DCPI 1725/2015

[2018] HKDC 1029

**IN THE DSTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1725 OF 2015

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BETWEEN:

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| WONG SHUI MING | Plaintiff |
| and |  |
| YEUNG KAM SHING | Defendant |

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| --- | --- |
| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing: | 23-24 July 2018 |
| Date of Judgment | 23 August 2018 |

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JUDGMENT

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1. This is a personal injury claim subsequent to an alleged assault on 1 August 2013.

*Background on the issue of liability*

1. The defendant runs a guest house in Flat B4, Block B, 17th Floor, Chung King Mansion, 36-44 Nathan Road, Kowloon (“the Premises”) and had employed a contractor (known as “Ah Lung”) for renovation. The work was near completion at the relevant time.
2. The plaintiff was a plasterer employed by Ah Lung. She had completed her work (at least 1 month before the relevant date) but alleged that she had not been paid by Ah Lung.
3. According to the plaintiff, she has attended the Premises once already before 1 August 2013. At that time, she was with her husband and two other workers. She attended on her own on 1 August 2013 (but with her husband waiting downstairs). On both occasions, she claimed that it was Ah Lung who asked her to attend the Premises (but, on questioning, she admitted that she did not go at the alleged agreed times and Ah Lung was not there on both occasions). She initially claimed that she had merely been shouting Ah Lung’s name to ask him to come out of the Premises. However, on further questioning from the court, the plaintiff finally admitted that she had been attending the Premises to ask the defendant to pay her the salary allegedly owed by Ah Lung, despite the fact that the defendant repeatedly told her that he has paid Ah Lung already. She said that she did not care as long as she got paid.
4. The defendant’s case was that the plaintiff had attended the Premises and had caused disturbance on at least 2 previous occasions before 1 August 2013. He had indeed paid Ah Lung in accordance with the renovation agreement (and had produced the relevant agreement and receipts in the trial bundle). If Ah Lung actually owed the plaintiff money, he expected that she should ask Ah Lung, who lived in another address in Chung King Mansion. The defendant said that the reason why the plaintiff repeatedly disturbed the Premises was because she knew that the defendant was running a hostel business, and the disturbance would pressurise him to pay her. This was despite the defendant’s repeated explanation that he had already paid Ah Lung. This seemed to be consistent with what the plaintiff finally admitted, that she did not care as long as she got paid.
5. In any case, on 1 August 2013, the plaintiff attended the Premises sometime around 18:00. She found the doors of the Premises open and she entered the Premises. She claimed that she was looking for Ah Lung inside. She did not find Ah Lung but found the defendant who asked her to leave. The plaintiff then went downstairs and called the police. She claimed that she needed the police for her own protection.
6. The plaintiff returned with two police officers and re-entered the Premises. She claimed that she needed to “re-check” for Ah Lung. She again did not find Ah Lung. The defendant again requested them to leave.
7. There are several versions of what happened next.
8. The Plaintiff stated in her witness statement dated 29 January 2016, as I translated into English:

*“As I was leaving, the defendant suddenly came out from the unit. He suddenly and forcefully pushed my left hand and back, causing me to stumble and twisted my back. I immediately lost my balance and was falling forward. Luckily, a police officer was standing near me and he immediately separated us and supported me, and prevented me from falling on the ground…Although I at last could stand firm, but when I fell forward I have hurt my back, and pain started immediately.*

*…Another police officer saw it and immediately asked the defendant why he assaulted me. The defendant did not answer and only said loudly<”I have to close the door.” Before I found out what happened, the defendant has use force to close the wooden door, and the wooden protrution in the middle of the door hit the middle of my back. The defendant’s two assaults caused unbearable pain in my entire back. I told the police that my back was injured….”*

1. According to the Joint Medical Expert Report dated 21 May 2016, during the assessment on 29 March 2016, the plaintiff told the experts that:

*“…she was pushed at the left lower back by an assailant, and was pushed forward. She fell forward, but was assisted by a policeman and did not actually fall. She said she felt pain in the left low back….”*

