# DCPI 1914/2017

[2022] HKDC 291

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1914 OF 2017

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BETWEEN

FUI SHING YUK Plaintiff

and

PO LEUNG KUK Defendant

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Before: His Honour Judge Andrew Li in Court

Dates of Hearing: 15, 16 and 20 December 2021

Date of Judgment: 6 April 2022

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JUDGMENT

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*INTRODUCTION*

1. This is a personal injury (“PI”) case involved a care worker who worked at one of the rehabilitation centres run by the defendant for special needs residents.
2. The plaintiff Madam Fui Shing Yuk met an accident in the course of her employment with the defendant on 15 December 2014 whilst she was working at the Pokfulam Rehabilitation Centre situated on the 5th & 6th Floors, 147 Pokfulam Road, Hong Kong (“the Centre”) which was managed by the defendant. She suffered personal injuries as a result of the accident.
3. The plaintiff commenced the present proceedings against the defendant for common law damages by way of a writ of summons in August 2017. A related employees’ compensation claim had been settled between the parties.

*BACKGROUND*

###### *The Accident*

1. According to the re-amended statement of claim (“Re-ASoC”), on the date of the Accident, at about 6:40 pm, a resident who was a mentally handicapped male adult (“the Resident”) was displaying flu symptoms and was required to go from the activity room situated on the 6th floor to the sick room (“the Sick Room”) on the 5th floor. However, the Resident refused to cooperate. The supervisor of the plaintiff, Ms Christine Lauren Chan (or more commonly known by her colleagues as “Ah Dan” (阿丹) (“Ah Dan”)) then instructed the plaintiff and a co-worker of hers to take off one of the slippers of the Resident in order to lure him to the Sick Room. While doing so, the Resident resisted strongly. Ultimately, it took the plaintiff, Ah Dan and 2 co-workers’ efforts together to take off one of the slippers of the Resident. The Resident became agitated emotionally as a result. Without paying regard to the Resident’s emotions, Ah Dan instructed the plaintiff to bring the Resident to the Sick Room by herself. In order to do so, the plaintiff used her left hand to hold the Resident’s right hand to lead him to the Sick Room. When they were walking towards the Sick Room, the Resident went out of control and used his both hands to pull the plaintiff’s left hand (“the Accident”). As a result, the plaintiff sprained her left arm and left shoulder and sustained serious personal injuries: (See: §§4(a) to (b) of the Re-ASoC).
2. It is to be noted that when the Resident was first requested to go to the Sick Room, Ah Dan, the plaintiff and the co-workers were all on the 6th floor. In other words, the plaintiff had to take the internal lift with the Resident by herself from the 6th floor to the Sick Room situated on the 5th floor. Further, while the plaintiff was holding the Resident’s right hand with her left hand, she was holding one of the Resident’s slippers in her right hand up high in order to lure the Resident to follow her.
3. The plaintiff described the accident in greater detail in her witness statement dated 7 December 2018 (“P’s WS”) in the following manner:-

“當日約下午6時40分，有一名智障學員(本人已記不起他的名字)(下稱「該學員」)因病需要到在該中心5樓的病房(下稱「該病房」)隔離。但由於該學員一向都很害怕到該病房，因此，該學員拒絕到該病房。當時該中心的導師，亦是本人的上司阿丹指示本人及另外1名工友合力將該學員穿着的其中一隻孩子脫下，以拿着該隻鞋子引誘他到該病房。由於該學員一向十分緊張自己的鞋子，因此，該學員強烈反抗。最後，要由阿丹、本人及另2名工友合力才能將該學員的一隻鞋子脫下。但該學員已被激怒，不停大叫。雖然當時該學員的情緒已失控，非常憤怒，但阿丹並沒有先安撫該學員的情緒，已只是指派本人拿着該學員被脫下的一隻鞋子，獨自帶該學員到該病房。由於阿丹是本人的上司，本人只好聽從阿丹的吩咐，帶該學員到該病房。當時本人用左手拖着該學員的右手帶着他前去。當本人與該學員行向該病房時，該學員用他的雙手猛力拉扯本人的左手。本人的左手臂和左肩因而扭傷。” (See §14 of P’s WS”)

*The defendant’s pleaded case*

1. The defendant pleads, *inter alia*, in its defence that:-
2. It is admitted that on 15 December 2014 at about 6:40 pm, while in the course of employment with the defendant, the plaintiff was working at the Centre;
3. It is not admitted about how the Accident happened and the plaintiff is put to strict proof of the existence of the circumstances surrounding the occurrence of the alleged accident;
4. It is averred that the plaintiff was employed specifically as a personal care worker of mentally handicapped persons at the Centre;
5. And it is averred that in particular, the plaintiff (along with her co-workers) were given training, namely,
6. training upon commencement of employment as to (i) how to deal with and take café of mentally incapacitated residents; and (ii) how to deal with work injuries; and
7. training workshop on breakaway techniques (脫身法) when facing aggressive and emotionally unstable residents.
8. There were regular consultation sessions between the plaintiff and her supervisors, as well as staff meetings (中心職員會議), whereby care workers were specifically taught and reminded how to handle violent behaviour of the residents;
9. The Centre was also equipped with facilities designed to ensure the safety of its staff, such as alarms (救命鐘) to enable assistance to be sought and obtained in a timely manner. There are two alarms in the common room and every sleeping room (4 Sleeping Rooms in the Male Dormitory) on the 5th floor has its own alarms. The defendant’s care workers, including the plaintiff, were taught how to use such alarms when dealing with emotionally unstable residents;
10. It is further averred that the defendant also conducted regular assessments of the resident and issued guidelines (行為處理指引) (“Guidelines”) to its care workers teaching them how to deal with the resident when he is in an emotionally unstable state. The Guidelines include:-
11. The care worker should attempt to calm the Resident down by giving him water to drink, or to gently spank the resident’s wrists;
12. The care worker should try to ascertain the reason causing the emotional instability of the resident, and see if such need of the resident can be fulfilled. If necessary, the care worker should use a firm tone requesting the resident to calm down; and
13. The care worker may consider arranging the resident to calm down at the quiet area.
14. It is averred that for the foregoing reasons, the defendant had taken all reasonable steps in discharging its duty of care to the plaintiff; and
15. It is further pleaded in the defence that the Accident was caused by the contributory negligence on the part of the plaintiff.

*The Issues*

1. In the light of the defence, the issues before the Court are as follow:-
2. Whether the Accident did occur, and if so, whether it occurred in the manner as pleaded by the plaintiff;
3. Whether the defendant, as an employer, was in breach of its implied, contractual, common law and statutory duties owed to the plaintiff, and/or whether the defendant had taken all reasonable steps in discharging its duty of care to the plaintiff and/or whether there was any negligence on the part of the supervisor for whom the defendant should be vicariously liable;
4. If the defendant is found liable, was the plaintiff contributorily negligent in the Accident, and, if so, the degree of the plaintiff’s contributory negligence; and
5. If liability is established, the extent of the plaintiff’s injuries resulting from the Accident and what would be the amount of quantum of damages.

*Witnesses*

1. By the Order of Master Catherine Cheng dated 23 December 2020, the joint medical report and the supplemental joint medical report dated prepared by the orthopaedic experts can be adduced without oral evidence.
2. Hence, only the plaintiff gave evidence at the trial in support of her claim whereas the defendant has called 2 factual witnesses, namely, Chung Lai Chu (“Madam Chung”), the Assistant-in-charge of the Centre at the time of the Accident and Ah Dan who worked as an instructor.

*DISCUSSION*

*LIABILITY*

*The plaintiff’s case*

1. According to the Form 2 filed by the defendant, the Accident was recorded as happened in the following manner:-

“受傷僱員在照顧學員(智障學員)時，被學員拉扯以致左肩及手臂受傷。”

1. The plaintiff had received a sum of HK$220,000 by way of employees’ compensation arising out of the Accident prior to the commencement of the proceedings. Hence, the fact that the plaintiff was an employee of the defendant and that the Accident arose out of and in the course of the employment of the plaintiff are not in dispute.
2. In the present case, the plaintiff’s claim is mainly based upon the negligence; the breach of statutory and common law duties as well as the breach of contract of employment on the part of the defendant. The plaintiff claims that they resulted in the injuries sustained her. In particular, she says that the Accident was caused by the negligence on the part of the instructor Ah Dan, for whom the defendant should be made vicariously liable.
3. As pleaded in the Re-ASoC, the plaintiff relies upon the common law duty of care to prove the breaches and liability on the part of the defendant.
4. The plaintiff also relies upon the relevant statutes, namely, the Occupational Safety and Health Ordinance Cap 509 (“the OSHO”), to prove the breaches of the statutory duties on the part of the defendant.
5. The plaintiff further relies on the implied terms of the employment contract to prove there was breach of the terms of the employment contract of the defendant.

