# DCPI 1454/2017

[2019] HKDC 556

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1454 OF 2017

---------------------------

BETWEEN

WONG CHUN KIN Plaintiff

and

CARITAS - HONG KONG Defendant

---------------------------

Before: His Honour Judge Andrew Li in Court

Dates of Hearing: 22, 25 and 26 February 2019

Date of Judgment: 18 April 2019

--------------------------

JUDGMENT

--------------------------

*INTRODUCTION*

1. This is a personal injury case where the plaintiff Wong Chun Kin (“the plaintiff”) allegedly sustained serious back injury while at work.
2. The plaintiff was employed by Caritas – Hong Kong (“the defendant”) as a welfare worker and trainer. The plaintiff alleges that he was injured while restraining a mentally handicapped student/member (who had been referred to as “X” throughout the trial and shall be referred to by the same in this judgment) in the course of his employment in the morning of 10 November 2014 (“the Accident”).
3. Both liability and quantum are in dispute.

*BACKGROUND*

*The Accident*

1. Caritas Lok Yin Day Activity Centre (“Lok Yin”) is a day care centre run by the defendant. Caritas Lok Ngai Day Activity Centre (“Lok Ngai”) also run by the defendant (collectively as “the Centres”). Lok Yin and Lok Ngai are physically located in the same premises on M/F, Screen World, Site 8, Whampoa Garden, Hung Hom, Kowloon (“the Premises”). They are day activity centres run by the defendant for mentally handicapped persons aged 15 or above. Lok Yin and Lok Ngai have 50 students/members each, ie a total of 100 members, who are under vocational / self-care training. Lok Yin and Lok Ngai shared the same office and staff. At the time of the Accident, there was a total of 37 staff members who worked at the Centres.
2. The 50 members of Lok Yin were placed into 3 classes known as 然一班 (“Class 1”), 然二班 (“Class 2”) and 然三班 (“Class 3”). At the time of the Accident, the instructors/trainers of Class 1, Class 2 and Class 3 were Ms Lam Hiu Dan (林曉丹) (“Ms Lam”), Mr Yu Tak Cheung (余德祥) (“Mr Yu”) and the plaintiff respectively. X was a member of Class 3. In addition, each of Class 1, Class 2 and Class 3 was assigned a service attendant (服務員) to help escorting members to visit the washrooms and/or from the bus to the classrooms when arriving at the Centres. They all shared the same open plan classroom (“the Classroom”).
3. Mr Hung Chak Ho (洪澤豪) (“Mr Hung”) was the social worker employed by the defendant at the Centres. He was the plaintiff’s direct supervisor.
4. According to the plaintiff, in the morning of the Accident, X had repeatedly left his seat in the Classroom. In an attempt to control X, the plaintiff pushed X back to his seat by using a mattress provided by the defendant. In the process, the plaintiff claims that X shoved him, causing him to lose his balance and making him bump into a table or object nearby.

1. The defendant did not admit that the plaintiff was injured by X in the way asserted. It put the plaintiff to strict proof of the matter.
2. At the trial, the plaintiff, Mr Yu and Mr Hung gave evidence.

*The setup of the Classroom and the system employed*

1. Members of Lok Yin all shared the Classroom. As all the members are mentally handicapped, the defendant has devised a system for staff members to support each other when additional manpower was required:-
   1. Staff members of Class 2 and Class 3 were instructed to support each other;
   2. If there was insufficient manpower in Class 3, Class 3 could seek help from the instructor or service attendant of Class 2. If further help was needed, than the trainer of Class 1 would provide such help. If there was still insufficient manpower, staff members were instructed to press the alarm bell to seek assistance from colleagues in the office.
2. In addition to the support system, the defendant had implemented a system to ensure that the staff members of the Centres understand the special circumstances and special needs of individual members. For example:-
3. Every working day at around 8:30am to 9:00 am, staff of the Centres would have a morning meeting to discuss work arrangements and conditions of individual members;
4. The defendant would prepare database to record special situations of each and every member;
5. The defendant arranged staff of the Centres to undergo training from time to time to improve staff skills in handling members;
6. From time to time, the defendant prepared case studies and arranged class meetings to discuss individual members: See for example the meeting minutes and records of case studies;
7. The plaintiff agreed that he was given a set of documents with detailed descriptions of each member’s behaviour of Class 3 from Ms Wong, the previous trainer of Class 3.

*Records kept on X’s behaviour*

1. The following records of X (written in Chinese) have been kept by the defendant prior to the Accident:-

|  |  |
| --- | --- |
| “Date | Record |
| 28/03/2014 | 學員走出位找食物，導師提示了他走出位也沒有食物給他。學員完全明白，已減少了走出位情況出現。 |
|  | **特徵**   1. 表達能力不足 2. 有常衝離座位情況 3. 搶別人飲品情況（紙包飲品） 4. 有抓別人衣領拍打物件情況 5. 不肯離開座位（過績組／車座位）   **處理方法**   1. 會使用簡單的圖卡／手勢動作 2. 安排予他有欄阻的特別座位及不給與太多注意力 3. 若要其離位時先給與準備／先最早叫他給與心理準備，而安排其最後離位的學員。 |
| 08/2014 | 學員有時出現抓人行為，經工作員、導師及護士評估商討後，學員於上落車、如廁和過班時，必須由兩位同工負責看顧，並且每人須捉緊前臂手腕以避兔他有突然抓人行為，並在早會上向同工作講解及宣佈 |
| 20/08/2014 | 請各同工留意，[X]於上落車、如廁和過班，必須由兩位同工負責看顧，並且每人須捉緊前臂手腕以避免他有突然傷人行為” |

1. The plaintiff agreed that X was placed to sit at a corner of the Classroom as a measure to prevent him from leaving his seat.
2. There is no dispute that a number of yellow mattresses were made available at the Classroom by the defendant. The dimensions of each mattress are 59 inches (in height), 35 inches (in width), and 2.5 inches (in thickness). They were placed at different spots around the Classroom for easy access by the trainers.
3. The main crux in this case revolves around how the plaintiff was to handle X if he left his seat and how such mattresses should be used.