1. Further, there are several different versions of events as recorded by treating doctors in various medical reports.
2. The Queen Elizabeth Hospital A&E doctor stated that she alleged that *“she was assaulted by several persons…She was allegedly being pushed by other persons against the wall…”* but in a subsequent report, it was stated that *“The patient gave a history of alleged assault, and the phrases “was pushed and hit against door edge” was noted down as the patient has reported during the consultation.”*
3. The Tseung Kwan O Hospital Department of Orthopaedics and Traumatology however reported that *“The patient* *claimed by somebody used a chair to hit her on her back on 1 August 2013.”*
4. The Tseung Kwan O General Outpatient Clinic reported she was *“assaulted by a person hitting her back with the wood of the door on 1/8/2013.”*
5. The defendant stated in his witness statement dated 3 February 2016:

*“The plaintiff was standing at the front door of the Guest House and obstructing the door…from closing. I wanted to close the door so as to prevent the plaintiff from trespassing…again to humiliate and disturb me, as well as to make the plaintiff to leave my Guest House, therefore I push the plaintiff’s left chest to shoulder area near her arm once, so that I could close the wooden door. However, this attempt was not successful as I did not push the plaintiff forcefully. The plaintiff just took a step backward, but she did not lose her balance. The plaintiff then rushed back to her original position immediately to obstruct the door…from closing. The plaintiff then alleged that the wooden door hit her and demand me to pay her…A close-circuit television (CCTV) was installed in my Guest house at the time….”*

1. The CCTV video footage was played during the trial and the court has also perused the footage subsequently in some details.
2. The following can be seen from the CCTV footage (with the time as it was recorded in the video):
   1. There were two doors to the Premises. There is a proper inner door but there was also a temporary outer door which was being used during the renovation. This outer door opened outwards against the wall outside and appeared to be made with plywood.
   2. 18:20:59 The plaintiff appeared with two police officers and they all entered the Premises.
   3. 18:21:44 The plaintiff and the police officers came out of the Premises.
   4. The plaintiff exited the Premises into the lobby area but then walked back to stand just outside the doorway (thus blocking the closing of the outer door). She appeared to be waving her arms and talking to someone inside the Premises.
   5. 18:21:57 The defendant appeared at the doorway and was talking to the plaintiff and the police officers.
   6. 18:22:05 Whilst the defendant was still talking, the plaintiff started to look at her mobile phone and appeared to be making a call.
   7. 18:22:21 The defendant pushed the plaintiff around the left arm / shoulder area and then used his right hand to attempt to grab the outer door handle to attempt to close it. The plaintiff took a step to her right with her right foot but then immediately stepped back. The outer door appeared to make contact with her left elbow or arm. It was not entirely clear whether the plaintiff was actually pushing the outer door back against the wall but she returned to her original position still obstructing the closing of the outer door. The defendant, plaintiff and police officers continued to talk and the plaintiff continued to stand at the doorway.
   8. 18:23:04 The defendant went back inside the Premises and closed the inner door.
   9. The recording went on until around 19:00, but I will address the rest of the footage later.
3. It was not in dispute that the defendant was subsequently charged with common assault and pleaded guilty.

*Issue of liability*

1. As far as liability is concerned, in the Amended Defence, the defendant did not deny that there was at least a “push on her left arm” and further did not deny the criminal conviction. He only denied the version of events of the assault as alleged in the Statement of Claim. His main arguments were concerned with causation, contributory negligence and damages.
2. As seen from the CCTV footage, it was very clear that the defendant did push the plaintiff whilst she was standing outside the Premises (but at the doorway).
3. Given the pleadings of the Amended Defence and the evidence of the CCTV footage, liability is established. Only the issues of causation, contributory negligence and quantum remain.

*Contributory negligence*

1. The “particulars of negligence of the plaintiff” as raised in the Amended Defence are, in summary, (a) refusing to leave the Premises; (b) standing in the doorway and refusing to move; (c) blocking the door whilst the door was being closed; (d) failing to take care generally.
2. I can say straightway that (a) cannot be established as the CCTV footage clearly showed that the plaintiff was not inside the Premises.
3. I also cannot see how it could be argued that the plaintiff could reasonably foresee being assaulted by the defendant and the defendant has not produced any precedent on the applicability of contributory negligence under such circumstances.
4. I would therefore rule that there was no contributory negligence on part of the plaintiff.

