## DCPI 2562/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2562 OF 2011

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##### BETWEEN

ZARIR KHALID Plaintiff

### and

GURUNG DURGA BAHADUR 1st Defendant

TRENDY INVESTMENT LIMITED 2nd Defendant

trading as MES AMIS

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Before: Master W.Y. Ho (In Open Court)

Date of Hearing: 3 March 2014

Date of Judgment: 8 April 2014

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JUDGMENT

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*Background*

1. This is the Plaintiff’s claim for damages arising from an incident that happened on 17 September 2009 inside a bar operated by 2nd Defendant. On the day of the incident, the Plaintiff was assaulted by the 1st Defendant and the staff of the 2nd Defendant.
2. An interlocutory judgment was entered against the 1st and 2nd Defendants (collectively referred to as “the Defendants”) on 5 March 2013 whereby the Defendants were ordered to pay the Plaintiff damages to be assessed and costs.
3. The hearing for the assessment of damages was fixed on 3 March 2014. The Defendants were absent at the hearing. Being satisfied that due notice of the hearing of assessment were given to the Defendants, I proceeded with the assessment in the absence of the Defendants.
4. The Plaintiff gave evidence at the hearing. He adopted his witness statement as his evidence-in-chief. No other witnesses were called by the Plaintiff.
5. The Plaintiff now claims the following damages:-
6. Pain, Suffering and Loss of Amenities $300,000.00

(“PSLA”)

1. Pre-trial Expenses and Loss:-
   * + - 1. Medical expenses: $7,680.00
         2. Travelling Expenses: $2,000.00
2. Future Expense and Losses:-
3. Loss of Earning Capacity: $200,000.00
4. Future Medical Expenses: $87,550.00
5. Aggravated Damages: $100,000.00
6. Interest on General and Special damages: $26,177.90

*THE ASSAULT AND THE PLAINTIFF’S INJURY*

1. On 17 September 2009 at about 1:22am, the Plaintiff was assaulted by the 1st Defendant inside a bar operated by the 2nd Defendant known as Mes Amis.
2. The 1st Defendant suddenly assaulted the Plaintiff by hitting the Plaintiff on the head with a glass bottle causing the Plaintiff’s head to bleed. He went to the washroom to check on his injuries.
3. After he came out of the washroom, the Plaintiff told the security guard of the bar that he required medical attention. Whilst waiting for the ambulance, 6 staff of the 2nd Defendant suddenly approached the Plaintiff and assaulted him by hitting him, kicking him in the face and stepping on his back. The assault lasted for 30 minutes. As a result of the assaults, the Plaintiff sustained injuries.

*Medical evidence*

1. Pursuant to Master J Chow’s orders dated 9 May 2013 and 27 November 2013, the Plaintiff’s medical expert evidence is limited to the report of Dr. Jack WK Wong (“Dr. Wong”) dated 10 June 2013 and the report was adduced without calling the doctor.
2. Dr. Wong confirmed the Plaintiff had good health in the past and had no previous surgery or chronic illness. The Plaintiff did not have any pain, problems or injury in his left shoulder prior to the assault.
3. Dr. Wong opined the Plaintiff sustained multiple injuries including lacerations, bruises, haematomata and abrasions over multiple regions (including the head, face, neck, both upper arms, both elbow joints, right axilla, left shoulder, left flank and lower back). He opined the Plaintiff suffered from anterior dislocation of left shoulder joint with labrum and bone damages. He concluded these injuries were compatible with the physical assault described by the Plaintiff.
4. An x-ray of the left shoulder revealed a bone spur over the inferior aspect of humeral head which is compatible with post-traumatic degeneration of the left shoulder joint.
5. Dr. Wong opined that the residual left shoulder pain, stiffness and weakness will be permanent and that the Plaintiff requires intermittent symptomatic treatment for pain. However further specific and continuous treatment, including surgery, is not necessary.
6. In respect of the Plaintiff’s work capacity, Dr. Wong opines the Plaintiff should be able to resume his pre-accident occupation with a slightly reduced capacity in that he may have aching discomfort or tiredness with prolonged desk or computer work.
7. Dr. Wong assessed the permanent disability impairment to be at 7% and the loss of earning capacity to be at 7%.