*LIABILITY*

*Issues on Liability*

1. By the end of the trial, the only outstanding issues which need to be resolved by the court are:-
2. Did the Accident happen as pleaded by the plaintiff?
3. Was there sufficient manpower provided by the defendant?
4. Were there sufficient instructions provided to the plaintiff and his co-workers?

*(1) Did the Accident happen as pleaded by the plaintiff?*

1. According to §5 of the statement of claim, the plaintiff pleaded as follows in regard to how the Accident happened:-

“At around 9:40 a.m. on 10th November 2014, (X) walked away from his seat during a training lesson taught by the Plaintiff. The Plaintiff thought (X) wanted to go to the toilet, so he asked an attendant to escort (X) to go to the toilet. (X) came back from the toilet after 5 to 10 minutes. However, in the subsequent half an hour, (X) still kept walking away from his desk for four to five times. In order to maintain the order of the training lesson, the Plaintiff had no method but to push (X) back to his seat with force with the assistance of another employee of the Defendant Mr. Yu (as (X) weighed more than 200 pounds but the Plaintiff only weighted about 130 pounds), pursuant to the instructions from the Plaintiff’s supervisor Mr. Hung (“Mr. Hung”). The Plaintiff used one or two pieces of cushion to separate his body from (X)’s body to avoid any direct bodily contact. In the process, the Plaintiff was shoved by (X) for several times and on one occasion the Plaintiff lost his balance by the shoving of (X) and bumped into the tables and chairs nearby (“the Accident”). As a result of the Accident, the Plaintiff sustained bodily injuries, losses and damage, which are particularized in the Statement of Damages.”

1. The plaintiff further pleaded that, prior to the Accident, X had a history of injuring other colleagues of the plaintiff and, the plaintiff had repeatedly reported the behavioral problems of X to Mr Hung. It is the plaintiff’s case that Mr Hung or the defendant was fully aware of the behavioural problems of X but it had not implemented any effective measures to prevent the Accident from happening. The plaintiff claims that the only instructions given to him by Mr Hung was “to use the cushion to push (X) back to his seat or find back-up and to report to the supervisor only when the problem could not be resolved.” When the plaintiff indicated to Mr Hung that such method did not work, he claims that Mr Hung insisted on requiring him to follow his instructions without providing any alternative solution: see §6 of the statement of claim.
2. The plaintiff claims that:-
   * 1. the Accident was caused by the negligence of the defendant, its servants, employees and/or agents for which the defendant is vicariously liable, particulars of which are summarized in §§ 7(a) to (i) of the statement of claim;
     2. further or in the alternative, the Accident was caused by the breach of the statutory duties of the Defendant, in particular, sections 6(1), 6(2)(a), 6(2)(c) of the Occupational Safety and Health Ordinance, Cap. 509 as pleaded in §§8(a) to (c) of the statement of claim.
3. The plaintiff further claims against the defendant for breach of implied terms of the contract of employment, the particulars of which are summarized in §9 of the statement of claim.

*The plaintiff’s evidence in regard to the Accident*

1. It is trite that a plaintiff has to establish his pleaded case and not any other case he chooses to run at the trial: See *Lam Chin Pang & Another v Wan Sui Ying* [2018] HKDC 1169, DCCJ 3391 of 2015 (HHJ MK Liu; 24.9.2018).
2. At the trial, the plaintiff has been specifically directed by the court to relate the Accident orally in evidence instead of adopting the relevant contents from his witness statement as his evidence in chief.
3. The plaintiff told the court that just before the Accident X had been accompanied to the toilet by a service attendant. After his return from the toilet, from around 8:40 am to 10:25 am, X had tried to rush out from his seat 4 to 5 times. On the fourth occasion when X left his seat, Mr Yu and the plaintiff each used a mattress to form a L-shaped blockage to prevent X from going into the main corridor of the Classroom. During the process, the plaintiff claims that X shoved the mattress a few times, causing him to hit a nearby table. The plaintiff however was not sure which table or object he had hit.
4. If the above account is true, I find it rather surprising that it was not mentioned in any contemporaneous documents where the plaintiff had provided information regarding the Accident. They included:-
   1. On 10 November 2014 when he first attended the A&E department of Tseung Kwan O Hospital (“TKOH”) he told the doctor that he had sustained “sprain back when heavy lifting at work (sic)”;
   2. On 11 November 2014, the day after the Accident, the plaintiff submitted a report to the defendant which included the following passage in Chinese. The significant point is that the plaintiff had made no mention of him hitting or being hit by a table when his “back and leg” were injured:-

「當時正執行課堂班務工作，有一身體較重的智障學員，不斷離坐，其維持約有四次以上，為確保班內秩序暢順，於是以恆常處理方法，與鄰班同事協力用墊相隔和其溝通，減低其往前急速推進的步伐，勸喻該學員回坐，避免對其他學員構成不必要的影響，期間本人弄傷腰腿而感不適。」