*Breach of Common Law and Statutory Duty of the Defendant*

1. Mr Steven Lau for the plaintiff, on the instructions of the Director of Legal Aid, submits that the defendant is liable to the plaintiff for the breach of the statutory and common law duties as well as the implied terms of the employment contract.
2. He further submits that, in its capacity as the plaintiff’s employer, the defendant owed the plaintiff a duty to provide a safe place, safe tools/equipment, a safe system of work and competent staff. Mr Lau points out that most importantly, the defendant has failed to provide safe and adequate working instructions, training, supervision and system and/or a competent supervisor, to the plaintiff for the subject work of handling the mentally handicapped persons, including the Resident in this case.
3. According to the plaintiff’s pleaded case, the Accident was caused by the unsafe working system/work method and the inadequacy of instructions, training and supervision provided to the plaintiff, causing the plaintiff to suffer injury to her left arm and left shoulder. The plaintiff submits that the defendant, as the employer of the plaintiff, was in breach of the statutory duties, namely, the aforesaid sections 6(1), (2)(a) & (c) of the OSHO.
4. Besides, according to the plaintiff’s pleaded case, the defendant, as the employer of the plaintiff, was in breach of the common law duty as well as the implied terms of employment contract.
5. Mr Lau further submits that the defendant’s employee Ah Dan was negligent in arranging and instructing the plaintiff to take off the slippers of the Resident in order to attract him but thereby provoking him and subsequently bringing him alone to the Sick Room. Therefore, the defendant should be vicariously liable for the negligence on the part of its employee, ie Ah Dan and the plaintiff’s present personal injury claim as well as the damages accordingly.

*The defendant’s case*

1. Mr Gary Lam, counsel for the defendant, on the instructions of its insurers, in his opening submission on the other hand has summarized the defendant’s position as follows:-
2. The defendant accepts that there was some pulling between the plaintiff and the Resident on the date of the Accident;
3. However, the Accident did not take place as alleged;
4. Even if the Accident did take place as alleged, the defendant had taken all reasonable steps in the circumstances, given that if the plaintiff’s version of events would be accepted, it would mean that prior to the Accident:-
5. it had been usual, with nothing eventful happening, for the care worker to take off the slipper of the Resident to induce him to walk to the Sick Room; and
6. it had been usual, with nothing eventful happening, for one care worker then to induce and walk with the Resident to the Sick Room.
7. Further and in any event, even if the Accident did take place as alleged, if the plaintiff’s version of events would be accepted, it would mean that the plaintiff well knew at the time the significant risk of the Resident getting violent with her, but still took the Resident alone; thus, in such circumstances, the plaintiff was substantially contributorily negligent, at least 80%; and
8. The injury (if any) was simply sprain of shoulder, and the rotator cuff tear as shown in the MRI taken in August 2016 (more than 2 years after the Accident) was caused after 25 February 2016.
9. Part of the defendant’s defence is that, as charted out in the “Centre’s Organization Chat” (中心架構圖), the plaintiff as a care worker (護理員) “co-worked” with an instructor (導師) under a social worker (社工). Hence, hierarchically, the defendant says that the instructor is at the same rank as the care worker, both reporting to the social worker. The instructor however assigns tasks to and instructs the care worker. According to the defendant, all these are accepted by the plaintiff, although the plaintiff goes further to say that in this sense, the instructor is the superior to the care worker: see the plaintiff’s supplementary witness statement (“P’s Supp WS”) §7.
10. The defendant further puts the plaintiff to strict proof of the Accident as alleged. In this respect, the defendant says that the CCTV watched by Ms Chung and contemporaneously recorded on the report dated 18 December 2014 did not show any taking of the slippers but only that there was some pulling between the plaintiff and the Resident. The record says:-

“從CCTV及社工蘇佩儀處了解事件，上述日期約下午6:40，受傷職員正帶上述學員到5/F男宿休息，期間學員有與職員互相拉扯，持續約有6分鐘引致職員受傷。事件發生顯示受傷職員未有了解及掌握學員特性及處理方法，中心會就事件向各職員一同檢討及重申處理學員行為方法。”

1. The defendant further says that the plaintiff’ own version of events is inherently fraught with problems which Mr Lam has painstakingly tried to set out and analyze in both his opening and closing submissions of which I shall not repeat here.
2. However, in my opinion, rhetoric and theory are not all that important in a PI case. What is more important in my view is what actually took place on the ground; what do the contemporaneous documents / records show; and the oral evidence given by the parties’ witnesses at the trial. They are matters which I shall try to sum up and analyze below.

*Approach in assessing witness’s credibility*

1. In a case involving assessing witnesses’ credibility who have given evidence at trial, the starting point is to understand what is the correct approach. It may be useful to remind ourselves by the following frequently cited *dicta* by Deputy Judge Eugene Fung SC in *Hui Cheung Fai and Other v Daiwa Development Limited and Others* (unreported, HCA 1734/2009, 8 April 2014) at §§76-82:-

“76. In making my findings of fact in this case, I am guided by a number of general principles which judges apply as to fact finding and the assessment of credibility.

77. Generally speaking, *contemporaneous written documents and documents which came into existence before the problems in question emerged* are of the greatest importance in assessing credibility: *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at 431 (Lord Pearce)…

78. In deciding whether to accept a witness’ account, importance should also be attached to the *inherent likelihood or unlikelihood* of an event having happened, or the *apparent logic of events*: eg *Lam Rogerio Sou Fung v Tan Soon Gin George* (unreported, HCA 2576/2005, 5 May 2011) §39 (Chu J).

79. In determining a witness’ credibility, I have also attached importance to the *consistency of the witness’ evidence with undisputed or indisputable evidence*, and the *internal consistency* of the witness’ evidence. The latter type of consistency is often tested by *a comparison between the witness’ oral testimony and his or her witness statement*.

80. I have cautioned myself against *the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses* (*Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 at §§36-37 (Bokhary PJ)), or from the assessment of the witnesses’ character (*Esquire (Electronics) Ltd v HSBC* [2007] 3 HKLRD 439 at §135 (Stock JA))…” [emphases added]

*The plaintiff’s evidence*

1. I accept the plaintiff’s evidence given at the trial. Not only her evidence in my view is consistent with the contemporaneous documents which came into existence at the time of the Accident, but her version of events is also inherently much more probable than the version given by the defendant’s witnesses. It also makes much more logical sense and adheres to common sense.
2. The plaintiff confirmed and adopted the contents of her 2 witness statements as evidence in chief in Court. In my view, the oral evidence she gave in the witness box is largely consistent with her 2 witness statements and her pleaded case as stated in the Re-ASoC.
3. I accept her evidence when the plaintiff says that she was required to follow the work arrangements and instructions given by the instructors and to assist the work of the instructors (導師): (see §7 P’s Supp WS). It makes sense to me as both in terms of job descriptions and responsibilities, the instructors took on a more advisory / supervisory role while the care workers were the ones who carried out the actual work or “orders”. In other words, the care workers did the more “hands on” jobs while the instructors gave out the “instructions”. Further, the care workers at the Centre worked longer hours and received lesser pay than the instructors. They also possess lower academic qualifications than the instructors.
4. Under cross-examination, the plaintiff gave a more detailed account of what happened during the Accident. She said that Ah Dan had told her specifically that she must do what she was told and could not “pick work to do” when she made a request to have other colleagues with more experience to be arranged to take the Resident to the Sick Room. Hence, I find that the plaintiff was specifically sent to the Sick Room with the Resident by herself by Ah Dan.
5. The plaintiff was cross-examined extensively about her statement made to the loss adjustor dated 25 March 2015 (“the Statement”). She explained that some contents of the Statement were not accurate, but maintained the version in her witness statements filed in the present proceedings. Under cross-examination, she was asked that she had countersigned at the left-hand side of the Statement because there were corrections and she should have understood before countersigning. She disagreed. In re-examination, she was asked as to why there was no countersigning in another line of the left-hand side at line 9 of the Statement. She replied she did not know.
6. I accept the plaintiff’s claim that the handwriting in the Statement is hard to read and some are even illegible. I further accept the plaintiff’s claim that some of the contents are not accurate and she was not given the opportunity to make corrections or amendments. I also accept the plaintiff’s claim that she was not given the chance to read the Statement properly and trusted the loss adjustor to read it over to her. I note all these allegations of the plaintiff has not been rebutted by the defendant’s side to call the relevant employee of the loss adjustor to confirm the accuracy and procedure of taking the Statement. Naturally, if the defendant really wants to challenge the plaintiff’s evidence in this respect, it is only reasonable that the defendant would call this witness to testify in support of its case. However, I find the defendant has consciously elected not to call this witness to testify in court.
7. In my view, what is more important to note is the fact that the loss adjustor who took the Statement from the plaintiff can by no means be treated as a neutral independent third party in the case. He was appointed and paid by the insurer to investigate into the Accident on its behalf. He obviously was trying to look at the matter from the perspective of the insurer and tried to avoid liability if they could. Hence, any statement taken by the loss adjuster must in my opinion be treated with caution. The fact that the defendant chose not to call the loss adjuster to give evidence at the trial for matters they have severely criticized the plaintiff during cross-examination must be something that I can make adverse inference against the defendant.
8. I further accept the plaintiff’s case that the defendant had not provided her with the documents as alleged by the defendant, namely, the Guidelines to Residents’ Behavior (學員行為指引); regular staff meeting records (中心職員會議); and the use of restraining items’ residents’ list (使用身體約束品學員名單) or the necessary training and instructions to cope with the situation when the Resident was being provoked and emotionally unstable[[1]](#footnote-1): (See §17 of P’s WS). Like many well-established institutes, I think the defendant had everything appeared on paper but without a proper system to implement them.
9. In relation to an earlier injury which happened in November 2014, the plaintiff said that she had returned to work after the sick leave period with no adverse effects. There was some dispute on exactly when that earlier accident happened and how it happened. However, in my view, they are not all that important. The more prevalent fact is that she had apparently recovered from that earlier incident and was able to return to work fully without any problem before the Accident took place.
10. Regarding the Accident itself, in my view, the way the plaintiff described how the Accident happened in her evidence is inherently probable. I find the minor discrepancies in her evidence are only natural and reasonable. They are at best peripheral and at worst irrelevant. I accept her evidence when she said that she was instructed by Ah Dan to take off one of the slippers of the Resident in order to lure him to go to the Sick Room with her. For an autistic person like the Resident, it is not uncommon to find that they are very possessive of their belongings as the plaintiff has testified. Hence, it is entirely possible and within common sense for the workers to use such a method to make the residents to follow their orders.
11. What I find to be rather disconcerting in this case is that in none of the official records or reports complied by the defendant after the Accident, it really tries to address the real cause of the Accident, namely, whether by asking or allowing the plaintiff to use an unsafe method to lure the Resident to the Sick Room (ie by taking off one of his slippers), it would expose the plaintiff to an unnecessary risk of injury. Instead, all the reports to “skirt around” the issue and put the blame of the Accident on the plaintiff.
12. For example, in the report labelled as 「保良局社會服務部報告」(“the Report”), the defendant recorded under the column “Superior’s Supplement” (「上級補充：」) the following:-

