contact between the workers and Bruiser. I note also that when D2 found that the main door was left open, she expressed no surprise at all.

(c) In my judgment, it was not sufficient for D2 to discharge her duty of care to the workers by just telling them to shut the smaller gate and then let them take care of themselves.

(d) As the workers needed to pass through the smaller gate for work possible many times a day, D2 must have foreseen a real risk of the smaller gate being left open during the day. It is therefore incumbent upon her, and her domestic helper as her agent, to ensure that there was sufficient supervision of Bruiser when the workers were there or to adopt such other measures which would be effective to keep the dog from the workers.

(e) I find as a fact that what Bruiser did in relation to the plaintiff on the day in question was not unforeseeable in that it was not a spontaneous act that was wholly out of character. In cross-examination, D2 said that she told the workers that when they come they should inform her and she would then lock up the dogs. I find that the incident happened was the kind of event which D2 had tried to avoid. However, on the day in question neither D2 nor her domestic helper as her agent had taken the necessary pre-caution to prevent the incident from happening.

40. Based on the above, I find that D2 had breached her duty of care owed to the plaintiff. I also find that her breach of duty of care was a contributing cause of the incident which resulted in the plaintiff’s injuries. There are clear case authorities that a cause needs not be the sole cause in order to give rise to liability in negligence: see *Hale v Hante & Dorset Motor Services Ltd & Anor* [1947] 2 All ER 628, where a local authority planted trees near the highway, the braches of which were allowed to overhang the road’s surface, and the claimant, a passenger in the defendant’s bus, which was negligently driven so close to the trees that a low branch struck the bus window, was blinded by broken glass, both the local authority and the bus company were liable for the injury.

41. As to whether the plaintiff’s injuries were caused by Bruiser, I respectfully follow what was said by Wall J in English case of *Chauhan v Paul*, All England Official Transcripts (1997-2008), Court of Appeal (Civil Division), 19.2.1998, which is adopted by Deputy District Judge Yee (as he then was) in *Cheung Kwok Keung v Yip Man Hing Building Materials Co Ltd*, DCPI 2738/2009, as follows:-

“In my judgment, whether or not the injury was "caused by" the animal is essentially an issue of fact. Thus, to take one of the examples canvassed in argument, if an innocuous dog barks at me as I am walking along the pavement and as a result I jump into the path of an approaching car, it may well be that any injuries I suffer were not caused by the dog, but by my excessive reaction to the dog's bark. It would furthermore be difficult for the owner of that dog reasonably to foresee that when taking it for a walk its act of barking would have the consequences described.

However, if I am approached at speed by a large dog whose intentions may (unbeknown to me) be friendly; if as a consequence I take the reasonable decision to remove myself from the scene as soon as possible; and if in the process of running away I am chased by the dog and injure myself by falling over or having a heart attack, on these facts the damage I suffer is, in my judgment, caused by the dog.”

42. I conclude therefore that the plaintiff has made out his case of negligence against D2.

*LIABILITY OF D2 & D3 AS OCCUPIERS*

43. There can be little doubt that D2 was an occupier of the premises as she was living there. As regards D3, I note that a company’s occupation of premises must be vicarious, through its servant or agents: *Wheat v E Lacon & Co Ltd* [1996] AC 552. There is no suggestion that D3 was a mere landlord which had parted with the possession of the premises to D2 as a tenant and retained no control over it. On the evidence, the inference is that D2 lived there as D3’s licensee or agent. Moreover, Ms Wang did not take any point about D3’s occupation. Therefore I find that D3 was also an occupier of the premises. On the other hand, there is no dispute that the plaintiff was a visitor for the purpose of the OLO, as he was invited to be there by D2 or the domestic helper as her agent for the purpose of carrying out water-proofing work.

44. At the outset of the trial, a point was raised as to whether the provisions of the OLO were applicable in the present case which, on the face of it, was not concerned with “dangers due to the state of the premises or to things done or omitted to be done on them”: see s 2(1), the OLO.

45. In this regard, I note that the Court of Appeal in *Chiang Ki Chun Ian v Li Yin Sze*, supra, does not exclude occupiers’ liability as a possible cause of action. I also managed to find the following passage in *Street on Torts*, 9th edition, on p 289 where the learned author says:-

“The Act plainly regulates the duty of the occupier in relation to structural defects or other dangers due to the state of the premises themselves, or indeed “things” on the premises such as vicious dogs roaming free in the garden.”

The learned author cited *Hill v Lovett* (OH) 1992 SLT 994 (unreported) as authority for the above proposition. The case was based on the Occupiers’ Liability (Scotland) Act 1960, c 30 which contains a provision similar to our s 2, OLO. In that case, a veterinary surgeon's receptionist was given permission to enter a private garden belonging to her employer, for the purpose of cleaning the surgery windows. While there she was bitten on the leg by one of two dogs, also belonging to her employer, which were in the garden. It was held that the employer was in breach of duty at common law in failing to ensure that the garden was a safe place of work for her and both defenders were liable under the 1960 Act in allowing the pursuer to enter the garden while the dogs were there. Based on the above authorities, I am satisfied that the OLO is applicable to the present case.