* 1. On 17 November 2014, which was a week after the Accident, when relating the Accident to the doctor at the outpatient clinic at TKOH, it was recorded the plaintiff had suffered “back sprain when preventing mental retarded student rushing to other classmates during work on 10/11/2014”;
  2. On 24 November 2014, when he consulted the doctors at the outpatient clinic of TKOH, he only mentioned that he had “sprained his back while trying to stop student from rushing towards other classmates.”;
  3. Similarly, between 5 December 2014 and 30 January 2015, when attending follow up treatments at the outpatient clinics, the plaintiff failed to mention the fact that he was being shoved by the student or having hit a table or an object in any of the medical records kept; and
  4. On 11 February 2015, Dr Andrew Chan in his report to the employees’ compensation division of the Labour Department only mentioned that the plaintiff suffered “sprain back injury while stopping a mental handicapped student at work.”

1. Further, the plaintiff was not able to provide any satisfactory explanations under cross-examination as to why 2 important elements of his injury, namely, (i) being shoved by X; and (ii) bumped into an object like a table, was not mentioned in any of the above medical records or in his own signed report.

1. I reject the following explanation given by the plaintiff under cross-examination. He claims that when he first prepared the signed report about the Accident on 11 November 2014, he had mentioned the fact that he was shoved by X but was asked by his superior to revise his draft and delete such comment. I cannot think of any reason why the plaintiff’s superior would ask him to delete such important comment while at the same time did not ask him to delete another adverse comment about “a rather heavily built mentally handicapped trainee” which the plaintiff alleged his superior had also showed a lot of concern about.
2. In my view, what is rather glaring in this case is that none of the above explanations was ever mentioned in the plaintiff’s witness statement when he had been given plenty of time and opportunities to prepare the same. I do not accept the fact that his superior would deliberately ask him to delete such important matter had X actually shoved him. I also do not accept his explanation that all the doctors at the government hospitals would omit these two important elements of the injury had he actually mentioned these to them.
3. I therefore would reject the account given by the plaintiff in court in relation to how the Accident happened. In particular, I reject his claim that (i) he was shoved by X; and (ii) his back hit against a table or object in the process.

*The defendant’s account of the Accident*

1. In contrast, I prefer the account given by Mr Yu, the plaintiff’s colleague who was the trainer/instructor of Class 2. I find his evidence to be much more objective and reasonable than those given by the plaintiff.
2. His evidence, which I find has not been shaken or undermined by the plaintiff in any way under cross-examination, can be summarized as follows:-
3. Mr Yu saw the plaintiff trying to stop X from moving forward without using a mattress. Mr Yu felt that the plaintiff could not handle X on his own;
4. Mr Yu then took a mattress and placed it on the ground between the plaintiff and X;
5. X did not explain why he left his seat. However, X’s movements suggested that X wanted to move forward;
6. Mr Yu fairly admitted that he could not remember whether the plaintiff picked up a second mattress. He said if one mattress was used, then he and the plaintiff would stand behind the same mattress. If two mattresses were used, then he and the plaintiff would place both mattresses in perpendicular directions;
7. All along the plaintiff and Mr Yu held the mattress(es) to prevent X from entering into the corridor between Class 3 and Class 2. As X only used normal force, Mr Yu did not have to use much force to stop X, and did not have to use the “horse stance” to hold his position against X. X was unable to surpass the mattress(es);
8. After around 5 minutes, a service attendant came and brought X to the washroom;
9. Mr Yu was standing around 1 foot away from the plaintiff; and
10. During the 5 minutes when Mr Yu and the plaintiff were stopping X, Mr Yu did not notice that the plaintiff was shoved by X.

*The court’s finding on how the Accident happened*

1. In conclusion, I find that the Accident did not happen in the way as described or pleaded by the plaintiff. Specifically, I find there was no shoving by X and that the plaintiff had not hit his back against a table or any other object.

*(2) Were there sufficient instructions provided to the plaintiff and his co-workers?*