*Findings on injuries*

1. Having considered the medical report of Dr. Wong, I find the injuries suffered by the Plaintiff were caused by the assault as described by the Plaintiff. I also accept the assault was committed by the 1st Defendant and the staff of the 2nd Defendant as described by the Plaintiff.
2. There is nothing to contradict the Plaintiff’s allegation that the men who assaulted him whilst he was waiting for the ambulance were the 2nd Defendant’s staff. Moreover there is nothing to show that the acts they committed were “unauthorized” acts.
3. Hence having considered the Plaintiff’s evidence, I find the 2nd Defendant is liable for the acts of its 6 staff members whom assaulted the Plaintiff.

*DAMAGES*

*Pain, suffering and loss of amenities*

1. The Plaintiff claims $300,000 in damages for pain suffering and loss of amenities.
2. The Plaintiff was 40 years old at the time of the incident and is now 43 years old.
3. In his witness statement the Plaintiff claims the following:-
4. He still suffers from pain over the back of his shoulder;
5. Weakness in his left shoulder and limited movement in his left shoulder when compared to his right shoulder;
6. He continues to suffer from headaches and needs to take pain killers on a regular basis; and
7. He used to play soccer, basketball, volleyball, judo and tennis. However after the incident, he has been unable to resume such activities and took up cycling instead.
8. Solicitors for the Plaintiff cited the following cases:-
9. *Chung Chi Wing v Secretary for Justice*, unrep, HCPI 436/1997. The plaintiff in that case was a fireman and, as a result of work related injuries, suffered an impinged tendon on his right shoulder. He was assessed to suffer a 16% permanent impairment of the whole person. The parties agreed the plaintiff should be awarded $350,000 for PSLA and this agreement was endorsed by the court.
10. *Wong Ching Ha v Manbright Company Limited trading as Ngan Lung Restaurant*, unrep, DCPI 886/2007. The plaintiff suffered from “bone bruising and oedema in the posterior part of the heard of the right humerus and supraspinatus tendonitis and early subacrominal bursitis.” At the time of the trial, she continued to suffer from right shoulder pain. She was assessed by 2 different doctors. The doctors assessed her to suffer 6% and 13% permanent impairment to the whole person respectively. She was awarded $200,000 for PSLA.
11. *Wong Lai Man v Eastern Terminal Limited*, DCPI 1655/2011. The plaintiff suffered from mild head contusion with mild swelling, right AC joint dislocation, contusion of lateral epicondyle and olecranon process of right elbow with reduced elbow movement and right knee 1 cm laceration. At the time of trial the plaintiff suffered residual pain, weakness and stiffness in the right shoulder and arm. The Employee Compensation (Ordinary Assessment) Board assessed the plaintiff’s loss of earning capacity to be 5% and the doctors assessed the permanent impairment to the whole person to be 2% and 8% respectively. An award of $200,000 was made to the plaintiff for PSLA.
12. The solicitor for the Plaintiff submitted that the injuries suffered by the Plaintiff are more serious that those suffered by the Plaintiffs in *Wong Ching Ha* and *Wong Lai Man*.
13. In the present case, the Plaintiff was assessed to suffer 7% impairment to the whole person. Dr. Wong opined that Plaintiff’s pain, stiffness and weakness in the left shoulder will be permanent. Although the Plaintiff no longer plays ball game sports, he is able to and did in fact take up cycling as his new hobby. The Plaintiff was never granted sick leave and was able to resume his work duties.
14. Having considered the evidence and the cases cited, I consider the appropriate the sum to be awarded under this head of damage is $250,000.

*Loss of earning capacity*

1. The Plaintiff claims $200,000 under this head of damages.
2. At paragraph 13 in the case of *Chan Chi Shing v Tsang Fook Metal Engineering & another*, unrep, CACV 238/1999, the Honourable Keith, JA said:-

“In those circumstances, it is important to remember what an award under this head of loss is actually for. As was said by Lord Fraser of Tullybelton in the Privy Council in ***Chan Wai Tong v. Li Ping Sum*** [1985] HKLR 176 at p.183B-D, it is intended

".... to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk - see Moeliker v. A. Reyrolle & Co. Limited [1977] 1 WLR 132, 140, where Browne L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant's age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant's earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant."