「從CCTV及社工蘇佩儀處了解事件，上述日期約下午6:40，受傷職員正帶上述學員到5/F男宿休息，期間學員有與職員互相拉扯，持續約有6分鐘引致職員受傷。事件發生顯示受傷職員未有了解及掌握學員特性及處理方法，中心會就事件向各職員一同檢討及重申處理學員行為方法。」

1. In the same record, next to the Chief Executive’s Approval & the Chairman’s Approval (「行收總監批示&主席批示」) (“the Approval”), the following has been recorded:-

「同意副主任意見，灰成玉在15/12/14所報稱被學員拉扯左手，確有發生。在事發前於16/11，17/11，20/11及24/11，灰自己已因左肩受傷求診，分別給病假2天，4天，4天及4天，其後已返回崗位工作。資料呈上級考慮。同意是次為工傷事件。」

1. In the light of the above reports, it cannot be disputed that an incident involving some physical scuffling which lasted for about 6 minutes between the plaintiff and the Resident did take place. However, what the defendant has very conveniently left out in the reports was what had happened prior to that scuffle between the plaintiff and the defendant while they were still on the 6th floor. In particular, whether the plaintiff was holding The Resident’s slipper on her left hand on her way to the Sick Room. Further, the defendant has not provided any plausible explanation as to why all the above could not be seen from the CCTV records and, if seen, why they were not put in the reports above. Most importantly, why the CCTV footages were not kept and produced as evidence in this case.
2. All in all, I find the plaintiff’s evidence remains unshaken despite the very meticulous and thorough cross-examination conducted by Mr Lam. I find her evidence remains intact, coherent and credible despite of the very detailed cross-examination.
3. Overall, I find the plaintiff as a credible, honest and reliable witness. I prefer her version of events than those given by the defendant’s 2 witnesses. I find as a fact that she was instructed by the instructor (導師) Ah Dan to take off one of the slippers of the Resident and to bring him to the Sick Room on 5th floor of the Centre by herself. As a result, it caused the Resident to become emotional and violent. Yet, the plaintiff was instructed to accompany the Resident to the Sick Room on a different floor by herself by using the internal lift. It was while the plaintiff was on the 5th floor with the Resident by herself that the Resident suddenly used both of his hands to pull the plaintiff’s left hand violently, causing her to sustain left shoulder injuries as a result.

*Defendant’s evidence*

1. As said, the defendant has called 2 witnesses to give evidence on its behalf at the trial. They are Madam Chung who was the “Assistant-in-charge” of the Centre at the time of the Accident and Ah Dan, who was the instructor working with the plaintiff and her fellow care workers on that day.

*DW1 – Madam Chung’s evidence*

1. Madam Chung confirmed and adopted the contents of her 2 witness statements in examination-in-chief. In evidence, she also supplemented her evidence about the Report by stating that the 4 lines of comments in Chinese under item (9) of “Superior’s Supplement” were written by her.
2. I do not accept Madam Chung’s evidence when she said that the relationship between instructors and care workers was more like that of a “co-operation” between them rather than subordination where the instructors had the duty to oversee and assign tasks to the care workers. I further reject her groundless suggestion that care workers could assign work to instructors sometimes. This in my view is in direct contradiction to the “Job Description” for the post of “Instructor”. Under item 1.c) of C) and the heading of “Major Responsibility” of that document, it states that “(T)o oversee and assign Care Workers/Workmen (Residents Care) to provide personal care service to service users”. Despite of this clearly worded contemporaneous document, Madam Chung still maintained in her evidence that there was no subordination relationship between Ah Dan and the plaintiff.
3. I find it rather astonishing that Madam Chung as the second most senior person in charge of the Centre at the time of the Accident would say something which was completely contradictory to an official document provided by the defendant. I do not find her to be completely truthful at all on this part of the evidence. Disregard of what the “Centre’s Organization Chart” may say, I find the reality at the workplace is that the instructor actually has the power (and in fact did exercise such power) to assign work to the care workers as related to the Court by the plaintiff. I find this was the actual working relationship between Ah Dan and the plaintiff at the Centre in this case.
4. In evidence-in-chief, Madam Chung stated that the Chinese words in item 5) of “Injury occurrence” (「受傷經過」) of the Report was written down by the plaintiff herself. However, she could not remember whether she had actually witnessed the plaintiff did that. I find that she must have mistaken on this due to the following. According to the “Application Form for Employment” (「職位申請表」), which was filled out by the plaintiff on 4 March 2014, it is clear that the plaintiff wrote in simplified Chinese rather than in traditional Chinese (as she grew up and received her education in the Mainland). For example, the characters “樓” and “學” were written in simplified Chinese characters as “楼”and “学” in the application form. However, the same words were written in traditional Chinese characters in the Report. Hence, I find that column under “Injury Occurrence” (「受傷經過」) could not have been put down by the plaintiff herself.
5. When Madam Chung was asked why the CCTV footage was not retained after she had viewed it, it is rather astounding to hear her say that, since there was no fracture or bleeding involved in the plaintiff’s injury, she did not regard the Accident as “serious”. I have no hesitation to reject this as the real reason. One must bear in mind that on the defendant’s own admission, the plaintiff had been “pulled” by the Resident for around 6 minutes during the struggle on the 5th floor alone. Of course this has not included what happened while the plaintiff and the Resident were still on the 6th floor when, according to the plaintiff, at least 3-4 workers (including Ah Dan) were involved to take off the slippers from the Resident. What we know is that the “struggle” on 5th floor has resulted in the plaintiff having to take 12 days as sick leave immediately after the Accident. In my view, this cannot be said to be not “serious” on any account. Hence, I find her reason for not keeping the CCTV record simply unconvincing and incredible. I find the real reason is that the CCTV records would show exactly what the plaintiff has told the Court of what had happened during the Accident. The defendant must have realized that the CCTV footage would throw them in a bad light, hence they would rather sum up the events in a “water downed” version in the reports than to keep the footage.
6. On the whole, I regret to say that I do not find Madam Chung’s evidence convincing or credible at all. While I am not saying that she deliberately tried to lie under oath, it is clear to me that she was trying hard to protect herself, the Centre and the defendant when giving her evidence. I find that she must have watched the entire CCTV footage and realized the seriousness of the Accident. The fact that the pulling or struggling between the plaintiff and the Resident on the 5th floor alone had lasted for 6 minutes indicates that it could not be a minor incident. Yet she and her superior at the time, namely, the “Centre-in-charge”, Mr Cheung Chi Shing, decided not to keep those CCTV footage as a contemporaneous and objective record for the Accident. Instead, Madam Chung considers that writing a report based on what she saw on the CCTV footage was sufficient. I find that not only disingenuous but also against common sense as it has been amply demonstrated by her evidence that the Report is an incomplete record of what had happened during the Accident. By the time she gave evidence 7 years later, she could not even remember if the plaintiff was holding a slipper in her hand when the Accident happened as this important matter had not been mentioned in the Report at all.
7. Further, I find one of the main reasons why Madam Chung and her superior at the time decided not to keep the CCTV footage is that they were afraid that it would show exactly what the plaintiff has told the Court, namely, that she was asked to accompany the Resident to the Sick Room by herself and that she was holding the Resident’s slipper in her right hand while trying to restraint the Resident with her left hand. When asked by the Court why they had decided not to keep the CCTV footage, Madam Chung very conveniently said that it was her then superior’s decision. However, she as the “Assistant-in-Charge” (hence second in command in the Centre) and the person who had viewed the footage must be able to have a say as to whether to keep those footages or not. Yet she has chosen not to do so. The only reasonable inference I can draw from that is those footages must have contained materials that would throw the defendant in a very bad light.