*Issue of causation and quantum*

*Treating doctors’ evidence*

1. Subsequent to the assault, the plaintiff attended the A&E of Queen Elizabeth Hospital on the same day. According to the medical report:

*“Major complaint was back and left elbow pain…*

*Medical examination revealed…*

*-left upper back tenderness, no bruise / wound*

*-left elbow tenderness, range of movement normal*

*X-ray of chest and ribs showed no fracture or pneumothorax.*

*The clinical diagnosis was back and left elbow contusion.”*

1. The plaintiff started attending the Tseung Kwan O General Outpatient Clinic on 7 August 2013. According to the medical reports:

*“She has no lower leg weakness or numbness….no fracture noted. Physical examination showed she had mild tenderness over L4-5 spine, there was no tenderness over paraspinal muscle.”*

1. The plaintiff was referred to the Department of Orthopaedics and Traumatology by the Tseung Kwan O General Outpatient Clinic. It was quite telling that the specialist orthopaedic surgeon reported:

*“We first saw her…on 7 November 2013. She could walk unaided. The back pain subsided mostly after swimming exercise herself. There was no bruises or muscle spasm noted over the back…Back movement was good and no neurological deficit could be detected. The X-rays of lumbar spine were unremarkable except mild degenerative changes and no fracture was noted. The diagnosis was alleged assaulted back injury with minimal persistent back pain…No regular analgesics was required and no active orthopaedics problem was noted…We granted only one day sick leave for this consultation…”* (my underlining)

*Expert evidence*

1. As for expert evidence, Dr. Lam Chi Keung, Johnson (“Dr. Lam”) instructed by the plaintiff and Dr. Baldwin Chan (“Dr. Chan”) instructed by the defendant have prepared 3 joint expert reports which are the Joint Medical Report dated 21 My 2016 (the “JMR”), the Supplemental Joint Medical Report dated 13 September 2016 (the “SJMR”) and the 2nd Joint Supplemental Medical Report dated 25 April 2017 (the “2SJMR”).
2. In the early part of the JMR, there appeared to be no dispute between the experts that the force of the “push” was not great (*“minimal”* according to Dr. Chan, *“only move one step after the push…able to regain balance by herself without falling down”* noted by Dr. Lam) and that the degree of injury was *“trivial”* (Dr. Chan) or *“may not be too severe”* (Dr. Lam).

*Waddell’s tests*

1. Both experts also agreed that there were findings of “inappropriate signs” in Waddell’s tests suggesting symptoms exaggeration.
2. Dr. Lam quoted a passage by Professor R. W. Porter:

*“These inappropriate symptoms and signs do not mean that there is no serious pathology present but it does mean that the signs cannot be explained in terms of that pathology. The patient is for some reason exaggerating their disability and is attempting to convey to the examiner that something is seriously wrong. They may feel neglected by the doctor and be attempting to communicate distress. However, this exaggeration response makes it more difficult to identify any underlying pathology.”*

