[English Translation – 英譯本]

DCPI 670/2016

[2019] HKDC 592

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.670 OF 2016

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| BETWEEN |  |  |
|  | CHAN CHUN WAI JOSE | Plaintiff |
|  | and |  |
|  | CHEUNG TAK SING | 1st Defendant |
|  | NG TIN WO | 2nd Defendant |

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Before：Deputy District Judge Alfred Cheng in Court

Dates of Hearing：4, 5 and 25 July 2018

Date of Judgement：16 May 2019

**JUDGMENT**

1. The plaintiff alleged that the two defendants assaulted him outside G/F, No 32, Yin Hing Street, San Po Kong on 11 May 2013, causing him injuries (hereinafter “the incident”). He commenced this action to claim damages against the two defendants.
2. The two defendants denied assaulting the plaintiff. They also disagreed with the amount claimed by the plaintiff.

The incident

1. The plaintiff testified on the course of the events as follows:
2. In the evening of 10 May 2013, the plaintiff went to have a late night snack with two friends at a restaurant called “New Ying Wah Restaurant” (hereinafter “the restaurant”) in Yin Hing Street at San Po Kong. The restaurant comprised two shops, namely shops 34A and 34B. The plaintiff was sitting in shop 34B with his friends. He did not know the two defendants before that night.
3. At around 11:30 pm, the plaintiff needed to answer a call of nature and the nearest toilet was inside shop 34A. He testified that when he entered shop 34A, there were ten-odd men and women, blocking his way to the toilet. He requested the customers to give way but his request was refused. Therefore, he had to find another toilet, and then he went back to shop 34B to continue his meal.
4. The plaintiff alleged that he needed to answer a call of nature again at around 12:45 am on 11 May 2013. He said that when he was waiting for his turn, an unknown man (hereinafter “the man”) walked close by asking if he was outraged that his earlier request was refused. The plaintiff replied in the negative, but the man started to swear at him and even punched him. The plaintiff alleged that later on other men punched and kicked him. He was beaten up until he fell to the ground.
5. After the police arrived at the scene, the plaintiff identified the two defendants as having assaulted him. The two defendants were arrested. Apparently the man fled the scene and was not arrested on the spot.
6. Thereafter, the two defendants were each charged with one count of wounding with intent, contrary to section 17 of the Offences Against the Person Ordinance, Cap 212. The case was transferred to the District Court for trial under case no. DCCC 528/2013. The two defendants later pleaded guilty and they were each sentenced to imprisonment.
7. According to the brief facts of the case of DCCC 528/2013, the two defendants admitted the following facts upon pleading guilty:
8. the man and the plaintiff had a dispute over the use of a toilet and then the man assaulted the plaintiff. The man later even assaulted the plaintiff with a plastic chair.
9. the two defendants and two other men joined in the assault on the plaintiff.
10. D1 admitted under caution that he had punched the plaintiff in the back twice.
11. D2 admitted under caution that he was pushed from behind and fell, and was therefore pushed against the plaintiff.
12. By virtue of section 62 of the Evidence Ordinance, Cap 8, the criminal convictions of the two defendants and the admitted facts in support of the convictions are admissible as evidence in the present case.
13. Upon consideration, I find the plaintiff’s evidence credible and accept his account of events as facts.

Are the defendants liable for damages?

1. First of all, although the two defendants had not raised the issue, I note that they may be able to rely on section 38 of the Offences Against the Person Ordinance, Cap 212, as a defence.
2. Section 38 reads as follows:

“If any person against whom any such complaint is preferred by or on behalf of the party aggrieved obtains such certificate of dismissal, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.”