1. The plaintiff alleges that he was told by Mr Hung to handle X with the mattress in the following manner:-
2. The plaintiff should use a mattress to separate a member and himself if the member walked away from his seat and disturbed others;
3. When a member demonstrates any aggressive behaviour, the plaintiff should use a mattress to separate him and the others, let him calm down, try to understand what he wants and use a mattress to push back the member;
4. If X keeps walking away from his seat, the plaintiff should separate X and himself and push X back to his seat if X persists in walking away from his seat without permission. The plaintiff should also understand what X wants and report to Mr Hung if X leave his seats more than three times continuously during training.
5. In contrast, the defendant claims that Mr Hung instructed the plaintiff to handle X in the following manner:-
6. The plaintiff could use a mattress to separate himself and X while communicating with X;
7. If the plaintiff could not handle a particular situation, he should first seek assistance from his colleagues in the Classroom ie Mr Yu and Ms Lam. Specifically, the plaintiff could ask Mr Yu to use a mattress to separate X and at the same time try to communicate with X; and
8. If further assistance is required, the plaintiff could seek assistance from Mr Hung or other employees on the Centres. Alternatively, the plaintiff could simply shout out for help.
9. The defendant’s case is that Mr Hung had instructed him to use mattress(es) available in the Classroom to restrain the students, in particular X, if he were to rush out from his seat. They were supposed to to separate X from the trainer and to allow the student to have time to calm down. At the same time, the trainer should find out what are the needs of the students and the reason(s) of leaving his seat.
10. The plaintiff states in evidence that Mr Hung had told him the usual method to prevent X from rushing out was first tried to understand him, for example, whether he needs to go to the toilet, if so, to ask the service attendant to accompany him. He was also asked by Mr Hung to record down the number of times of X going to the toilet and whether such frequency was necessary. The plaintiff further stated in evidence if X rushed out more than 3 times, then this should be reported to Mr Hung so as to allow him to decide whether to put X into the quiet room.
11. A very serious allegation made by the plaintiff in evidence is that, if the situation persisted, he was instructed by Mr Hung to push X back to his seat by force. The plaintiff claims that the situation with X had not improved during the months when he was in charge of Class 3. When he repeatedly reported back the situation to Mr Hung, he was allegedly given the same instructions by Mr Hung, ie if X continues to rush out his seat repeatedly, the plaintiff could use force to push him back.
12. In contrast, Mr Hung in his evidence has emphatically stated that they would not ask the trainers to use mattresses to push any student because, if they do so, there would be a high chance that the student may fall and get injured. This is consistent with Mr Yu’s evidence in that, according to his experience, to push any student with the mattresses would be a dangerous act because if the members lose their balance, they could easily hurt the back of their head. Even though this matter has not been specifically mentioned in either Mr Hung or Mr Yu’s witness statement, they make perfect sense to me.
13. In fact, in Mr Hung’s witness statement, in reply to the plaintiff’s allegations raised in his answer to the request for further and better particulars of the statement of claim in relation to the allegations that Mr Hung had personally instructed him to use the mattress to push the students back to the seats, Mr Hung stressed that the staff at the Centres and himself had never instructed any trainer, including the plaintiff, to use the mattress for such purpose. Indeed, I agree with his observation that to use force towards the students would only provoke them and make them more emotional and makes future communication with them much more difficult. Such method also would not enable the trainer to find out the root cause of why the members behave in such a way in the first place.
14. Mr Hung has fairly accepted in his evidence that, from time to time, students like X would leave their seat. As pointed out by him, the mere fact that X leaves the seat does not in itself cause any immediate threat, because X might have good reasons to do so. For example, he may want to stretch his limbs; goes to the toilet or wants to have some snacks. X’s leaving of his seat might only post a problem when he appeared to be agitated or if he left his seat without indicating his motive. Even then, Mr Hung states that it would not be always necessary to handle X with a mattress.
15. I accept his evidence that, in most of the situations, concise, firm and simple oral instructions; giving him some snacks or allowing him to visit the washroom would resolve the matter. In any event, Mr Hung states that there was no need to pick up a mattress to block X whenever he leaves his seat. In his own words, it is not fair to discipline the students if they have only left the seat but did not disturb others in the Classroom.
16. Between the two different accounts of alleged instructions given by the defendant, I much prefer Mr Hung’s and Mr Yu’s version than that of the plaintiff’s for the following reasons:-
17. The instructions of pushing X back to the seat simply does not tally with common sense. As pointed out by Mr Hung in his evidence, pushing a student may only provoke the student further and makes it more difficult to control his emotions. It will also make future communication with the students more difficult;
18. The instructions of pushing X back to the seat is also inconsistent with the defendant’s ethos of training the students in looking after themselves rather than being controlled by others;
19. It is also inconsistent with the defendant’s own recommended methods in reducing injury to the students, namely, (1) to reduce any sudden pulling and pushing movements; (2) to reduce confrontation with the students; (3) allowing more personal space for the students; and (4) always take preventive action[[1]](#footnote-1);
20. During cross-examination, both Mr Hung and Mr Yu have confirmed independently that pushing a student is a dangerous act, because the student might fall backwards and injure themselves; and
21. In the report submitted by the plaintiff to the defendant on the day after the Accident, the plaintiff described that he had used the “usual way” in handling X on the day of the Accident. In the report, he described what was the “usual way” in details but it did not include pushing X back to the seat with the mattress.
22. Having heard Mr Hung’s and Mr Yu’s evidence, I am convinced that the alleged instructions of using force to push X back to the seat had never been part of the instructions given by the defendant to the plaintiff. In my view, there is no evidence to suggest that either the plaintiff or any of his colleagues had had any difficulties in handling X’s habit of leaving his seat and that such extreme measures of using force to push him back to the seat was not considered to be necessary.
23. There is no dispute that when the plaintiff was first employed at the Centres in June 2014, Mr Hung gave an induction session to the plaintiff where the use of mattress was discussed. In the transition meeting attended by Mr Hung, where the plaintiff and Miss Wong (the former trainer of Class 3) went over the individual characters of each person, nothing was mentioned about the need of using force to restrain X. During the changeover, which I find must have taken place in or around June 2014 (and not August 2014 as alleged by the plaintiff) which was around the time when the plaintiff took over Class 3, while mattress was mentioned as a tool to protect both the trainers and the students, I find that Mr Hung did not ask the plaintiff to make use of the mattress to push the students back to their seats.
24. Even according to the plaintiff’s own case, prior to the Accident, while he was the trainer of Class 3, X had at least left his seat for over 200 times and the plaintiff could handle him on each occasion either by himself or with the assistance of another trainer. They were all done without using the means of pushing him back with force.
25. In his evidence, the plaintiff admits that he could record any unusual behavioural problem of the students in Class 3 in the defendant’s database. However, he accepts that none of the records from the database shows that he had recorded down any unusual behaviour of X which would require the use of force in pushing him back to his own seat. The plaintiff simply could not give any plausible explanation as to why he had failed to put down such important matter in writing, if this was true at all.
26. The evidence also reveals the plaintiff and other staff members of the defendant were free to raise any concern about the individual students’ behaviour. For example, in the entry dated 20 August 2014, X’s tendency of scratching others was recorded. On another record dated 10 October 2014, X’s frequent visits to the toilet was also discussed amongst the staff. Again, nothing was mentioned about having the need to use mattress to force the plaintiff to return to his seat on these records.
27. In my judgment, the most reliable evidence on whether such instructions were ever given by Mr Hung comes from Mr Yu who was present at the time when the Accident happened. While he was not certain whether one or two mattresses had been used on that occasion, he confirmed that if two mattresses were used, then a L-sharp would be formed as the usual method to prevent X from rushing forward. However, he has no recollection that X had managed to get through the blockage formed by the mattress(es). Nor did he has any recollection that X had caused the plaintiff to bump his body into the desk or another object. He certainly did not see that happen at all. Further, Mr Yu has no impression that the plaintiff had used force to push X back to his seat. While he thought the plaintiff might be using great force in blocking X, he did not have the impression that the plaintiff had to push X forward resulting in him stepping backwards. Mr Yu stated that he certainly would not use such method to push students back to their own seats.
28. In the light of the above evidence given by Mr Yu, I reject the plaintiff’s evidence that Mr Hung had instructed him to use force to push X back to his seat when he was not able to control him. In contrast, I find the instructions given by Mr Hung on behalf of the defendant were more than sufficient or adequate in the circumstances. I therefore find that the plaintiff has failed to establish this issue also.