1. I have grave concern whenever this passage is quoted (invariably only by the plaintiff’s and not defendant’s expert) because the expert may then suggest that display of “inappropriate signs” (e.g. positive Waddell’s test) actually shows that the patient was “*feeling neglected by the doctor and be attempting to communicate distress”*, and as such, tries to persuade the court that this must be evidence that the patient actually has pain. Similarly, Dr. Lam here (on page 5 of the JSMR, under “Present Condition”) suggested that the plaintiff was *“attempting to convey to the examiner that something is seriously wrong”* and *“attempting to communicate distress”*.
2. This line of argument, which is a blatant attempt to turn a negative clinical finding to a positive one, is clearly flawed.
3. Firstly, Professor Porter only gave one example of *“some* *reasons”* why the patient wished to exaggerated the symptoms and signs.
4. More importantly, it is clear that the example that Professor Porter has given must be in the context of a treating doctor facing a patient displaying inappropriate signs and not in the context of an expert examining a plaintiff in litigation. A patient might feel *neglected* by his treating doctor and wished to communicate distress. A plaintiff, on the other hand, is clearly not being cared for by the experts during a medical assessment and no feeling of *neglect* should be assumed to exist under the circumstances.
5. I would therefore think that Professor Porter’s example was unfortunate (or might be quoted out of context) as it clearly would not apply in the context of litigation (despite the fact that the article was titled “Back Injury and Litigation, 1995”). As such, I would think that experts should be careful when quoting this passage in their reports and appropriate clarifications should be made.
6. One of the most obvious reason, I would imagine, of the plaintiff displaying “inappropriate signs” during expert examination must be the intention to exaggerate the symptoms and disabilities in order to maximise the potential claim. It is a matter of the plaintiff pursuing his or her own self-interest which is, understandably, human nature under the circumstances.
7. Therefore, any supposedly independent medical expert acting as if he or she was blind to, or worst, attempting to distract the court from, this obvious possibility is doing his or her own credibility a disservice.
8. It is perhaps even more mystifying that, after agreeing that the injury *“may not be too severe”* and that there were *“inappropriate signs”*, Dr. Lam then completely reversed his opinion by relying on the subjective complaint of the plaintiff (page 24 of the JMR):

*“In this case, the evidence available suggest presence of persistent pain in the low back despite various treatment and a long period of rest. Dr. Lam opined that it is unlikely that Madam Wong suffered from mild soft tissue injury to the low back”.*

1. Dr. Lam went on with some rather convoluted arguments basing such on the assumption that the “persistent back pain” was true. In short, he was simply working backwards: because there was (compliant of) persistent pain, the initial injury must be “moderate” rather than “mild”.
2. As such, Dr. Lam has committed the fundamental fallacy in what lawyers call “putting the cart before the horse” / “leading the evidence”, and what scientists call “confirmation bias”. He already concluded that the plaintiff’s subjective complaints of persistent back pain etc. were truthful, and so he worked backwards to “massage” the evidence to justify (or confirm) his conclusion. In other words, he was “leading the evidence” to his preconceived conclusion instead of following the evidence to see where it leads him.
3. This is rather alarming given that, during the trial, Dr. Lam agreed with the court that the positive Waddell’s signs suggested that the plaintiff’s subjective complaints would be unreliable.
4. Positive Waddell’s test shows that plaintiff was exaggerating her symptoms (for whatever reasons). This rendered her subjective complaints or evidence unreliable and the experts should not be relying on them (at least not without a clearly worded “qualifying statement”). Further, the experts could not say more about *the degree* of pain (or any other subjective complaints and signs) that the plaintiff actually suffered (if any at all) based on her subjective evidence alone because the test does not give information on the extent or degree of exaggeration.
5. Under such circumstances, the truthfulness of any such subjective complaints by the plaintiff is a matter of finding of facts by the court at trial. It is not for the expert to make any assumptions on the truthfulness of the plaintiff (at least not without a clearly worded “qualifying statement”).
6. During the trial, Dr. Lam seemed to suggest that he had assumed the plaintiff would be truthful to his treating doctors because she would wish to get better.
7. I cannot see any reason or justification for that assumption. In many litigation cases, it might be in the self-interest of the plaintiff to exaggerate the severity and duration of any injuries to the treating doctors (as well as the experts during medical examination) in order to maximise the potential claim.
8. Given Dr. Lam’s agreement as to the unreliability of the plaintiff’s subjective evidence, one would question why he sought to rely on that (at least in part) to “work backwards” to conclude that the injury must therefore be “moderate” rather than “mild” in the JMR.
9. I would think that a truly independent expert should not rely, even partly, on any evidence that he knew to be unreliable for his opinion. Dr. Lam’s expert opinion must therefore be viewed with utter scepticism.

*Objective evidence*

1. Dr. Lam also suggested that there were “supportive” objective signs: namely the muscle spasm and the findings of the MRI scan. I shall deal with these below.