1. As the two defendants have been released after serving their prison terms resulting from the incident, they may argue that they are protected by section 38.
2. The effect of section 38 was analysed in *Chan Chung Lop v Chan Yun Sun* [1999] 3 HKLRD 442, where the Court of First Instance held that section 38 shall not be a defence for the offence of assault occasioning actual bodily harm or other more serious offences against the person. Furthermore, according to section 38, it only applies to criminal proceedings preferred by or on behalf of the party aggrieved. In *Chan Chung Lop,* the criminal prosecution was brought by the Department of Justice, which the court found to be different from one preferred by or on behalf of the party aggrieved.
3. In the present case, the prosecution against the two defendants was brought by the Department of Justice of the offence which was clearly more serious than the offence of assault occasioning actual bodily harm. According to the doctrine of precedents, I must follow the case of *Chan Chung Lop*. Hence, I find that the two defendants cannot rely on section 38 of the Offences Against the Person Ordinance as a defence.
4. Furthermore, the authorities state clearly that the effect of section 62 of the Evidence Ordinance is to shift the onus of proof to the two defendants who have to prove they did not assault the plaintiff in the incident.
5. Although the two defendants did not raise the issue concerned, I note that their criminal convictions were based on the concept of joint enterprise: namely even though the injuries of the plaintiff were not inflicted by only the two defendants, they did participate in the assault by their co-attackers and they were criminally liable for all the injuries suffered by the plaintiff. Therefore, the two defendants may be able to argue that they are not liable for all injuries in this action as they were not the principal attackers of the plaintiff.
6. In *Lee Chun Fat v Chan Kin Wo & Chan Kin Sing* CACV 334/2002 (Hon Rogers VP, Le Pichon and Yuen JJA: 20 March 2003), the Court of Appeal conducted an analysis on whether the concept of joint enterprise is applicable to a case of personal injuries. In brief, with the support of evidence, the court may find a defendant liable in a civil action based on the concept of joint enterprise.
7. As the two defendants pleaded guilty to the charge against them and admitted the brief facts, I find that they have to adduce evidence in rebuttal in order to prove that they did not participate in the assault of the plaintiff.
8. Both defendants relied on the CCTV footage at the scene at the time of the incident to claim that they did not participate in the assault of the plaintiff. They were, on the contrary, trying to pull away the attackers.
9. During the trial, I allowed the two defendants to rely on the CCTV footage as evidence, and play the sections of the footage they considered to be relevant to the present case. I also invited both parties to make submissions on the situation reflected by the CCTV footage.
10. When considering the decision in the present case, I played and considered all of the CCTV footage. In my view, only the following three video clips can reflect the circumstances surrounding the incident.
11. The first video lasted about 27 minutes[[1]](#footnote-1). In the video, there were two people fighting on the street at first, immediately after that two other men joined the fight, and then another two men approached them. The video clip neither showed the man picking up a plastic chair to attack the plaintiff, nor showed anyone trying to dissuade the men from fighting.
12. The second video lasted about 40 minutes[[2]](#footnote-2). In the video, two men started to fight, and then two other men dashed forward to throw punches and join the fight. In the middle of the video, there were moments of swearing at each other. I also saw a man picking up a plastic chair, but the video failed to record clearly the conduct of the man after he had picked up the chair.
13. The third video lasted about 43 minutes[[3]](#footnote-3). I saw a group of men start to swear and scuffle, and then a man in a green upper garment picked up a plastic chair next to him to attack another man. I did not see anyone at the scene clearly stopping the man in the green upper garment during the event. And then, the same man in the green upper garment picked up the plastic chair to attack him. Only after he had launched the attack did other people at the scene push him away. The same man in the green upper garment picked up the plastic chair for the third time, but this time a woman stopped him.
14. The resolution of the CCTV footage is not good enough for me to identify the people in the video, however as shown in the above description, no matter who the defendants are in the video, the situation reflected in the CCTV footage is not entirely consistent with the stance of the defendants. I find that the CCTV footage fails to show that from the outset the two defendants had dissuaded the man from attacking the plaintiff, or pulled away the man in order to stop him attacking the plaintiff. Hence, I find the two defendants have failed to adduce sufficient rebuttal evidence to prove that they did not participate in the assault of the plaintiff. I refuse to accept the defence they put forward in this case.
15. The two defendants also claimed that the police officers used violence against them after they were arrested. In my view, this is an issue unrelated to the present case as the two defendants did not produce any evidence to prove the police officers who used violence against them (if it really happened) were acting upon the instruction of the plaintiff. Hence, the allegation of the two defendants did not constitute any defence.
16. Lastly, the two defendants had alleged that the plaintiff did hit them, therefore they should not be liable for the injuries of the plaintiff. In my view, as they were convicted of assaulting the plaintiff, any counterattacks from the plaintiff (if any) would at most be regarded as self-defence, which do not constitute any successful grounds of defence for the two defendants. Otherwise it would be contrary to their criminal convictions. Hence, in my view, it is unnecessary to make a finding of fact on whether the plaintiff had hit them.
17. Hence, I find the two defendants liable for damages for all the injuries suffered by the plaintiff consequent upon the incident.