*(3) Did the defendant provide sufficient manpower?*

1. It is the plaintiff’s case that the Accident could have been prevented if there were sufficient manpower being deployed in the Classroom when the Accident took place.
2. According to the plaintiff, there were about 14 to 17 mentally handicapped students in each class and three classes were placed in the same Classroom with different trainings going on at the same time. Each class was assigned with 1 trainer and 1 service attendant.
3. It is not disputed that the students have different levels of mental disabilities, some were able to look after or express themselves better than others.
4. It is also not disputed that the system of support developed by the defendant placed the primary duty to look after the students on the trainer of the class. He would be assisted by the service attendant. However, if the service attendant is not available, eg, if he/she has to accompany the students to the toilet or to receive them from the bus by the road side, then the trainer would be assisted by the trainer from the next class. As the Classroom was designed as an open space, other trainers or service attendants could easily become available as and when the situation required. It is the defendant’s case that when the situation could not be managed by one person, the plaintiff should first seek assistance from another trainer in the Classroom, namely, either Mr Yu or Ms Lam in this instance.
5. According to the plaintiff’s own evidence, prior to the Accident, he had at least personally handled X leaving his seat situation for over 200 times. If this were to break down from the time when he first joined the defendant as a trainer in June 2014 to the time of the Accident in November 2014, and assuming he worked on an average of 22 days in a month, it means that X would leave his seat on an average of 3 times a day.
6. Further, according to plaintiff’s evidence, amongst the over 200 occasions when he dealt with X leaving of his seat situation, most of the time he would be able to handle X by himself. However, whenever two persons were required, either the service attendant of Class 3 or Mr Yu from the next class would be the first person to offer such assistance. This will be followed by Ms Lam (who was the trainer of Class 1) and Mr Hung (who usually worked in the office). In his evidence, the plaintiff has never suggested that more than two persons would be required to handle X in the past.
7. The above is consistent with Mr Yu’s evidence given at the trial. According to him, over 90% of the students at the Centres whom he has come across in his 18 years of experience could be handled by no more than two persons. These would include the case of X. His evidence in this respect is supported by Mr Hung when he stated that in Class 3, student No 6 and student No 9 actually required more attention than X due to their more serious behavioural problems. In his experience, X was never one of those more problematic students.
8. Judging from the above, there is no serious dispute between the parties that two persons would be sufficient to handle X in any given situation. In any event, it was not put to Mr Yu duing cross-examination that more than two persons were required to handle X in the classroom. I therefore find that two persons would be sufficient as manpower to control X even if he were to rush out from his seat in the Classroom.
9. In terms of evidence, the plaintiff claims that the Accident took place at or around 10:00 am. At that time, Mr Yu, Ms Lam, the plaintiff and the two service attendants were all present in the Classroom. While Mr Yu was helping the plaintiff in restraining X, the plaintiff accepted that if he were to ask one more person to help, there would be someone available to offer such assistance. The plaintiff accepted that it was not necessary to ask the third person to help on that day.
10. Again, the plaintiff’s evidence on this is consistent with Mr Yu’s evidence. According to Mr Yu, if two persons were found to be insufficient to keep a particular situation under control, those two persons could seek help from a third person. In the unlikely event that three persons were found to be insufficient, a fourth person could be called. In this case, Mr Yu states that the first person who would help at the plaintiff’s class would be him, Ms Lam would be looking after his students and her own class’s students. In the event that if both he and the plaintiff could not put a situation under control, then Ms Lam would help them. The principle is that the more people to help, it would be easier to bring a situation under control. Mr Yu has fairly stated that, in his years of experience in working with mentally handicapped students, he rarely saw any emergency situation which could not be handled by four persons. It is not disputed by the plaintiff that there were more than four staff members available in the office at the material time of the Accident. Therefore, if required, a fourth person could always be summoned for help from the office.
11. Based on the above, I find the defendant had provided sufficient manpower on the day of the Accident and therefore the plaintiff’s claim based on this limb must fail also.