*Muscle spasm*

1. Dr. Lam opined that muscle spasm was *“an objective sign of significant pain, usually a kind of mechanism to try to alleviate pain in the low back. For example, when there was pain over, say, a facet joint or disc that was injured…Another example is in cases with sciatica / nerve irritation…”* (page 4 under (b) of the 2SJMR).
2. First of all, the possibility of sciatica and nerve irritation can be disregarded in this case. Dr. Lam agreed in court that the “Flip test” showed that (see page 13 of the JMR) showed that the plaintiff’s complaint of sciatica-like pain was unreliable. The subsequent MRI scan also confirmed *“no overt impingement of descending or exiting nerve roots. No central canal stenosis or compression of cauda equine.”* (page 4 of JSMR).
3. More importantly, I note that “muscle spasm” was not reported in any of the medical reports of the treating doctors: not by the A&E doctor nor by the General Outpatient Clinic doctors (who have seen the plaintiff on many occasions evidenced by numerous sick leaves granted from August 2013 to at least June 2015, about 1 month before that medical report was written). The treating specialist orthopaedic surgeon was clearly looking for this and reported *“there was no…muscle spasm noted over the back.”*
4. I also note that both experts agreed that there was “no spasm” in the JMR (page 11 of the JMR, under “The Back”)
5. In fact, the only mention of “muscle spasm” was made not by a medical doctor but by a physiotherapist, and was reported once only on 6 December 2013, some 4 months after the alleged injury (Physiotherapy Report dated 20 July 2015).
6. Dr. Chan was of the opinion that muscle spasm is *“a description of muscle in a contracted state with various degrees.”* He suggested that there might be many reasons for such, e.g. muscle fatigue and cramp. Whilst a soft tissue injury can cause spasm, the finding of muscle spasm is not proof of soft tissue injury.
7. I understand that Dr. Chan must mean that muscle spasm might also be caused by pain (besides muscle fatigue and cramp), but there were many causes of pain and this was not proof that the pain must therefore be related to soft tissue injury.
8. Overall, I do not accept that this single finding by a physiotherapist of “muscle spasm” some 4 months after the incident (against the findings of many doctors on many occasions, including the experts during the joint examination) would lend any support that the plaintiff had, on balance of probability, suffered from such alleged persistent and severe pain for more than two years (as alleged in paragraph 15 of the plaintiff’s witness statement).
9. As a passing comment, on the second page of this physiotherapy report, it was stated that: *“On objective examination, Ms. Wong complained of stretching pain over left lumbar paraspinal muscle when performing active lumbar flexion and right flexion and back pain when performing active lumbar extension….For the straight leg raising…with back stretching feeling…On palpation, there was tenderness….”*
10. I do not accept that a patient complaining of pain when a manoeuvre was performed should be considered an “objective” finding, at least not in the “legal” sense from the Court’s point of view. Much in the same way that complaint of “tenderness on palpation” cannot be considered an “objective” evidence. During such examinations, it would be entirely up to the patient to tell the physiotherapist (or the doctor) whether he or she felt pain (or “stretching feeling” etc.) when certain movements were performed or when certain part of the body was palpated. The examination would clearly rely on the truthfulness of the patient and such findings could not be considered “objective” evidence.
11. As such, I do not see the reason why when this passage was quoted in the JMR, the words “**objective examination**” was put in bold letters (when it is not in bold in the physiotherapy report). It gives the impression that whoever has drafted this part of the JMR was attempting to suggest to the court that these were really “objective examinations”. I would expect that any expert should be aware that such examinations could not be considered “objective” evidence in the legal sense.

*The MRI scan*

1. The MRI scan was discussed at length in the SJMR.
2. The experts are in agreement that the various findings were degenerative changes which were consistent with the previous x-rays findings mentioned in the treating doctor’s medical reports.
3. Further, as agreed by both experts, the findings were limited by the fact that there was no pre-injury MRI scan for comparison.
4. The significance with the lack of pre-injury scan is that no direct comparison is possible (and thus there is no direct evidence) to see whether there has been any change after the incident.
5. The MRI report showed, amongst others:

*“At L4-5: Circumferential round disc protrusion of L4-5...but no significant lateral recess or neural foremen is found. Central canal remains capacious and the cauda equine is not impinged.*