46. Ms Wang submitted that the plaintiff sustained injuries outside the premises and therefore the claim based on the OLO could not stand. With respect, I am unable to accept Ms Wang’s submission. I respectfully agree with the following passage in Street on Tort, supra, at n2:-

“At common law if the danger confronted the visitor while on the premises, although he actually suffered the harm off the premises, e g falling off an unfenced cliff into the sea, the rules regulating the duties of occupiers towards visitors applied: *Perkowski v Wellington Corporation* [1959] AC 53, [1958] 3 All ER 368, PC. The wording of this section of the Act is also wide enough to cover this situation.”

47. Based on the evidence which I have accepted, I am satisfied that both D2 and D3 breached their common duty of care to the plaintiff, who was there on the business of D2 and D3, to take reasonable care in all the circumstances to see that he would be reasonably safe in using the premises or the purposes for which he was invited or permitted by them to be there. As I have said, I find that in the circumstances of the present case, the fact that D2 had told the workers to keep the smaller gate shut was, without more, not enough to absolve either D2 or D3 from liability: see s 3(4)(a), OLO.

*WHETHER PLAINTIFF CONTRIBUTORY NEGLIGENCE*

48. Ms Wang submitted that the plaintiff was guilty of contributory negligence in that:-

(a) the smaller gate could have been left open by the workers;

(b) the plaintiff could have shut the main gate after him so as to prevent Bruiser from chasing him; and

(c) the plaintiff’s injuries could have been less serious if he had put on an upper garment or he would not have fall if he had wore appropriate footwear rather than a pair of flip-flog.

49. With respect, I am unable to accept anything of the above. My reasons are as follows:-

(a) Whilst it is possible that the smaller gate could have been left open by the workers on the day in question, there was no evidence before me as to who he or she was. It had not been put to the plaintiff that it was him who left it open. The burden of proving contributory negligence is on D2 and D3 on balance of probabilities and they have, in my judgment, failed to discharge this burden.

(b) It would be, in my judgment, unrealistic to expect to the plaintiff to think about closing the main gate at the heat of the moment. Also, there was no evidence that he had time to do it or that it was viable.

(c) The work he was asked to perform did not require him to wear any upper garment or a pair of shoes. Besides, the plaintiff could not have foreseen that he would be chased by a dog on that day.

50. I see no basis to suggest that the plaintiff had failed to take reasonable care of himself. I find that he was not contributory negligent.

*QUANTUM*

*General damages*

51. In the present case, the plaintiff suffered abrasions over his head, trunk and limbs, an avulsed nail of his left toe and a broken nail of his right toe. I have seen the pictures showing the plaintiff’s injuries. The injuries were relatively minor ones. The plaintiff asserted that he has since been afraid of dogs but this assertion has not been supported by any expert evidence.

52. The plaintiff in the statement of claim seeks damages on pain, suffering and loss of amenities in the sum of $300,000. Mr Chiu in his closing submission greatly reduced the claim under this head to $100,000. He referred me to the following cases:-

(i) *Susi Yanti & Anor v Chu Shiu Chuen*, HCPI 176/2000 (a 4-year old girl who was attacked by a pack of dogs, suffering wounds on limbs and developed a fear of dogs was awarded $130,000 for PSLA);

(ii) *Tsang Ka Hung Barry v Tang Yuk Ling*, DCPI 525/2007 (a medical doctor who was bitten by a dog with no lasting injuries was awarded $50,000 for PSLA);

(iii) *Chiu Po Ling v Wong Yuet*, DCPI 115/2006 (a 10-year old boy bitten by a dog just below his left eye resulting in a wound and was awarded $100,000 for PSLA)

(iv) *Tse Parc Ki v Atlantic Team Limited*, DCPI 1981/2006 (a 2½-year old girl whose finger was crushed by a closing door resulting in an avulsed nail and fracture was awarded $40,000)

53. I am of the view that the injuries of the plaintiff were not in the category or were not as serious as those shown in the above cases. In my assessment, the appropriate amount for PSLA in the present case is $35,000.

*Special damages*

54. The plaintiff was given 7 days sick leave as shown in the medical report of Yan Chai Hospital dated 12 May 2010. There is a certificate from his employer showing that his daily wage was $750. The amount of damages under this head is therefore:

$750 x 7 = $5,250.

55. The plaintiff also asks for medical expenses and travelling expenses which he puts as $1,000 each. Although no receipts provided to support these items, I would adopt the approach in *Mui Ling Kwan v Wong Yin Wah* [1973] HKLR 45 and allow a reasonable sum for each of these items. In the present case, I allow the claims under these heads in full, ie, $1,000 for travelling and $1,000 for medical expenses.

*CONCLUSION*

56. The plaintiff is awarded the following, which is to be paid jointly and severally by D2 and D3:-

General damages:

PSLA $35,000

Special damages:

Sick leave $5,250

Travelling expenses $1,000

Medical expenses $1,000

\_\_\_\_\_\_\_

Total $42,250

57. I make an order nisi that there be 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 date of the incident to the date of this judgment.

58. I also make an order nisi that the plaintiff’s costs be paid by D2 and D3, to be taxed if not agreed, with certificate for counsel. I also make an order nisi that D1’s costs be paid by the plaintiff, to be taxed if not agreed.

( Alex Lee )

District Judge

Mr Victor KH Chiu, instructed by Lee & Associates Law Office, for the plaintiff

Mr CP Erving, of Chong & Yen, for the 1st defendant

Ms Athena KW Wang, instructed by Cheung & Liu, for the 2nd and 3rd defendants

1. 5 C & P 1, 2 [↑](#footnote-ref-1)