It is also useful to remember what Browne L.J. actually said in Moeliker at p.142 A-C:-

"The consideration of this head of damages should be made in two stages. 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."”

1. The Plaintiff is an Information Technology consultant and is the sole director of Flex-IT Solutions Limited. At the time of the incident, HSBC employed the Plaintiff’s company as its information technology consultant on a project basis. The daily rate charged by the Plaintiff was £650.00 per day (equivalent to HK$7,837.57 adopting the exchange rate at 1GBP = HK$12.0578 as submitted in the Plaintiff’s Opening Submissions) and the Plaintiff was required to work 8.5 hours per day for 5 days a week.
2. The Plaintiff claims he was able to work for 10 – 15 hours per day before the incident. However since the incident, he is no longer able to work for such long hours. The Plaintiff also claims his working capacity is affected such that his efficiency and endurance is adversely affected after the incident.
3. Having considered the Plaintiff’s evidence, I note the Plaintiff’s consultancy contract with HSBC pays the Plaintiff to work for 8.5 hours a day. Although the Plaintiff claims his working hours have reduced since the incident, he does not make clear how many hours he is currently able to work. There is no evidence from the Plaintiff to prove that he could not work the 8.5 hours per day as required by the HSBC contract.
4. According to the Payment Summary attached to the witness statement (page 108 of the Bundle of Documents), the Plaintiff had received wages for each month of work for HSBC. Dr. Wong’s report stated the Plaintiff was not granted any sick leave. Hence there is no evidence to show that he had to stop work because of the incident.
5. Furthermore, Dr. Wong opined the Plaintiff should be able to resume his pre-accident occupation with slightly reduced capacity. It could be seen that about 4 years after the incident, the Plaintiff secured another consultancy contract (see page 111 of the bundle of documents) which pays a higher salary than the consultancy contract he had at the time of the incident. Under the new consultancy contract, the Plaintiff was remunerated at €840 per day (equivalent to HK$8,918.784 adopting the exchange rate at 1EUR = HK$10.6176 as submitted in the Plaintiff’s Opening Submissions) and was required to work a minimum of 8 hours per day. Again, there is no evidence to show that the Plaintiff is unable to work 8 hours a day.
6. Having considered the evidence, I am not satisfied the Plaintiff has proven, on a balance of probabilities, there is a real or substantive risk he will lose his current employment or be unable to resume his pre-incident occupation as an IT Consultant. On the contrary, the evidence shows the Plaintiff was able to secure a more lucrative contract despite the injuries caused by the incident.
7. I therefore disallow the damages sought under this head.

*Pre-trial expenses and loss*

1. The Plaintiff seeks the following damages:-
   1. Pre-trial Expenses and Loss:-
      1. Medical expenses: $7,680
      2. Travelling Expenses: $2,000
2. Having considered the evidence, I allow these sums in full.

*Future medical expenses*

1. The Plaintiff claims $87,550 for future medical expenses. The Plaintiff adopted a multiplier of 17.51 (at discount rate of 4.5%) in his Statement of Damages.
2. Dr. Wong opined that the residual left shoulder pain, stiffness and weakness will be permanent and concluded that the Plaintiff “needs intermittent symptomatic treatment for pain”. Dr. Wong estimated that the average annual cost is about $5000.
3. I am satisfied that the Plaintiff will require treatment for his permanent condition and that the sum claimed is a reasonable amount. I therefore allow the sum of $87,550 in full.