*At L5-S1: Similar circumferential round disc protrusion is noted, causing mild left lateral assess recess stenosis. Condition is further aggravated by degenerative hypertrophy of the L5-S1 facet. However, no overt impingement of left S1 descending nerve root is seen.”*

1. As such, both experts also agreed that “there is no overt impingement of descending or exiting nerve roots. No central canal stenosis or compression of cauda equina...”
2. Then the experts were in disagreement: Dr. Lam again reiterated the factors he considered in the JMR (which, as discussed above, the court would regard as unreliable) and opined that the “*focal protrusion at left L4-5 paracentral aspect...were consistent with clinical picture of persistent pain, symptoms and signs (more over left low back) despite various treatments.”*
3. With this MRI findings, Dr. Lam *“would like to deliver a cemented opinion that, considering the overall evidence...it is likely that Madam Wong suffered from moderate degree of soft tissue injury to low back, probably significantly causing / aggravating focal protrusion at left L4-5 paracentral aspect +/- circumferential disc protrusion at L4-5 and L5-S1 levels, causing persistent low back pain and impairment as a residue of the subject accident.”*
4. There are several problems with this opinion.
5. Firstly, as stated before, the *“overall evidence”* mentioned by Dr. Lam are largely based on subjective evidence (history of complaint of persistent back pain despite treatment etc.) which are unreliable.
6. Despite of the limitation that there was no pre-incident MRI scan for comparison, Dr. Lam simply proposed, in short, that because there was no evidence that patient had back pain before the incident but she complained so after the incident, the findings of the disc protrusion after the incident should therefore be caused by or contributed to the incident.
7. The flaw of this argument is again a “working backwards” from the conclusion: Dr. Lam appeared to have already concluded that her complaint of back pain was truthful so he was now making the evidence to fit or confirm the conclusion.
8. Secondly, in court, Dr. Lam made much about the *“focal disc protrusion at L4-5”* being *“consistent”* with the clinical picture because the plaintiff complained of *“mild tenderness over L4-5 spine”* as reported by General Outpatient Clinic.
9. However, this was only reported on 7 August 2013, some 6 days after the incident. The A&E records on the day of the accident clearly recorded tenderness on the left middle and upper back.
10. More importantly, the plaintiff did not complain of tenderness over the L5-S1 spine despite a *“similar circumferential disc protrusion”* reported in the MRI scan.
11. The explanation of this is simple, and this explanation was confirmed by Dr Lam when questioned in court: the MRI scan is not a very reliable test in investigating back pain in that when there is a “positive” finding, it does not mean that the patient must have the disease or the symptoms. In other words, there are a large percentage of “false positive” results.
12. The fact that the “positive” finding at L5-S1 level did not correspond to any complaints by the plaintiff in this area exactly illustrated a “false positive”. If the MRI was such a reliable test, the plaintiff should have complained of pain in both L4-5 and L5-S1 areas.
13. Similar MRI findings are not uncommon in the general population. Dr. Lam opined that 1/3 of the population has some types of disc protrusion. Thus if one were to perform MRI scans to every member of the general population, one would find plenty of “false positives”. It is therefore not normal clinical practice to make a diagnosis based on the “positive” findings on the MRI scan alone and, as Dr. Lam agreed, the doctor would need to correlate with clinical findings before one could make the diagnosis. However, the clinical findings in this case were largely subjective and, as stated above, were unreliable.
14. As pointed out by Dr. Chan, the MRI scan basically *“showed degenerative change of her lumbar spine, which was an expected finding given her age and background”*.
15. As such, due to the above mentioned limitations of the MRI scan, I do not think it adds much to what the x-rays already showed: that there were degenerative changes. It cannot tell us more on the issue of causation. This case is still down to a finding of facts by the court.