The plaintiff’s injuries

1. The plaintiff was aged 26 at the time of the incident. He was aged 31 at the time of the trial.
2. After the incident, the plaintiff was taken to the Accident & Emergency Department of Queen Elizabeth Hospital. The medical officer recorded that the plaintiff suffered a laceration on his forehead; abrasions on his neck, right shoulder, left arm, both knees and both arms; and also bruises on both his knees. After receiving medical treatment, the plaintiff was discharged from the hospital on the same day and he was given sick leave for eight days by the medical officer.
3. On 18 May 2013, the plaintiff went to see a doctor at the Out-patient Department of Tseung Kwan O Hospital. He complained that he had been suffering from vertigo, headache and occasional neck pain ever since the incident.
4. On 11 July 2013, the plaintiff went to the Neurology Department of Tseung Kwan O Hospital for follow-up treatment. He complained that he had been suffering from vertigo and pain in his shoulder and neck regions after the incident. He would feel scared in a crowded place and that would remind him of the incident. The medical officer arranged for him to have an MRI scan and found no problem with his brain. Although there were signs of degeneration of the plaintiff’s cervical spine, there was no nerve compression. The last time the plaintiff went to the Neurology Department of Tseung Kwan O Hospital to receive treatment was on 6 May 2014.
5. On 22 October 2013, the plaintiff went to receive treatment from a clinical psychologist at Tseung Kwan O Hospital. The plaintiff complained that he found it difficult to fall asleep and he woke up in a panic easily. He became irritable and agitated easily. The clinical psychologist observed that the plaintiff was calm on the day, but he was slightly annoyed when he talked about the incident. The clinical psychologist assessed that the plaintiff was suffering from post-traumatic stress disorder. The condition of the plaintiff improved slightly during the second meeting. He later failed to attend his appointment with the clinical psychologist.
6. After taking into account all medical reports and evidence in the present case, I am satisfied that the plaintiff sustained the injuries or suffered from the condition as stated in the medical reports.
7. As the plaintiff felt that he had some hearing loss since the incident, he went to see Dr Lau Sai Kit. He also went to consult Dr Kwok Wai Ming, a psychiatrist.
8. The plaintiff engaged Dr Chow Shun Kit, specialist in Otorhinolaryngology, to prepare an expert report for the present case. Upon considering the hearing test taken by the plaintiff in November 2013, Dr Chow agreed that the plaintiff experienced some high-frequency hearing loss in both ears. Since there was no evidence to show the plaintiff had any hearing problems before the incident, Dr Chow believed that the incident indeed had caused the hearing loss of the plaintiff. As the middle ear helps maintain a person’s balance, the plaintiff would experience tinnitus and vertigo. Dr Chow considered the plaintiff’s hearing loss incurable.
9. In addition, the plaintiff also engaged Dr Yeung Sai Hung, Orthopaedic specialist, to prepare an expert report for the present case. Although the plaintiff’s cervical degeneration was caused by natural wear and tear of the spine, Dr Yeung believed the incident may have caused the pain to appear early. He estimated that the incident had caused the plaintiff’s pain to appear 5 years earlier.
10. After considering all the medical evidence, I reject the suggestion of Dr Yeung that the incident was the cause of the cervical spine degeneration resulting in the neck pain of the plaintiff. As Dr Yeung mentioned in his expert report, the MRI showed no nerve root compression caused by vertebral degeneration. In my view, the neck pain alleged by the plaintiff is not a symptom caused by degeneration.
11. Moreover, the plaintiff did not call any psychiatrist to give expert evidence in the present case. In *Yeung Lai Ping v Secretary for Justice* [2019] HKCFI 881 at paras 139-143, Bharwaney J stated that the court, under such circumstances, would be unable to find the plaintiff suffered from a recognisable mental illness, but the court may take into account that the incident had caused emotional distress to the plaintiff. I will follow the judgment of Bharwaney J.
12. In his statement of damages, the plaintiff claimed PSLA, special damages, future medical expenses and travelling expenses. Subsequently, the claims for future medical expenses and travelling expenses were struck out by Master Josephine Chow on 14 June 2017.
13. The two defendants suggested a rough figure of HK$3,000.00 as an appropriate amount for damages. As the onus of proof lies on the plaintiff in this claim, I have to look at the claimed items one by one so as to consider the appropriate amount for damages.