*Aggravated damages*

1. The Plaintiff claims the sum of $100,000 under this head of damage.
2. The Plaintiff claims that the assault happened in a crowded place with many by-standers. The Plaintiff explained that many people witnessed him being beaten by the 1st Defendant and the staff of the 2nd Defendant. He felt that he was labeled and treated as if he was the “bad guy”. He felt the incident ruined his professional image and he felt embarrassed by the incident, especially since some of the by-standers took a photograph of the Plaintiff after he was beaten.
3. The solicitor for the Plaintiff cited the following cases in support of the Plaintiff’s claim:-
4. *Chan Kwok Wai v. Secretary for Justice*, unrep, HCPI 134/1999.
5. *John Raymond Luciw v. Wolfgang Derler & others*, unrep, HCA 2148/2011.
6. *Chung Lai Ha v. Ching Mei Mei*, unrep, DCPI 2755/2012.
7. The principles relating to aggravated damages are succinctly set out in the case of *Chung Lai Ha*. I shall not repeat those principles, save and except that aggravated damages are to compensate for sufferings to feelings, dignity and pride.
8. Having considered the evidence, I find that it is appropriate to make an award of aggravated damages. The Plaintiff was suddenly attacked and thrown out of the bar. The incident caused the suffering to the Plaintiff’s dignity and pride.
9. However I do not accept that the incident caused damage to the Plaintiff’s reputation or professional image. There is no evidence from the Plaintiff to show that he was with colleagues or business partners in the bar at the time of the incident. Moreover, there is no evidence from the Plaintiff to show that someone at the scene recognized him in his professional capacity or that this incident was known to any of his colleagues or business partners.
10. I am of the view that this present case is less serious compared to the cases submitted by the Plaintiff’s solicitors.
11. I find the present case comparable to the case of *Luk Sung Fei Veronica v Chau Chung Shun & Anor*, unrep, HCPI 392/2009. In that case, the plaintiff was a resident of the building. Her evidence was that she was assaulted by the 1st defendant (a security employed by the 2nd defendant) at a public place, i.e. the lobby of the Building and the 1stdefendant had continued to threaten her after the Incident. She had requested the 2nddefendant (the property management company of the building) to remove the 1st defendant from the building. The 2nd defendant had promised they would do so but took no action until after two years. To avoid the hostile gestures and threats from the 1st defendant, the plaintiff had to move out from her own property and to live in undesirable environment for two years. The plaintiff’s evidence was accepted by the Master. The plaintiff was awarded a sum of $20,000 as aggravated damages.
12. Having considered the Plaintiff’s evidence, I find the Plaintiff’s case akin to that of *Luk Sing Fei Veronica*. I am of the view that an award in the sum of $20,000 under this head is appropriate.

*Summary*

1. In summary, I assessed the Plaintiff’s damages to be as follows:-
   1. Pain, Suffering and Loss of Amenities $250,000

(“PSLA”)

* 1. Pre-trial Expenses and Loss:
     1. Medical expenses: $7,680
     2. Travelling Expenses: $2,000
  2. Future Expense and Losses:
     1. Future Medical Expenses: $87,550
  3. Aggravated Damages: $20,000

Total: $367,230

*Interest*

1. I make an order nisi for the Defendants to pay to the Plaintiff the following interest:-
   1. Interest at half judgment on special damages ($9,680) from the date of the incident to the date of judgment.
   2. Interest on the damages awarded for PSLA and aggravated damages (total at $270,000) at 2% per annum from the date of the writ to the date of the judgment.
2. The award of damages shall carry interest at judgment rate from the date of judgment until payment.

*Costs*

1. I order that the costs of this action, including the costs reserved by Master J Chow on 30 May 2013, and 28 November 2013, to be to the Plaintiff.
2. The Plaintiff asked that costs of the action to be summarily assessed and submitted their Statement of Costs for Summary Assessment. The Plaintiff claims costs in the sum of $249,946.
3. Having considered the Statement of Costs, I summarily assessed the Plaintiff’s costs at $46,374. I therefore make an order nisi for the Defendants to pay the Plaintiff’s costs summarily assessed at $46,374.
4. The orders nisi made herein shall become absolute after 14 days hereof unless any party applies to vary the said orders within 14 days hereof.

( W.Y. HO )

Master

Mr. W. Kwan of Messrs. Or & Lau for the Plaintiff

The 1st and 2nd Defendants absent.