*Lack of training, instructions and supervision*

1. I further find the so-called system, training, instructions and supervision alleged by Madam Chung in her witness statement, only worked in theory, but not in practice. In other words, they appeared only on paper but have never been properly implemented by the defendant at the Centre.
2. According to Madam Chung’s evidence, only the “Instruction Records” ( 「督導記錄」) dated 20 June 2014 and 26 August 2014 mentioned in her 2nd witness statement were actually provided to the plaintiff but not the other 3 important items the defendant is heavily relying on in its defence. They included: (a) 「中心職員會議」; (b) 「學員行為處理指引」; and (c) 「使用身體約束品學員」. All Madam Chung could say is that they should have been provided to the plaintiff by the defendant but that was not done by her. There were however no contemporaneous documents to show that they had in fact been provided to the plaintiff. In Madam Chung’s evidence, she could only rely upon the document named 「新到職/替假員工簽閱中心導向課程文件指引」 which was signed by the plaintiff on 7 April 2014, to show that some guidelines had been shown to the plaintiff when she first joined the defendant as a new member of the staff. However, this document does not show that copies of the guidelines had been provided to the plaintiff or that the plaintiff was specifically briefed of the contents of those guidelines. She was simply asked to sign on the document. In her evidence, the plaintiff admitted that she had viewed the DVD alone in a room once but denied that she had received copies of the documents or a copy of the DVD.
3. Summing up the evidence, I find neither Madam Chung nor the other witness called by the defence, namely, Ah Dan, has managed to show to the Court that the plaintiff did receive any adequate training, instructions or supervision over her work, in particular in taking care of those autistic / hyperactive / mentally retarded / emotionally unstable and sometimes violent residents in the Centre as alleged or pleaded in the defence. In the circumstances, I find the defendant has failed to establish that there was a sufficient and safe work system, training, instructions or supervision over the plaintiff’s work.
4. I further find that there was a lack of a sufficient and safe working system provided by the defendant as stated by Madam Chung in her evidence to the Court in this case. In my judgment, there was simply no properly formulated or well considered system set up by the defendant to deal with the not uncommon problem of the residents becoming emotionally unstable or violent at the Centre. In my view, asking a care worker to take off one of the slippers of a resident in order to lure him to the Sick Room is clearly not a safe system of work. Further, I expect that defendant would ask at least 2 care workers to accompanying an emotionally unstable resident to the Sick Room under such circumstances. I consider it is particularly important for the defendant to establish a safe system of work as it is not uncommon to find their employees got injured during work when handling the residents, as admitted by Madam Chung in her evidence.

1. Thus, taking Madam Chung’s evidence in the round, I find the defendant has failed to show that it had taken any reasonable steps to ensure the safety of the plaintiff and has failed to discharge the various duties owed to the plaintiff as its employee as pleaded in the Re-ASoC.

*DW2 -- Ah Dan’s evidence*

1. I also find the evidence of Ah Dan who is DW2 at the trial equally unconvincing and incredible.
2. In her witness statement, Ah Dan stated that she did not supervise anyone at work at all. However, under cross-examination, she admitted that she needed to oversee the care workers at the Centre and to assign work to them.
3. I note that she has also made a contradictory statement in her witness statement when she said that “as an instructor, I would oversee and assign tasks to care workers *at times*”: (See §3 of the witness statement of Ah Dan) [emphasis added]. This is contrary to what she agreed under cross-examination wen she said those are part of her normal duties. I find it rather odd for her to say she did not need to supervise anyone at work in her own witness statement but in evidence admitted that in fact she needed to oversee and assign work to care workers generally, but not sometimes. In my view, they are simply illogical and cannot be reconciled with each other. I do not accept what she has stated in her witness statement her at all. I find assigning jobs and supervising the care workers are very much within her daily tasks and duties as an instructor.
4. In her witness statement, she said under §8 that “*no one else discussed the Alleged Accident with me u*ntil I was asked about this matter in 2018” [emphasis added]. However, it is conceded by her in Court that there was a prior discussion over the Accident given by the Centre as stipulated under item (9) of (「上級補充」) “Supplement by Supervisor” in the Report, ie「保良局社會服務部報告」(中心會就事件向各職員一同檢討及重申處理學員行為方法。)[[2]](#footnote-2). I find as a fact that there must be a prior discussion between her and her supervisors over the Accident otherwise the Report would not have mentioned the Accident. I therefore would reject her evidence when she said that there was no one who had discussed the matter with her until she was asked about it in 2018 when she made her witness statement.
5. It is Ah Dan’s evidence that she had made 2 reports earlier, ie on 31 January 2018 (“1st Report”) and 7 August 2019 (“2nd Report”) respectively. There were done prior to making her witness statement in the present proceedings which was on 11 September 2019.
6. I note that in her 1st Report, she stated that she has no recollection about whether she had told the plaintiff to remove the shoe / slipper of the Resident as follows:-

「於2014年12月15日，本人為當值導師，當天學員XX因病需到5/F男宿隔離，*本人沒有印象曾經告訴CW灰承玉處理學員XX時可脫去學員的鞋*。」 [emphasis added]

1. In her 2nd Report, she repeated said that she did not have any recollection of telling the plaintiff to remove the shoe / slipper of the Resident and stated as follows:-

「於2014年12月15日，本人為當值導師，天學員XX因病需到5/F男宿隔離，本人沒有印象學員XX當時情緒狀態，亦沒有印象曾安排CW灰承玉帶學員到5/F男宿。

如學員XX當時情緒不穩，一般做法都會先安撫學員情緒，待學員情緒平穩後才會安排學員到5/F男宿，並不會只安排一位CW帶有情緒的學員到5/F。

*本人並無印象曾經告訴CW灰承玉處理學員XX時可脫去學員的鞋*。」[emphasis added]

1. In both her witness statement and in her evidence, Ah Dan adamantly insisted that she would not tell the plaintiff to remove the shoes / slippers of the Resident because it was contrary to her “usual practice and common sense”. §9 of her statement reads as follows:-

“It is wholly inconceivable that I would instruct the Plaintiff to remove the Resident’s shoe or indeed any personal belonging of him in order to induces the Resident to move to a particular location. Such suggestion is against common sense and also my usual practice.”

1. What I find rather odd in her evidence is that if she had not instructed the plaintiff to take off the slippers of the Resident, why she would say she had “no recollection of it” in both of her reports. The fact that it was contrary to “usual practice” does not mean that a person would not do it, particularly as the plaintiff has mentioned in her evidence that such method had always worked in the past with the Resident. Human nature as it is, I do not think the staff of an institute like the defendant would stick to the “rules” if they have found a way which would work better “on the ground”.
2. What makes it even more incredible in this case is that Ah Dan could remember the Accident in greater detail at the time when she made her witness statement on 11 September 2019 than in her reports which were made earlier. It is important to bear in mind that the witness statement was made only 1 month after the 2nd Report which was dated 7 August 2019. For example, she stated the following at §7 of her witness statement:-

“To the best that my memory serves (and having refreshed my memory based on the Plaintiffs Witness Statement), I remember that the Resident was sick and needed to be sent to a medical treatment room located on the 5th floor on that day. The Resident was originally at the 6th floor. The Plaintiff took the Resident to the 5th floor. *Somehow in the course of so doing the Resident became emotionally unstable. I recall that the Plaintiff broke her bangle,* but I have no recollection that she was hurt physically.”[emphasis added]

1. In the 2nd report, Ah Dan said that she had no recollection about the Resident’s state of emotion. However, 1 month later, in her witness statement, she remembered specifically that the Resident became emotionally unstable. Further, she could even remember that the plaintiff had broken her bangle during the Accident. In my view, it is simply unimaginable that she could remember all those details while could not remember the obvious fact of whether the plaintiff was holding one of the slippers of the Resident in her hand. This is highly improbable to me.
2. Ah Dan said that before making the witness statement, she had discussed with another instructor about the incident for the purpose of refreshing her memory. Of course, this part of evidence has never been mentioned in her witness statement. In any event, I am not surprised that she did as it is only natural for someone in her position to do so. But it is the inconsistencies that existed between her reports and the witness statement, something which she could not able to provide any plausible explanations during the trial, that makes her evidence unbelievable.
3. Thus, in the light of the above inconsistencies and discrepancies, I find Ah Dan is not a credible witness and her evidence will be rejected.