*The CCTV footage*

1. Under the circumstances, I think this provides very useful objective evidence.
2. The plaintiff alleged that *“the two assaults* (meaning the “push” and then being hit by the wooden door) *caused severe pain in my entire back, I told the police officer that my back was injured. I called my husband and told him I was injured, so he called an ambulance for me.”* (paragraph 4 of the plaintiff’s witness statement)
3. Under cross-examination, the plaintiff also confirmed that she had a lot of pain after being bumped by the door, and that all along she was feeling the pain and needed to use the umbrella to support herself.
4. I have perused the footage in some details and I have recorded some of my findings regarding the assault in paragraph 17 above. I cannot see how the defendant was using much force in the “push”: the plaintiff took one step to her right with her right foot to regain balance and was able to immediately step back to “reclaim” her space to (intentionally or otherwise) obstruct the closing of the door.
5. The door was a temporary one which appeared to be made of rather flimsy wooden material (plywood?). It would not be heavy. Further, the defendant managed to close it no more than a few inches before the door was stopped by the plaintiff stepping back. So it was unlikely that the door would have attained much speed at the moment of contact.
6. Subsequent to this incident, the plaintiff had continued to talk and stand normally after the incident without any obvious indication of distress or severe pain.
7. At 18:23:12, the plaintiff was able to bend forward to retrieve her umbrella from just inside the doorway. She then walked out of the doorway normally and put the umbrella against the wall.
8. For the next 20 or so minutes, the plaintiff was standing and walking in an apparently normal manner. She at times was gesticulating and waving her left hand arm, and at times hooking the umbrella over her left elbow. She was able to make a number of telephone calls using her left hand and raising her left arm to put the phone to her ear. She was also using both her left and right hands when rummaging through her handbags looking for items. This was despite the fact that she now claimed to be injured in the left arm and *“left elbow tenderness”* was reported in the A&E records.
9. The footage did not show that the plaintiff had to use the umbrella for support. In fact, the footage hardly showed any time that the umbrella actually touched the ground. She was at times swinging it, or carrying it whilst walking or standing, or putting it up against the wall.
10. At 18:44:41, (after standing and walking for some 22 minutes after the incident), far from needing any support to stand, the plaintiff actually lifted her left leg off the ground to use her left thigh to support the bottom of the handbag to rummage in her handbag. She was therefore momentarily standing only on her right leg. I would think that this was something that anyone with severe back pain would not be able (or would not be willing) to do. After this, she squatted and then sat down on the ground, before the ambulance-men arrived at around 18:47:04.
11. In answering a question regarding the behaviour of the plaintiff shown on the footage (2SJMR, page 11), Dr. Chan opined that:-

*“Generally speaking, if an injury had happened, victim should feel pain immediately. Delay increase of pain intensity may be possible during the “heat of the moment” but usually this would indicate that the magnitude of the pain was relatively mild and/or the victim was distracted by another more painful site...It would be unusual if the victim had no pain at all immediately after the injury and only started to have pain 20 minutes later.”*

1. On the other hand, Dr. Lam, in answering the same question, again revert to arguing backwards from the “other evidence” in justifying that there was a prolapsed disc, and then argue from there to attempt to explain the apparent “delayed onset of pain”. As discussed above, I found none of the “other evidence” reliable.
2. Importantly, it was never the plaintiff’s case that she had “delayed onset of pain” (see paragraphs 83 and 84 above). She claimed that she had severe pain immediately after the assault and that was when she informed the police officer that her back was injured and called her husband that she was injured (so he called an ambulance).
3. If it was true that the pain onset was delayed for 20 minutes, she would not have immediately told the police officer or called her husband, and the ambulance would not be called until much later. The CCTV footage showed that the ambulance-men arrived within 25 minutes of the alleged assault and within 3 minutes after the plaintiff sat down on the ground.
4. As such, Dr. Lam’s “delayed pain onset” explanation might appear to be a desperate attempt to salvage the plaintiff’s case.
5. In doing so, Dr. Lam seemed to have forgotten that the duty of an expert was to help the court impartially and independently. Dr. Lam has signed the “expert declaration” at the end of each expert report, but I would question whether he has actually abided by it.