Pain, suffering and loss of amenities

1. The plaintiff claims damages for pain, suffering and loss of amenities in the sum of HK$300,000.00.
2. No cases of a similar nature have been submitted to the court by either party. In determining a reasonable amount for damages, I take into account the following authorities.
3. In *Wong Fung Nui v Leung Yat Ho* DCPI 455/2006 (Judge Chow: 2 November 2007), the defendant slapped the plaintiff once, causing the plaintiff to suffer from mild hearing loss, vertigo and adjustment disorder. The court assessed damages for PSLA at HK$80,000.00.
4. In *Fong Kam Chi v Wong Wai Shing* HCPI 910/1997 (Jackson J: 13 Dec 1999), the defendant assaulted the plaintiff, causing multiple injuries to his face, temporary loss of hearing, as well as problems such as vertigo and tinnitus. The court assessed damages for PSLA at HK$120,000.00.
5. In the present case, I assess damages for PSLA at HK$150,000.00.

Special damages

1. The plaintiff claims the following expenses incurred: medical expenses in the sum of HK$5,610.00, travelling expenses in the sum of HK$2,000.00, tonic food in the sum of HK$10,000.00. In his witness statement, he claimed that his medical expenses amounted to HK$77,740.00.
2. The receipts adduced by the plaintiff confirm that he had paid HK$5,610.00. The expenditure referred to in his witness statement is not stated in his statement of damages, I therefore assess damages for medical expenses at HK$5,610.00.
3. The plaintiff had not adduced any receipts in support of the travelling expenses he claims. In my view, the appropriate amount of damages is HK$1,000.00.
4. The plaintiff had adduced some receipts to prove that he had bought tonic food for consumption. In the present case, I believe the appropriate amount of damages is HK$2,000.00.

Conclusion

1. I find the two defendants jointly and separately liable for the plaintiff’s injuries caused by the incident and they shall pay damages in the sum of HK$158,610.00.
2. The two defendants are to pay interest on the above damages. For damages for PSLA, interest is awarded at 2% per annum, from the date the writ of summons was served to the two defendants to the date of judgment; for special damages, interest is awarded from the date of the incident to the date of judgment at half judgment rate; for all damages, interest is awarded at judgment rate from the date of judgment until satisfaction.
3. I also order the two defendants to pay costs of these proceedings to the plaintiff, to be taxed if not agreed. This order nisi is to be made absolute within 14 days from today if no application for variation is made by either party.
4. I thank all parties for their assistance.

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|  | (Alfred Cheng)  Deputy District Judge |

The Plaintiff appeared in person

The 1st Defendant appeared in person

The 2nd Defendant appeared in person

Translated by the Judgment Translation Unit of the Judiciary and vetted by Mr. P. Y. Lo, Barrister-at-law.

1. In the computer file called 00\_01\_130511\_004500\_011220\_0094706700.mp4 provided by the two defendants [↑](#footnote-ref-1)
2. In the computer file called 02\_01\_130511\_004917\_013000\_0125347900.mp4 provided by the two defendants [↑](#footnote-ref-2)
3. In the computer file called 03\_01\_130511\_004500\_012818\_0118978908.mp4 provided by the two defendants [↑](#footnote-ref-3)