*Adverse inference to be drawn*

1. Rather significantly in this case, in P’ Supp WS, the plaintiff has stated under §20 that she had reported the whole circumstances and cause of the Accident to her immediate supervisor So Pui Yee, a social worker (「上司社工蘇佩儀」) (“Madam So”). Madam Chung, who is now the Centre-in-Charge, admitted in her evidence that Madam So is still working for the defendant at the Centre. However, she was not called to give evidence in Court without any reasonable explanation given.
2. Given what the plaintiff has stated in P’s Supp WS, it is clear that Madam So’s evidence is crucial in this case in order to determine if the Accident actually happened as described by the plaintiff. Yet, for some unexplained reasons, the defendant has chosen not to call her to give evidence in this case.
3. In *Li Sau Keung v Maxcredit Engineering Limited & Another* CACV 16/2003 or [2004] 1 HKC 434 at p11, Hon Le Pichon JA said the following:-

“28.But the plaintiff’s evidence was unequivocal: he maintained that he had told So about the fall. Not only was it not put to the plaintiff that he never told So about it, So, who was an employee of the 2nd defendant, was not called to give evidence. Mr Chan SC rightly submitted that this was a matter that may properly be taken into account. In Cavendish Funding Ltd v Henry Spencer & Sons Ltd [1998] 6 EG 146 at 148-149, Aldous LJ cited the following passage from the judgment of Newton and Norris JJ in O’Donnell v Reichard [1975] VR 916 at 929:

“It is sufficient to say that in our opinion for the purposes of the present case the law may be stated to be that where a person without explanation fails to call as a witness a person who he might reasonably be expected to call, if that person’s evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person’s evidence would not have helped that party’s case; if the jury draw that inference then they may properly take it into account against the party in question for two purposes, namely:

(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; …”

1. It is further to be noted that So was not a “safety officer” as the judge had thought; rather, he was an employee of the 2nd defendant. Whilst a safety officer would have been trained in the task of recording industrial accidents, the same cannot be said of an employee of the main contractor. Had So given evidence, this aspect could have been further explored. *As he did not, the plaintiff was deprived of the opportunity. In the circumstances, an adverse inference should have been drawn against the defendants.*
2. Further, there was nothing inherently improbable about the plaintiff’s explanation concerning the omission of a fall from the report. He explained that he could not read or understand some of the characters in the report due to his limited education (which was only up to primary level in the PRC during the cultural revolution). He had not noticed that there had been no mention of the fall in the report when he came to sign the declaration.” [emphasis added]
3. In this respect, I consider I am entitled to draw adverse inference against the defendant for the failure to adduce positive evidence/to call witnesses such as Madam So in support of its case. I so draw such inference against the defendant.

1. As mentioned in P’s Supp WS, she had informed Madam So about the Accident and the whole circumstances surrounding it. I agree with Mr Lau that it was open and easy for the defendant to call Madam So to give evidence as she is still working for the defendant. I find the only reason why it has failed to call her is because they know Madam So would likely going to corroborate the plaintiff’s account.
2. Similarly, as mentioned, I consider the same adverse inference can be drawn against the defendant for failing to call the maker of the Statement from the loss adjustor.

*Defendant’s Liability*

1. In the aforestated premises, I find the defendant has failed to provide sufficient safety instructions, training and supervision for the plaintiff to carry out her job at the Centre. I further find that it has failed to provide a safe system of work, a safe place of work and adequate co-workers to restrain the Resident.

*Contributory Negligence*

1. Mr Lam for the defendant in his closing submissions submits that the plaintiff should be held “at least 50% contributory negligence in the circumstances” based on matters raised under §§22-27 of his opening submissions.
2. I have no hesitation to reject such bold but totally unfounded submission.
3. Mr Lam submits that, as the Resident had already been provoked and became emotionally unstable, the plaintiff should not have insisted to drag him to the Sick Room by herself. He compared this as “almost a case of *violenti non fit injuria*, as in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656”. While he says that the defendant, being an NGO, does not wish to take the matter as far as *volenti*, its position is that the plaintiff should be held accountable for her own fault for “basically, failure to exercise some common sense and/or to follow the system”. Otherwise, Mr Lam submits that it is very difficult for such an NGO as the defendant to operate. In his opening submissions, Mr Lam was as bold as asking this Court to find the plaintiff “at least 80% contributory negligent, if the alleged Accident did take place as alleged.”
4. First, as I have found above, the defendant so-called “system of work” only existed on paper but not in practice. When it comes to implementation, it did not exist at all. I find as a fact that it has allowed and positively encouraged and instructed care workers like the plaintiff to adopt an obviously unsafe system of work by using one of the Resident’s slippers as a lure to take him to the Sick Room. I do not accept Mr Lam’s submission that the plaintiff could use her “common sense” to wait for the Resident to calm down first and then to adopt “a proper and suitable posture when dragging the Resident along e.g. calling for assistance from colleagues or superior, and/or use both hands to take the Resident”.
5. The evidence revealed at the trial clearly shows that the plaintiff did exercise “common sense” in that she had raised with her supervisor / instructor the wisdom of using the slipper as a lure to take the Resident to the Sick Room. She also asked for help from Ah Dan to get someone more experienced to take the Resident to the Sick Room. But her request was flatly refused. She was told that she could not choose how to perform her job.
6. Further, I would reject the preposterous claim that this was akin to a *violenti* situation. In my judgment, the plaintiff was given no choice but to adopt an unsafe system adopted by her employer. She either risked losing her job (as she had feared) or risked her personal safety to carry out a task which the defendant knew or ought to have known as unsafe. I do not see how she could have said to have accepted the risk voluntarily in the Accident. I find there is absolutely no basis for the defendant to suggest this.
7. Hence, I do not find there was any contributory negligence on her part at all.

*Conclusion on defendant’s liability*

1. In conclusion, based on the discussions above, I find the defendant 100% liable for the Accident.

*QUANTUM*

*The plaintiff’s injuries, treatment and prognosis*

1. The plaintiff was born on 13 February 1969. She is currently 53 years old. At the date of trial, she was 52.
2. As a result of the Accident, the plaintiff sustained left shoulder injury, with sprained rotator cuff. MRI examination of left shoulder was performed on 18 July 2016 at QMH showed partial tear of subscapularis tendon.
3. She attended the clinic of Dr Julian Chan, an orthopaedic specialist in private practice, the day after the Accident for her injuries. Physical examination by Dr Chan showed “marked diffuse tenderness with muscle spasm all over her left lower cervical region; shoulder and scapular regions with much decrease in range of movements due to pain. The diagnosis made by Dr Chan on that day was left shoulder and arm injury. A course of treatment with stronger drugs and intensive physiotherapy was arranged for her. She was last seen by Dr Chan on 29December 2014 where it was reported that there was some but not much improvement subjectively with “residual left shoulder pain; weakness and stiffness with limited range of shoulder motions.” The plaintiff then requested to be referred to the public hospitals for further management due to geographical and economic reasons.
4. The plaintiff first attended the Department of Family Medical Clinic at the Caritas Medical Centre (“CMC”) on 29 December 2014. She complained of left shoulder pain since the Accident. There was also left clavicular pain on movement. She was given Panadol for “as need” usage and was referred for physiotherapy. X-ray of the left shoulder and clavicle was also arranged on that occasion which showed that the bony alignment was normal and there was no focal bony lesion. She was also referred to the occupational therapist for work assessment and training on 9 January 2015. She was last seen on 27 February 2015 at the family clinic and her shoulder pain was in improving trend, though the pain was worsened on carrying heavy objects.
5. The plaintiff was also referred to and attended occupational therapy treatment. The 1st course took place on 29 January 2015 to 26 February 2015 for 7 sessions at the Department of Occupational Therapy of CMC. The 2nd course took place from 16 March 2015 to 20 April 2015 for 5 sessions of work hardening programme and 3 work capability assessments at the Occupational Therapy Department of Tang Shiu Kin Hospital (“TSKH”). The 3rd course took place from 11 June 2015 to 13 October 2015 for 14 sessions.
6. She was also referred to receive physiotherapy treatment. The treatment period lasted from 31 August 2015 to 17 December 2015 at the physiotherapy department of TSKH for a total of 20 sessions.
7. The plaintiff was examined by the Employees’ Compensation (Ordinary Assessment) Board on 18 June 2015 and 2 September 2016. She was assessed to have 1.5% loss of earning capacity permanently caused by the Accident. The injury was recorded as “left shoulder and arm injury resulting in residual pain and decreased range of motion of left shoulder”. The sick leave granted by the Board as a result of the Accident covered the periods from (i) 16 December 2014 to 25 April 2015; (ii) 5 June 2015 to 24 December 2015; and (iii) 28 December 2015 to 25 August 2016. The Form 7 was then issued on 15 September 2016.
8. MRI arthrogram of the left shoulder was performed on 18 July 2016 at QMH which showed “an articular sided partial tearing seen at distal subscapularis tendon”.