*Conclusion*

1. I am satisfied that the CCTV footage clearly showed that the force of the defendant’s push was not great and I agree with Dr. Chan that any injury would likely be trivial. The behaviour of the plaintiff after the incident was clearly not compatible with her allegation of immediate and severe pain.
2. Given the discussions above (including the plaintiff’s positive Waddell’s tests and Flip Test, the unreliability of her subjective evidence and the court’s findings on any objective evidence) and the inconsistency of the plaintiff’s evidence in court (I need not go into all the details but one example was stated in paragraph 4 above), I do not find the plaintiff a credible and honest witness. As such, I would also seriously question the motive of her *“pain-focused behaviour”* all this time after the incident.
3. I find that the plaintiff has failed to convince the court that she has suffered from the injuries and disabilities as alleged. Dr. Chan is clearly correct that the plaintiff’s persistent complaint of back pain for years afterwards was:

*“…inconsistent with the nature of her injury. Yet she had attended various clinics and had attended physiotherapy for a significant period of time and she reported residual back pain. Underlying degeneration was detected but this was mild and should not have contributed significantly to her residual back pain. Overall, her relentless back pain after the alleged incident was considered excessive and unexplainable. In additional, the documented physical examination by various clinics and in this examination was largely normal and could not support her claim of significant back pain. Therefore, her presentation was just based on a subjective non-verifiable back pain from a trivial injury and inorganic factor such as pain-focused behaviour was likely a major contributor to her presentation.”*

1. As such, I also accept Dr. Chan’s opinion that the plaintiff did not suffer from any residual impairment or disability, that a reasonable duration for sick leave after the alleged incident should be 2-3 days, and that the plaintiff *“should be able to resume her pre-injury work and fit to take up other forms of employment without being hindered by the effect of the alleged accident.”*
2. In passing, I also note that Dr. Chan’s opinion was consistent with the view of the treating specialist, the consultant orthopaedic surgeon Dr. Leung Yuen-fai (see paragraph 28 above). Further, it was perhaps telling that Dr. Leung had only granted *“one day sick leave for this consultation”*. He seemed to be at pains to point out that the sick leave was not meant for any “sickness” but only for the attendance of that consultation.

*Quantum*

*PSLA*

1. The plaintiff is claiming HK$300,000 under PSLA which is clearly excessive.
2. The defendant has not provided any precedent for such trivial injuries. Nevertheless, under the circumstances, I think HK$5,000 is a reasonable figure.

*Pre-trial loss of earnings*

1. I agree with Dr. Chan that a sick leave period of 2-3 days would be reasonable. I would allow 3 days. I would accept that the daily wage of the plaintiff before the incident was HK$1,100 (paragraph 12 of her witness statement) so I would allow HK$3,300.

*Future loss of earnings*

1. I find that the plaintiff did not suffer from any residual impairment or disability so there will be no award under future loss of earnings.

*Loss of earning capacity*

1. Similarly, there should be no award under loss of earning capacity since the plaintiff does not suffer any disadvantage in the labour market.

*Special damages*

1. I would allow reimbursement of the costs of attending A&E of Queen Elizabeth Hospital. However, I find no reasonable justification for the defendant to reimburse the cost of the plaintiff’s attendance of all the other clinics, physiotherapy sessions, bonesetter etc. which must be the result of *“inorganic factor and pain-focused behaviour”* and not a result of such a trivial injury. I would therefore award HK$100 as medical expenses and HK$9.80 as travel costs for the journey home from Queen Elizabeth Hospital.
2. Similarly, I see no justification that the defendant should reimburse any tonic food expenses incurred by the plaintiff.

*Summary*

1. In summary, I would award the following:-

|  |  |  |
| --- | --- | --- |
|  |  | HK$ |
|  | PSLA | 5,000 |
|  | Pre‑Trial Loss of Earnings | 3,300 |
|  | Loss of Earnings Capacity | 0 |
|  | Post‑Trial Loss of Earnings | 0 |
|  | Special Damages | 109.8 |
|  | Total | **8,409.80 (plus interest)** |

1. As for interest, there be 2% per annum on general damages from the date of the Writ to the date of judgment and interest at half judgment rate on special damages from the date of accident to the date of judgment.
2. There be an order *nisi* for costs of the action be to the plaintiff to be taxed at District Court scale if not agreed, with certificate for Counsel granted.

(Harold Leong)

District Judge

Miss Phyllis Lee, instructed by Yeong & Co., for the plaintiff

Mr John Wright leading Mr Holden N. Slutsky, instructed by Yip & Partners, for the defendant