*Conclusion on liability*

1. In conclusion, as a matter of the evidence, I find the plaintiff has failed to establish:-
2. the Accident happened as alleged by him and as pleaded in the statement of claim;
3. there was insufficient instructions given by the defendant; and
4. there was insufficient manpower provided in the Classroom at the time of the Accident.
5. In the circumstances, the plaintiff has failed to prove his case against the defendant and his claim must be dismissed.

*QUANTUM*

1. For the sake of completeness and in case I am wrong on my finding on the liability, I shall deal with the issue of quantum hereinbelow.
2. The plaintiff was born on 31 August 1979. He was 39 years old at the date of trial. At the time of the Accident, he was 35 years old. He worked for the defendant as a welfare worker/trainer from 3 June 2014 to 19 January 2015.
3. At the beginning of the trial, the parties’ position in regard to quantum can be summarized as follows:

|  |  |  |
| --- | --- | --- |
|  | Plaintiff (HK$) | Defendant (HK$) |
| PSLA | 250,000 | 90,000 |
| Pre-trial loss of earnings & MPF | 45,192 [Agreed] | |
| Loss of earning capacity | 50,000 | Nil |
| Special damages | 19,968 | 6,625 |
| *Less*: employees’ compensation | (100,000) [Agreed] | |
| Total (before interest) | 265,160 | 41,817 |

*Treatments and alleged injuries & disabilities*

1. After the Accident, the plaintiff was well enough to continue with his class and fit enough to handle X with Mr Hung on a fifth occasion. He only went to A&E of TKOH for medical treatment at 8:00 pm that evening after he had completed his day of work.
2. Examination showed tenderness over the plaintiff’s left lower back and he was diagnosed of sprain back, X-ray of the lumbar spine showed no fracture and no dislocation.
3. He then had follow-up consultation in Tseung Kwan O Po Ning Road General Out-patient Clinic (“PNRGOC”) and Tseung Kwan O Jockey Club General Outpatient Clinic (“JCGOC”) for his alleged persistent back pain at PNRGOC during the period from 17 November 2014 to 9 February 2015. He resumed his medical consultation at JCGOC on 7 July 2015 until 2 September 2015.
4. The plaintiff also received 4 physiotherapy treatments at a private physiotherapy & rehabilitation clinic during the period from 8 December 2014 to 23 January 2015. The back pain was reportedly improved by 20% during this time.
5. On 27December 2014, MRI on the plaintiff was done and it was revealed that there was a slight posterior prolapse of the T11/12 disc and early dehydration of the lumbar and lower thoracic discs detected but no significant nerve impingement.
6. On 11 June 2016, another MRI on the plaintiff was done and it was revealed that:
7. normal lumbar alignment;
8. mild disc desiccation at T11/12 & T12/L1;
9. L5/S1. There is mild left lateral disc protrusion with no significant compression; and
10. lower thoracic spine showed mild left paracentral disc protrusion.
11. Dr Miu, the plaintiff’s expert, was of the opinion that MRI of the lumbar spine did not show any fracture or prolapsed disc. It only showed early radiological features of degenerative change, which was a very common radiological finding in men of the plaintiff’s age.
12. The plaintiff was further referred to orthopaedic and traumatology department (“OTD”) and physiotherapy department (“PD”) of TKOH for treatments. According to the physiotherapy progress note of PD dated 9 March 2016, it was recorded that during the period from 6 July 2015 until 9 March 2016, the plaintiff had received 28 physiotherapy treatment sessions. In another physiotherapy progress note dated 18 May 2017, it was recorded that the plaintiff had received 18 physiotherapy treatments in 30 weeks.
13. The condition of the plaintiff allegedly did not improve any further after the physiotherapy treatments.
14. He was granted sick leave almost continuously from 10 November 2014 to 31 January 2015. The plaintiff resigned on 20 December 2014 and his last day of employment with the defendant was on 19 January 2015. He then took up a similar job with Po Leung Kuk on 2 February 2015.
15. During the period from 7 July 2015 to 30 June 2018, 294 days of sick leave were granted intermittently to the plaintiff.
16. Form 9 of the Employee’s Compensation Board issued on 20 October 2015 assessed the loss of earning capacity permanently at 2%, reportedly caused by the lumbar sprained resulting in back pain, stiffness and left lower limb numbness. Sick leave granted was from 10 November 2014 to 22 November 2014 and from 24 November 2014 to 31 January 2015.
17. Despite the prolonged treatments received by the plaintiff, the plaintiff claims that he still suffers from residual back pain, stiffness and left lower limb numbness. The plaintiff complains of continual numbness (pins-and-needles) from left lower back to lateral and posterior left thigh, leg and ankle. He also complaints of left side low back pain down to the left buttock continuous nonstop, left calf and left foot weakness and tremor first appeared in the recent one year, but his daily activities are essentially independent. He is unable to sleep in the supine position or sleep on his left side. His condition deteriorates when he stands or walks for a long period of time, carry weight of 5 kg for 10 minutes. He was fond of various sports and outdoor activities such as playing basketball, cycling, jogging and hiking. However, due to the aforesaid injuries, the plaintiff allegedly has to refrain from participating in such sports and activities like before.