*The plaintiff’s pre-existing condition*

1. In Dr Julian Chan’s report, he recorded that the plaintiff had previously attended his clinic on 17 November 2014 complaining of “persistent left shoulder and clavicular region pain since after she lifted a heavy object at home dated 15 November 2014.” It was recorded that she went to consult the doctor at St Paul Hospital with X-ray taken. She was told that the result was normal and she was treated conservatively. Dr Chan stated that the plaintiff’s condition slowly improved after few sessions of treatments with physiotherapy. Better range of movements were detected over neck and left shoulder.
2. Madam Chung stated in her 1st witness statement that the plaintiff took a total of 12 days of sick leave from 17 to 28 November 2014 due to her shoulder injury.
3. In respect of the injury in November, in re-examination, the plaintiff said that after the sick leave, she had returned to work normally until the occurrence of the Accident on 15 December 2014.
4. In §14 of P’s Supp WS, the plaintiff said that the injury in November was a minor one and she was able to return to work very soon after:-

「而就鍾女士在中的第2份證人陳述書第9段所提到本人在2014年11月17日至2014年11月28日曾經因左肩受傷放取12日的病假。*由於該次的左肩受傷，只是一個輕微的扭傷，很快已可復工。*而由於是次意外的傷勢嚴重很多，因此，本人已忘記了在是次意外前曾經左肩有受傷。直至被告人於2019年9月30日向本人的律師提供有關的病假紙，本人看到後才記得曾經是在該段期間左肩因工作時受傷。*但在該次的受傷，由於很輕微，本人只是放取了病假，並沒有追討工傷賠償。*」[emphasis added]

1. The above has been reflected in the payroll of the plaintiff for the month of November 2014. HK$3,971.00 was deducted from her basic salary (基本薪金) and HK$403.30 from her special allowance (特別津貼), which is consistent with the number of days she took for the November 2014 injury. The plaintiff did not claim any EC compensation for the injury she had sustained in November 2014.

1. According to Dr Julian Chan’s record, which is reproduced in §6 of the Supplemental Expert Report of Dr Lau & Dr Chun, it contains the following relevant entries:-

|  |  |
| --- | --- |
| 20 November 2014 | 🡫 pain 🡩 ROM, dizziness° |
| 21 November 2014 | Nil entry |
| 24 November 2014 | Further 🡫 pain/swelling +  🡭 ROM, mild deltoid pain + |
| 27 November 2014 | Further 🡫 pain  Poor sleep + |

1. In the light of the above records, I consider that whatever injuries sustained by the plaintiff in November 2014, they could only be described as minor. There was no fracture or bony abnormality resulting from the injury. Further, there was a downward trend of pain recorded by Dr Chan in his medical notes, viz 20 November 2014 🡫 pain; 24 November 2014 further 🡫 pain; 27 November 2014 further 🡫 pain.

1. It should be noted that the plaintiff returned to work on 28 November 2014 and no more sick leave was given after that date until the occurrence of the Accident on 15 December 2014. In other words, the Plaintiff could return to work in full capacity for more than 2 weeks. There is no evidence to suggest that she had requested or was assigned any lighter dutybefore she met with the Accident. It can therefore be reasonably inferred that the plaintiff was able to work without being affected by the injury in November 2014 at all. Hence, I find the injury sustained by her in November, whether she sustained it at home or at work, could not amount to a “pre-existing condition” which would adversely affect the plaintiff’s work capacity even without the Accident or it is something needs to be considered for the reduction of any damages/compensation in this case.
2. I shall deal with this matter further when discussing the orthopaedic expert evidence below.

*The orthopaedic experts’ opinion*

1. For the present proceedings, the plaintiff was jointly examined by two orthopaedic experts, namely, Dr Lau Chi Yuen (“Dr Lau”) appointed by the plaintiff and Dr Chun Siu Yeung (“Dr Chun”) appointed by the defendant on 4 September 2018.
2. Both experts have prepared a joint medical report dated 29October 2018 (“the Joint Report”) and a supplemental joint medical report dated 5 August 2020 (the Supplemental Joint Report”).
3. In the Joint Report, both Dr Lau and Dr Chun agreed with the diagnosis of “left shoulder injury, with sprained rotator cuff”: (See §45.1).
4. However, the orthopaedic experts have disagreements over the cause of the related injury of partial tear of subscapularis; the length of the sick leave period; the length of the treatment received; the extent of the impairment and loss of earning capacity; and whether the plaintiff could resume her pre-accident work.
5. Dr Lau agreed with the MRI report’s finding that there was articular sided partial tearing of distal subscapularis tendon. He opined that the left shoulder injury was likely related to the alleged injury on 15 December 2014. He opined that forceful hyperextension injury of shoulder was one of the typical mechanisms of subscapularis tear. He noted that there was no obvious pre-existing condition which was attributable to her then condition.
6. On the other hand, Dr Chun opined that the mechanism if occurred as described, was consistent with “a sprain of the left shoulder” and that there were possibilities that the MRI finding of articular sided partial tearing of distal subscapularis tendon was a “false positive MRI finding” or “the partial tear occurred after 25 February 2016 which should be more likely”. Dr Chun opined that to cause an acute tear of a normal tendon required a very significant force and would commonly be found in patients with acute anterior dislocation of the shoulder joint. While isolated subscapularis tear occurred with acute abduction-external rotation trauma, or in acute anterior shoulder dislocation, or in elderly patients with recurrent anterior shoulder dislocation; not as with hyperextension as Dr Lau suggested.
7. In respect of his working capacity, Dr Lau opined that the plaintiff would have difficulty in resuming duty as a care worker in hostel for mentally retarded, as the job nature involved of constantly caring of clients who were uncooperative and would struggle from time to time. She might consider seeking jobs that were less physically demanding, like cashier, restaurant waitress, or resume her previous job, as a nail cosmetic beautician.
8. However, Dr Chun opined that she was able to return to work as a care worker especially with no other pathology noted on the MRI examination to involve other rotator cuff tendons.
9. Considering the shoulder injury with rotator cuff tear, Dr Lau endorsed her sick leave (continuous sick leave from 16 December 2014 to 25 August 2016 and from 11 to 17 October 2016) and she did not require further sick leave thereafter. Whereas Dr Chun opined that the reasonable sick leave should be up to 25 April 2015 (ie 4 months and 10 days) only and any subsequent sick leave given by the doctors at the public hospital according to him was not justified.
10. In the Supplemental Joint Report, Dr Lau considered that as the previous injury sustained by the plaintiff on 15 November 2014 was relatively minor, thus, her condition should fall into category I, ie that she is almost certain to have gone through life unaffected by the condition.
11. Dr Chun on the other hand at §20 of the Supplemental Joint Report stated the following:-

“For the pre-existing OA change at the AC joint, combined with the type II acromion, which are factors for causing rotator cuff lesion with impingement syndrome... she falls into Category Il to III, there is a *strong possibility if not almost certain that she would / will have the impingement syndrome with the rotator cuff tear either as a natural progression of the degeneration or in association with some event in life such as her domestic injury on 15/11/2015*, in the absence of the alleged injury, at any time, as the usual presentation of symptoms of the rotator cuff impingement is in the 4-50 of age in patients in the general population.” [emphasis added]

1. Hence, Dr Chun disagreed with Dr Lau and opined that her condition should fall into the category II to III and apportionment of 40% should be made to the pre-existing condition.

*Findings on the experts’ opinion*

1. With greatest respect to Dr Chun, even with his vast experience as an orthopaedic surgeon and years in acting as an expert in PI cases, I do not find his opinions expressed in this case objective and convincing at all.
2. In my judgment, what makes Dr Chun’s opinions not credible in this case is the inconsistent opinions he had expressed on 2 separate occasions. First, when he acted as an unsanctioned single expert directly appointed by the insurer in 2015 where he ended up preparing a single report dated 12 December 2015 for them (“the Single Report”). Then 3 years later as a joint expert instructed by the defendant’s solicitors in October 2018 where he co-authored with Dr Lau to prepare the Joint Expert Report. This of course was followed by the Joint Supplemental Expert Report which was written in August 2020.
3. During the trial, it was discovered that the instructions to appoint Dr Chun to prepare the Single Report for the insurer were issued to him in September 2015. It is important to bear in mind that at that time no legal proceedings had been commenced by the plaintiff yet. Thus, Dr Chun was appointed to prepare the report for the insurer without any leave of the Court. While there is nothing wrong in principle in why Dr Chun could not appointed directly by the insurer so long as his evidence is not biased and the contents of the evidence should not in any way be influenced by the outcome of the litigation, one must be cautious when an expert is directly appointed by the ultimate client who has a direct interest in the outcome of the case: See *Tang Ping Choi v Secretary for Transport* [2004] 2 HKLRD 284, Court of Appeal (Rogers VP, Le Pichon & Yuen JJA) at §§13-15.
4. In the Single Report, Dr Chun assessed 1% of the whole person impairment (“WPI”) for the possible residual pain and mild stiffness and 1% for the loss of earning capacity (“LOEC”): See §59 of the Single Report. However, in the Joint Expert Report, Dr Chun assessed 0.5% for the WPI for the left shoulder with possible mild residual and 0.5% for the LOEC: See §§51.2 & 52.2 of the Joint Expert Report.
5. Further, in the Single Report, Dr Chun opined that a reasonable sick leave should be “less than 6 weeks (ie up to end of January 2015)”: See §60 of the Single Report). However, Dr Chun changed his view in the Joint Expert Report and opined that reasonable sick leave should be up to 25 April 2015: See §55.2 of the Joint Expert Report. Dr Chun provides no plausible explanation as to why he has extended the sick leave period while at the same time reduced the percentage of the LOEC and WPI.
6. Last but not least, it is important to note that Dr Chun found that the X-ray taken at the single examination on 26 October 2015 shows “no abnormality except “*type III* acromion, a hooked one, this is congenita” whereas based on the X-ray examination taken at the joint examination on 4 September 2018 he opined that there was “no significant finding except osteoarthritic change at AC joint & *type II* acromion”*.* [emphasis added]. Thus, Dr Chun found no osteoarthritic change in the AC joint in 2015 while he found such changes 3 years later. It is common knowledge that osteoarthritic changes of the AC joint take place over a long period of time and they do not occur within a short period of time like 2-3 years. Thus, if the AC joint arthritis is pre-existing, which then as Dr Chun opines “should be the pre-existing factors to the contribution of the subscapularis partial tear or tendinosis/tendinitis which is difficult to distinguish on the MRI study”, it begs the question of why Dr Chun was not able to detect that condition in the X-ray taken by him in 2015 when he prepared the Single Report: (See §46.8 (iv) & (v)).
7. In other words, in the X-ray examination carried out by Dr Chun on 26 October 2015, no osteoarthritic change in the AC joint was detected. But in the X-ray taken at the joint examination on 4 September 2018, there was osteoarthritic change in the AC joint “of long standing and not occurred within 2-3 years” according to him. It is therefore difficult to understand how Dr Chun could say that the AC joint arthritis should be of long standing and not developed within 2-3 years when he had detected none of that in the X-ray examination taken by him on the same shoulder of the plaintiff only 3 years ago.
8. Dr Chun also has not explained in the Joint Export Report why he considered that the plaintiff had a type II acromion while in the Single Report while he thought it was a type III acromion, ie the “hooked type.”