*The medical experts’ opinions*

1. Dr Miu is of the opinion that the Accident resulted in soft tissue sprain injury of the plaintiff’s lower back, he would very likely suffer from persistent back pain, especially after exertion or prolonged weight bearing.
2. Dr Chun, the defendant’s expert, on the other hand, opines that the plaintiff of exaggerating his pain especially the left calf and foot weakness first appeared 1 year prior to the joint examination on 5 December 2016. Also Dr Chun notes that the plaintiff’s pain is unsupported by MRI evidence, when there was no neurological deficit, no wasting of the left calf muscles.
3. Dr Miu endorses the sick leave granted by the treating doctors at the public hospitals. Dr Chun, on the other hand, argues that the appropriate sick leave is 2 weeks.
4. Dr Miu also is of the view that the plaintiff could be able to return to his pre-injury work which did not require strenuous manual work. His working efficiency, however, would likely be adversely affected by the Accident. The whole person impairment for the back injury is assessed by him at 3% and the loss of earning capacity at 3%. Dr Chun on the other hand is of the view that there was no impairment rating and loss of earning capacity.
5. Further, Dr Chun states that, firstly, low back pain is a very common condition in the general population, and secondly, the MRI showing degenerative changes which are running a progressive deteriorating course and the complications of this deteriorating degeneration can give rise to symptom at any time. Therefore, in the absence of the alleged injury, there is a strong possibility that he would/will have back pain at any time in any event.
6. Dr Chun’s concludes that “(A)ny injury if occurred is a conventionally called a sprain back or sprain muscle/soft tissue of the back. This is a minor trauma and under normal circumstances will recover within a short period of time.”

*The court’s observations on the plaintiff’s injuries*

1. I note that the medical records kept by the treating doctors and physiotherapists do not support any objective signs of any serious back injuries. The subjective complaints at that stage could only be described as mild. For example, in the report dated 24 October 2015 from TKOH, it was recorded there was “left lower back tenderness” and “normal lower limbs power and sensation”; in the report dated 8 October 2015 from TKOH, it has been recorded that there was “no tenderness over lumbosacral spine with normal gist” and “lower limbs powers was full with straight leg rasing tests 80 degree for both lower limbs”; and in the report of Dr Andrew Chan Pak Ho dated 30 January 2015, “mild residual back pain, resumed basketball game, activities of daily living not affected” was recorded.

1. In my view, all the above suggests that the plaintiff’s alleged injuries are much less serious than those he had reported to the treating doctors and therapists. They are certainly much less serious than those he tried to present to the court during the trial.
2. Perhaps the most telling piece of evidence comes in the form of the video recording taken by the private investigators engaged by the defendant. On 22 December 2015, the plaintiff was filmed to have been able to lift up a number of boxes containing computer equipment, sometimes on his own and sometimes together with one of his colleagues. He was able to do so with no difficulties at all. The plaintiff admitted that he and his colleagues were instructed by his new employer (Po Leung Kuk) to move some LCD monitors and computers hardwares from their office in Kwai Chung to a new office in Cheung Sha Wan on that day. During the 30 minutes when he was being filmed discreetly, he showed no sign of discomfort or distress at all. He did not need to take any break.
3. I have no hesitation to reject the plaintiff’s evidence when he tried to explain that the small boxes he carried were around 5 Kg while the larger boxes carried by him and a colleague weighed less than 10 kg. I do not believe that at all as they appeared to weigh much heavier than that to me. In any event, if it was less than 10 kg, I do not think his colleague would require his help at all. In any event, I find the plaintiff has no difficulties in carrying moderate to heavy weight by December 2015.
4. I note that this is very different from what he had told the medical experts. On 5 December 2016 when he was examined by the experts, the plaintiff complained of “continual numbness (pins-and-needles) from left lower back to lateral posterior left thigh, leg and ankle” which was “exacerbated by walking for 30 to 40 minutes, sitting for 10 minutes… carrying weight of 5 kg for 10 minutes…”. He also complained of “left sided low back pain down to the left buttock continuous nonstop, fluctuating from VAS 4-5/10 to 8/10, with some exacerbating factors as the left lower limb numbness.” He also complained of “left calf and left foot weakness and tremor first appeared in the recent one year.”
5. I find the plaintiff has grossly exaggerated his injuries and disabilities to the experts when he was examined by them. I find that by that time he was able to carry out normal daily activities and could carry normal weight.
6. Another objective sign which shows that the plaintiff was not telling the truth is about the duration of how long he could sit without any pain. In evidence in chief he told his counsel that he feels pain after sitting for 30 to 40 minutes on hard surface and 10 minutes on soft surface. Yet for the entire time when the plaintiff was giving evidence (which lasted about 1.5 hours in the morning and 2 hours in the afternoon), he showed no sign of any discomfort or pain. I observe that he did not need to change position on a frequent basis during the entire time when he gave evidence. When asked by the court about this, he then made up the pathetic excuse that when he mentioned “soft” surface, he meant seats like a sofa and not a cushioned chair which he was sitting on in court. I find this not believable at all and hold that the plaintiff’s injuries are much less serious than those he had tried to present to the doctors and the experts.