*The MRI Findings*

1. On the MRI arthrogram of the left shoulder performed at the QMH on 18 July 2016, according to the radiologists at QMH Dr Wong Suet Wah and Dr Ng Hoi Ting’s interpretation:-
2. “An articular sided partial tearing is seen at distal subscapularis tendon. Contrast is seen extending along the muscle fibers of the subscapularis muscle. Other rotator cuff tendons including the long head of biceps tendon are intact;
3. Maximal acromial arch is type 1. Lateral down sloping acromion is seen. Please correlate clinically for impingement. No significant degeneration is seen at gleno-humeral joint. Articular cartilage is preserved.”
4. In this respect, I much prefer Dr Lau’s direct and straight forward interpretation of the MRI arthrogram which is consistent with the interpretation of the MRI arthrogram by the two radiologists at QMH. Dr Lau opines that the MRI report stated that there was articular sided partial teadning of distal subscapularis tendon, which is consistent with the powerful and violent pulling of the plaintiff’s hand by the Resident during the struggle. Further, there was no feature of tendinosis or other degenerative changes in the glenohumeral joint. Dr Lau also accepts that the acromion arch is type I, with lateral down sloping which is consistent with the findings made by the radiologists. Taking the above into account, Dr Lau concludes that there appears no obvious pre-existing condition that is attributable to the plaintiff’s present condition. This seems to me to be a perfectly reasonable and logical conclusion which is based on the objective findings of the MRI report made by the radiologists.
5. Dr Chun casted doubts on the MRI findings made by the radiologists on several grounds. They included (i) the type of acromion they found in their report as type I but Dr Chun opined it was type II; (ii) the non-reporting of the status of the AC joint in the MRI report; (iii) the AC joint arthritis which should be pre-existing factors to the contribution of the subscapularis partial tear or tendinosis/tendinitis which Dr Chun considers is difficult to distinguish on the MRI study.
6. Dr Chun further explained in the Joint Report why in his view the clinical data presented was not consistent with the image findings when compared with the clinicians’ information recorded in the MRI report: (See §46.8 (vi)).
7. Dr Chun concluded by stating that “considering the overall MRI findings and the clinical picture, and that false positive or false negative MRI results can occur, one must formulate the diagnosis & causation basing upon objective clinical ground which should correlates well with the image study findings”: (See last bullet point of §46.8).
8. Based on the above, Dr Chun postulated 3 possibilities with respect to the MRI finding of partial tear of the subscapularis. They included:-
9. There was an actual partial tear sustained at the time of the Accident but considering the factors given by him he thinks that should be “very unlikely”; or
10. That particle tear occurred after 25 February 2016 (the date of taking the MRI) which “should be more likely”; or
11. The MRI partial tear being a false positive findings: (See §46.12 (i) to (iii)).
12. With respect, I do not find Dr Chun’s reasoning to dismiss the findings of the radiologists in the MRI report convincing or credible.
13. First, contrary to Dr Chun’s opinion, I think the violent struggle between the plaintiff and the Resident is entirely consistent with the finding of *“articular sided partial tearing at distal subscapularis tendon”* made by the radiologists in the MRI report. The fact that the plaintiff was holding the slipper in her right hand above her shoulder and holding the Resident’s hand with her left hand (as demonstrated by her in Court) and the violent efforts of the Resident in trying to get it back suggests that significant force had been used. This would explain why there was a partial tear.
14. Second, in my view, it is extremely unlikely that the partial tear occurred after 25 February 2016 as Dr Chun has suggested as no doctors, physiotherapists and occupational therapists in the public hospitals who had treated the plaintiff over a lengthy period has ever suggested that this might be the case.
15. Third, I do not think that the 2 radiologists in a large teaching hospital like QMH would easily make a “false positive finding” as Dr Chun has suggested.
16. Lastly, Dr Chun suggested in the Joint Export Report that *“the left hand Jamar power-grip pattern does not conform to a bell-shape curve indicating submaximal insincere effort thus cannot be genuine ... she had exaggerated her disability and expanded her symptom at this examination”:* (§48.8). However, this statement is inconsistent with the findings of the treating doctors and therapists as in none of the reports or records that there is any suggestion that the plaintiff has exaggerated her symptoms. Having observed the plaintiff carefully when she gave evidence, I do not find her to have exaggerated in any part of her claims, including her injuries, at all.
17. Summing up the above, I prefer the opinions of Dr Lau as they accord to the mechanism of the injury sustained in the Accident as described by the plaintiff; consistent with the medical records and reports of the doctors and therapists in the public hospitals; and in accordance with the X-ray and MRI reports’ findings.

*General and Special Damages*

*(a) Pain, suffering and loss of amenities (PSLA)*

1. It is trite that the starting point for the assessment of damages for pain, suffering and loss of amenities in a comparison of the injuries in the case in question with injuries in similar cases in which awards have already been made by the court. Consideration will next be given to any special features which might influence the award in a particular case and only then, when a tentative conclusion has been reached, will attention be paid to the established guidelines set out in *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657 and *Lau Che Ping v Hoi Kong Ironwares Godown and Co.* [1988] 2 HKLR 650.
2. The “established guidelines” are the 4 categories of injuries stated in *Lee Ting Lam*: ie serious injury, substantial injury, gross disability, and disaster. “Serious injury”, which is the lowest category, is defined as an injury which “leaves a disability which mars the general activities and enjoyment of life, but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device, or bad fractures leaving recurrent pain.”: See *Lee Ting Lam* at pp 659-660.
3. In *Chan Pui Ki v Leung On & Another* [1996] 2 HKC 565, the Court of Appeal held that for the category of serious injury, the award should be from HK$400,000.00 to HK$540,000.00.
4. The “Serious Injury” category has recently been revised upwards to the range of HK$530,000.00 to HK$716,000.00. In *Ko Chu Keung v Temmuk Engineering Co., Limited & Another* HCPI 1319/2016 (Deputy High Court Judge Kenneth Wong; 12 December 2018), where the learned deputy judge stated the following:-

“36.  I have taken into account the cases referred to this Court by both parties.  The more pertinent ones in my view include the following:

1. In *David John Slater v Commissioner of Police* [2018] 4 HKC 1 in which Bharwaney J updated PSLA in personal injury cases falling within the Serious Injury Category to start at $530,000. His Lordship also referred with approval to the Personal Injury Table 2016 adjusting for inflation of PSLA for Hong Kong over the past years.  Based on the Table, the *David Slater (supra)* figure represents a +3.1% over the 2016 figure.  Accordingly, as at 2017, the range of awards for PSLA for Hong Kong should be revised upwards to: Serious Injury: $530,000 – $716,000.”
2. Mr Lau, the plaintiff’s counsel, has cited the following cases where he says similar injuries had been sustained by the victims and where PSLA awards ranging from HK$200,000 to HK$400,000 have been made:
3. *Chung Chi Wing v Secretary for Justice* HCPI 436/1997 (Suffiad J; 28 July 1998);
4. *Tsang Wai Hung v Trustful Engineering & Construction Company Limited & Others*HCPI 30/2015 (Deputy High Court Judge Patrick Fung SC; 23 January 2017);
5. *Lee Lap Pang v Yuen Tat Wah (t/a Chong Hing Motor Co)* HCPI 1111/1997 (Deputy Judge To; 21 May 1999); and
6. *Wong Ching Ha v Manbright Co. Ltd trading as Nagn Lung Restaurant* DCPI 886/2007 (HH Judge HC Wong; 31 March 2008).
7. Mr Lau submits that the injuries of the plaintiff fall short of the “serious injury” category but are similar to those suffered by the plaintiff in *Lee Lap Pang* and *Wong Ching Ha,**ibid*. He therefore submits that an appropriate award should be at HK$200,000.
8. Mr Lam for the defendant on the other hand relies on the case of *Yiu Yuen Yee v Johnson Cleaning Services Co Ltd* [2019] HKDC 1110 (HH Judge Harold Leung; 16 August 2019) where a sum of HK$150,000 was awarded for the plaintiff who suffered residual symptoms of intermittent pain, weakness and stiffness of mild nature in his left shoulder after surgery was done.
9. Mr Lam submits that as there was little complaint about stiffness in this case and there was no surgery undergone by the plaintiff, an appropriate PSLA should be at HK$80,000.
10. In my view, the plaintiff injures definitely fall below the serious injury category. Given the injuries sustained by her in the Accident and her residual symptoms of intermittent pain and weakness suffered by her, I consider that an appropriate award or PSLA in the case should be at a sum of HK$200,000.