*(A) PSLA*

1. For PSLA, the plaintiff’s counsel Ms Koo has referred me to the following cases:
2. *Wong Yun Chiu v Union Printing Company Limited*HCPI 282/2009, unreported, 29 July 2011;
3. *Chau Chin To Chadow v Wing Fung Financial Group Limited* HCPI 163/2015, unreported, 1 August 2017;
4. *Yuen Macie v Yeung Ying Kit*HCPI 528/2015, unreported, 24 November 2016;
5. *Yau Shui Ming v Excellent Development Ltd*DCPI 47/2002, unreported, 28 May 2003; and
6. *Cheung Oi Yan Ruby v Wong Hoi Sum* [2012] 4 HKLRD 334P13F.
7. In the above cases, PSLA awards of HK$200,000 to $300,000 were made. In my view, the injuries sustained by the victims in the above cases are much more serious than those experienced by the plaintiff, at least as those opined by Dr Chun whose opinion I prefer. Further, the sick leave required by the plaintiff in my view is much less than those given by the doctors at the public hospitals. I therefore am of the view that none of the above cases are comparable with the actual injuries and disabilities experienced by the plaintiff.
8. On the other hand, Mr Ho for the defendant submits that award for PSLA involving soft tissue injury at low back with short period of sick leave will not exceed HK$100,000. He referred me to the following cases:-
9. *Sulakhan Singh v Federal Securities Limited and Another* DCPI 231/2007, unreported, 6 June 2008;
10. *Leung Hiu Yan Hilda v Lau Kam Hung*DCPI 220/2012, unreported, 15 May 2013;
11. *Yip Mau Kei v Wong Kam Tim* DCPI 1905/2013, unreported, 10 February 2015; and
12. *Yip Kwok Shing v Fung Chau Tim* DCPI 2627/2015, unreported, 26 June 2017;
13. I find the plaintiff’s injuries sustained in the Accident are more in line with the injuries reported in the above cases cited by Mr Ho. Any residual pain and discomforts experienced by the plaintiff are in my view mild and any disabilities insignificant. In my view, he certainly did not require sick leave for more than a few weeks as opined by Dr Chun. I consider an appropriate award for PSLA should be at HK$80,000.

*(B) Pre-Trial Loss of Earnings*

1. The defendant agrees with the plaintiff on the calculations of pre-trial loss of earnings at HK$45,192.00.

*(C) Loss of Earning Capacity*

1. The plaintiff claims HK$50,000 under this head.
2. The plaintiff is complaining of persistent back pain, stiffness and left lower limb numbness, his condition deteriorates when he stands or walks for a long period of time. All of this I have already rejected.
3. In *Yu Kok Wing v Lee Tim Loi*[2001] 2 HKLRD 306, Keith JA held at 311I-312G that if there is a “substantial” or “real” risk that a plaintiff would lose his present job at some time before the estimated end of his working life, and he thereby suffers the risk of financial damage, he may be awarded loss of earning capacity.
4. I find no such evidence in this case.
5. The plaintiff only suffered soft tissue injury at low back. The plaintiff’s job as a welfare worker is not physically demanding at all. After the plaintiff has resigned from the defendant, he secured employment from Po Leung Kuk within a few days. He remains in the same employment with Po Leung Kuk since that date. It cannot be seriously disputed that the plaintiff has no or negligible risk of losing his job as a result of his alleged disabilities.
6. I make no award for loss of earning capacity in this case.

*(D) Special Damages*

1. The plaintiff claims HK$14,968 medical expenses, HK$3,000 travelling expenses, and HK$2,000 tonic food.
2. I agree with Mr Ho’s submission that the following amount should be allowed in this case:
3. The plaintiff should be entitled to medical expenses up to 31 January 2015 only. According to the summary for expenses, medical expenses up to 31 January 2015 added up to HK$4,625;
4. At all material times the plaintiff had no walking difficulties. He therefore is only entitled to claim travelling expenses on public transportation but not taxi. According to the summary for expenses, there were 26 medical visits from 10 November 2014 to 31 January 2015. Accordingly, I agree that travelling expenses should not exceed HK$1,000; and
5. Only a nominal sum should be allowed for tonic food: See *Yu Ki v Chin Kit-lam & Another* [1981] HKLR 419, at 421 F–G, per Roberts CJ. In the absence of any actual evidence of tonic food, I agree that tonic food expenses should not exceed HK$1,000.
6. In the circumstances, I would allow a sum of HK$6,625 as special damages in this case.

*(E) Interest*

1. Had the plaintiff succeed on liability, he will be entitled to interests on PSLA at 2% per annum from the date of the writ to the date of judgment and interests on pre-trial loss of earning and special damages at half of judgment rate from the date of the Accident to the date of judgment.

*(E) Summary of calculations*

1. In summary, had I find in favour of the plaintiff on liability, the quantum which I would allow in this case will be at:-

(A) PSLA HK$80,000.00

(B) Pre-trial loss of earnings HK$45,192.00

(C) Loss of earning capacity Nil

(D) Special damages HK$6,625.00

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

HK$131,817.00

Less: employees’ compensation (HK$100,000.00)

Total: HK$31,817.00

=============

*CONCLUSION*

1. In conclusion, I will dismiss the plaintiff’s claim with an order nisi that the plaintiff will pay the defendant’s costs with certificate for counsel, such costs to be taxed if not agreed. The plaintiff’s own costs will be taxed in accordance with the legal aid regulations. The costs order nisi will become absolute 14 days after the date of handing down this judgment in the absence of any application from the parties to vary the same.

( Andrew SY Li )

District Judge

Ms Koo Yeuk Lan, instructed by V Hau & Chow, for the plaintiff, assigned by the director of legal aid

Mr Leon Ho, instructed by Au & Associates, for the defendant

1. See the record of training dated 13.9.2014 on how to prevent students’ injuries at [104-106] of the hearing bundle [↑](#footnote-ref-1)