*(b) Pre-trial Loss of Earnings*

1. According to the RSOD, the plaintiff was working as a “personal care worker” at the time of the Accident earning an average monthly income of HK$12,445. The plaintiff was granted intermittent sick leave from 16 December 2014 to 17 October 2016, a total of 583 days.

1. The defendant in the Answer to the RSOD claimed that the plaintiff earned an average monthly salary of HK$10,472.93. It is also denied by the defendant that the plaintiff should be entitled to a total of 583 days of sick leave as pleaded and that she was unable to return to her pre-accident employment.
2. In my view, the defendant’s calculations for the average monthly earnings as stated in the Answer to the RSOD are incorrect for various reasons. Mr Lam in his closing submission has fairly accepted it was the case and the monthly salary at the time of the Accident should be at HK$12,445. Mr Lam further accepts that the median monthly earning of a care worker in a comparable job is currently at HK$20,952.50. Therefore, her average pre-trial monthly income as a care worker is no longer in dispute.
3. The plaintiff was granted intermittent sick leave from 16 December 2014 to 17 October 2016, ie a total of 583 days. I accept Dr Lau’s opinion that the sick leave granted by the doctors at the public hospitals are reasonable in view of the plaintiff’s injuries. I also accept that during the sick leave period the plaintiff was not able to work. I further accept that due to the pain and repercussion of her injuries, the plaintiff was not able to return to her pre-accident employment.
4. After the expiration of sick leave, the plaintiff tried to work as a nail worker / beautician in about mid-2016. However, she found herself not able to perform her duties due to her residual disabilities. She quit after a few weeks and then became unemployed.
5. I accept Dr Lau’s opinion that in view of the residual shoulder pain, stiffness and weakness, the plaintiff will have difficulty in returning to her previous job as a care worker as the job would involve caring of uncooperative residents and would involve with physical struggle from time to time. He recommended the plaintiff to seek less demanding jobs like that of a cashier, waitress or nail cosmetic beautician.
6. In the RSOD, the plaintiff pleaded that she should be able to work in alternative employment like that of as a security guard earning around HK$10,000.00 per month. Mr Lau submits that the monthly salary of a security guard should be increased to a sum of around HK$13,000.00 today. The median of the monthly salary for a security guard therefore should be currently at HK$11,500.00 (HK$10,000.00 + HK$13,000.00 / 2). I consider that as reasonable.
7. Hence, I will allow the pre-trial multiplicand at a monthly sum of around HK$9,452.00 as pleaded (HK$20,952.50 – HK$11,500.00). The remaining pre-trial period after the expiry of the reasonable sick leave, ie 18 October 2016, up to the date of trial on 20 December 2021, will be around 62 months.
8. Therefore, by allowing the full sick leave period of 583 days and the remaining period of 62 months until the date of trial, I would allow the plaintiff’s pre-trial loss of earnings as follows:-

During the Sick Leave Period (16 December 2014 to 17 October 2016)

(HK$12,445.00/30 x 583 days) = HK$241,847.80

For the Remaining Pre-trial Period (18 October 2016 to 20 December 2021) ie 62 months

(HK$9,452.50 x 62 months) = HK$586,055.00

Total Loss for the Pre-trial Period (16 December 2014 to 20 December 2021)

HK$241,847.80 + HK$586,055.00 = HK$827,902.80

*(c) Loss of Future Earnings*

1. I accept Dr Lau’s opinion that the plaintiff will not be able to return her previous job as a care worker. I think that is entirely reasonable given the demanding nature of the job as a care worker and the injuries sustained by her in the Accident.
2. As for the multiplier, in the present case, the normal retirement age as a care worker will be at 65. The relevant table to be used should be “Table 10”in *Personal Injury Tables Hong Kong 2019*. Having reference to what Bharwaney J said in *Chan Pak Ting v Chan Chi Kuen* *and others* [2013] 2 HKLRD 1, the discount rate for “plaintiffs with needs of more than 10 years”, will be at 2.5%. Having considered the discount rate applicable in the present case and the plaintiff’s age at the notional date of trial, ie 52, by cross-reference to the “Table 10”, the multiplier should beat 10.98.
3. Assuming that the current monthly salary of that of a care worker is at HK$20,952.50 and the earning of her alternative job like that of a cashier or care taker at HK$13,000, the loss of future earnings I would allow in this case will be at:-

(HK$20,952.50 – HK$13,000.00) x 10.98 x 12

= HK$1,047,821.40

*(d) Loss of MPF*

1. The plaintiff is entitled to MPF of 5% of the pre-trial and post-trial loss of earnings; therefore:-

(HK$827,902.80 x 5%) + (HK$1,047,821.40 x 5%)

= HK$93,786.21

*(e) Loss of Earning Capacity*

1. This head of damages generally arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that she might lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another or an equally well paid job.
2. In view of the plaintiff’s injuries, her residual disability and the current job nature, I do not consider that she will run a risk of losing her employment in the alternative jobs suggested by Dr Lau and therefore I do not think she is entitled to a separate award for loss of earning capacity.

*(f) Other Special Damages*

1. In the RSOD, the plaintiff claims the following special damages:-

(1) medical expenses HK$12,300.00

(2) travelling expenses HK$3,000.00

(3) tonic food HK$15,000.00

(4) bonesetter & acupuncturist fees HK$4,000.00

Total: HK$34,300.00

1. The medical expenses according to the schedule provided by the plaintiff in the trial bundle should be at HK$12,255, and not HK$13,870 as pleaded in the RSOD. I agree with the defendant that the plaintiff has not provided any good reason for not keeping the receipts especially when she had been legally advised since at latest in 2015 when her EC application was commenced. Having said that, the schedule of medical expenses is consistent with the follow up appointments and the treatments she received at the public hospitals. I will allow the sum of HK$12,255.00 set out in the schedule.
2. For travelling expenses, I consider HK$3,000 is a reasonable sum. A sum of HK$5,000 will be allowed for tonic food in the absence of any receipts. For bonesetter & acupuncturist fees, I consider a sum of HK$3,000 will be considered as reasonable since the plaintiff already received extensive treatments from the public hospitals.

1. I therefore would allow a total of HK$23,255 as special damages in this case.

*(g) EC Compensation*

1. The plaintiff has already received a sum of HK$220,000.00 as the EC compensation. Therefore, credit must be given to this sum of money when calculating the appropriate quantum of damages.

*CONCLUSION*

1. In conclusion, I will allow the following as damages in this case:-

(a) PSLA HK$200,000.00

(b) Pre-trial Loss of Earnings HK$827,902.80

(c) Loss of Future Earnings HK$1,047,821.40

(d) Loss of MPF HK$93,786.21

(e) Loss of Earning Capacity nil .

(f) Other Special Damages HK$23,255.00

Sub-total HK$2,192,765.41

*(g) Less* EC compensation HK$220,000.00

Total HK$1,972,765.41

*Judgment entered*

1. Judgment therefore will be entered against the defendant in the sum of HK$1,972,765.41 with interest and costs.

*Interest*

1. Interest will be awarded at 2% per annum for general damages for PSLA from the date of writ until judgment, thereafter at judgment rate. Interest on pre-trial loss of earnings and for special damages will be awarded at half of the judgment rate at 4% from the date of the accident to the date of judgment, thereafter at judgment rate.

*Costs*

1. Costs will follow the event. The plaintiff having succeeded in her claim is entitled to her costs. I therefore will make a costs on a *nisi* basis that the defendant to pay the plaintiff’s costs of the action on a party and party basis, such costs to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs will be taxed in accordance with the legal aid regulations. In the absence of any application from the parties, the order *nisi* will become absolute 14 days after handing down of the judgment.

( Andrew SY Li )

District Judge

Mr Steven Lau instructed by Candy Ho & Co. for the plaintiff, assigned by the Director of Legal Aid

Mr Gary Lam instructed by Au & Associates for the defendant

1. (另外, 被告人亦沒有提供任何怎檥處理智障學員情緒失控的培訓和指示及本人。就上述而言，被告人在本人入職時，本人只看了一段短片，內容並不包括如何處理智障學員的情緒及如何預防被學員襲擊。) [↑](#footnote-ref-1)
2. [E/221 or 221-1] [↑](#footnote-ref-2)