#### DCPI 2757/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2757 OF 2012

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BETWEEN

TSANG SAU YAN Plaintiff

and

MAN SHING CLEANING

SERVICE COMPANY LIMITED Defendant

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##### Before: Deputy District Judge Amy Chan in Court

Date of Hearing: 7 and 14 August 2014

Date of Judgment: 17 September 2014

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## JUDGMENT

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* + - 1. The plaintiff was employed by the defendant as a cleaner working in the government building in Shek Kei Mei (“the Building”) since 2007.
      2. On 4 May 2010, the plaintiff was assaulted by her colleague Chan Yuk Mui (“Chan”) in the course of work in the Building. The plaintiff suffered certain physical injury as a result of the assault.
      3. This is the plaintiff’s claim against the defendant for her personal injuries that she had sustained in the assault. The damages claimed, after deducting the settled sum from the employees’ compensation, is at $567,555.72
      4. The defendant disputes both liability and quantum.

*BACKGROUND*

* + - 1. The defendant carries on the business of a cleaning and maintenance company. It maintains the cleaning works for the entire Building. There were ten cleaners (including the plaintiff and Chan) who worked under the supervisor Man Kwong Lan (“Man”).
      2. The plaintiff started working for the defendant in October 2007 and was assigned to work with Chan in a team of two since then. They were responsible to clean the 5/F to 10/F, four toilets in the car park (“CP2”) and the E&M office on the 11/F (“11/F”) of the Building. Both the plaintiff and Chan were working well in a team.
      3. For the performance of the cleaning duties, plastic rubbish bags were provided to the cleaners which were placed in the resting room at the CP2.
      4. Chan was convicted for the offence of “common assault” in the magistrates’ court on 20 September 2010. She pleaded guilty and admitted that she had a dispute with the plaintiff about the using of plastic rubbish bags. She hit the plaintiff’s shoulder and pushed the plaintiff. As a result, the plaintiff fell down onto the ground.
      5. The facts that the plaintiff was assaulted are undisputed and indisputable by the defendant.

*THE ISSUES*

* + - 1. The plaintiff’s claims against the defendant for her personal injuries that she suffered from the assault of Chan are premised on the basis of breach of duties and vicarious liability.
      2. Therefore the core issues arising for my determination are as follows:-

1. whether the defendant is liable for breach of duties;
2. whether the defendant is vicariously liable for Chan’s tortious act; and
3. the amount of damages the plaintiff is entitled to if she is able to establish liability.

*THE FACTS*

*The plaintiff’s case*

* + - 1. In or about the New Year Day of 2010, Chan borrowed $100 from the plaintiff and she promised to repay her at the end of the month. However, Chan did not do so even on the payday in February 2010.
      2. On 11 February 2010, the plaintiff chased Chan for the loan. Chan was not happy. However, Chan made the repayment of the sum on the following day, ie 12 February 2010. She told the plaintiff that she no longer wanted to work with the plaintiff in a team. Chan proposed to work on 5/F to 7/F and CP2, leaving 8/F to 10/F and 11/F to the plaintiff. The plaintiff was not content with such a division because there was no lift service to 11/F. She was required to walk up the staircase from the 10/F so as to reach 11/F. Then the plaintiff suggested that they should leave the division of CP2 and 11/F to their supervisor by drawing lots. Chan said, “I owe you $100. Does it mean that the entire live is owed to you!”（欠你$100，欠你一世呀!） As a result of the draw, the plaintiff was responsible to clean CP2 and Chan had to clean 11/F.
      3. In short, the plaintiff worked on 8/F to 10/F and CP2. Chan worked on 5/F to 7/F and 11/F (“the Arrangement”).
      4. Prior to the Arrangement, the defendant had allocated a large batch of plastic rubbish bags to Chan and the plaintiff. Both agreed to put them in the toilet for the disabled (“the Toilet”) on the 5/F. The plaintiff folded the bags and put them in a box so that she could use then.
      5. On 4 May 2010 at around 3:30 pm, both the plaintiff and Chan were on duty. When the plaintiff returned to the Toilet to collect the folded plastic rubbish bags, Chan accused the plaintiff of taking her bags. The plaintiff replied that the bags was taken to the 5/F from CP2 by her. Since she had no plastic bags for use and so she came down to the Toilet to get them. It developed into a heated argument（針鋒相對）. Chan struck the plaintiff’s shoulders and further pushed the plaintiff by using both hands, causing the plaintiff to lose her balance and her head hitting the wooden frame of a door before falling onto the ground (“the Assault”). The plaintiff felt very painful and unable to get up. She shouted for help. Report was made to the police by the staff working for the government in the Building.
      6. Under cross-examination, the plaintiff confirmed she had been working in a team with Chan for more than two years before the Assault. She accepted that she could not have guessed that Chan would assault her. It appeared that Chan was gentle（斯文）and was not fierce. The plaintiff denied that she swore at Chan that her children would die（喪子喪女）during the heated argument before the Assault.
      7. The plaintiff accepted that after the Arrangement, there was no chance for them to argue and have friction. She and Chan both thought that the Arrangement was good to them. The Building is spacious. It consists of the East and West Wings. She accepted that they did not work in a small area.
      8. The plaintiff accepted that if there was anything that she was scared of, she would tell her supervisor, Man.
      9. The plaintiff confirmed the plastic bags were stored in the resting area where the cleaners have their lunch in the CP2. The defendant distributed the bags to the cleaners for self keeping. Before the Arrangement, the plaintiff had put the folded rubbish bags in the Toilet. She returned to the Toilet after the Arrangement because there was no bag in the CP2.
      10. The plaintiff originally agreed that the dispute was a “personal matter” between Chan and her. In re-examination, she clarified she made a mistake in saying so. She meant that she went to 5/F to get back her personal belongings such as towels and flower pots.

*The defendant’s case*

* + - 1. Man was the supervisor of the cleaners employed by the defendant working in the Building. Apart from supervising the ten cleaners, she was required to do the cleaning of the Building herself.
      2. As to the relationship between the plaintiff and Chan, Man opined that they were in good terms before the Arrangement. Man had seen them sharing a piece of sweet potato harmoniously. In fact, she never saw any argument between the plaintiff and Chan. It was only after the Arrangement, they did not talk to each other during the lunch time. They appeared to be not getting on（面左左）. She did not find it necessary to inform her supervisor as she found it trivial.
      3. Man said that the defendant had ample supply of rubbish bags and they were kept in the resting area in CP2. She accepted that she arranged and distributed the equipment, including the plastic bags, for the cleaners to use. The cleaners were free to take the plastic bags that they needed and kept in their own area of work. When the stock of the bags ran out, she would make order through the defendant.
      4. Man admitted she had no objection for the Arrangement made between the plaintiff and Chan. However, she did not know the reason for the Arrangement. She did not suggest a draw to determine who should be responsible for CP2 and 11/F. She knew that they were in a disharmonious relationship. She denied that she was aware of the dispute between Chan and the plaintiff in relation to the loan of $100.
      5. Man admitted that the defendant has no guideline to resolve any disharmonious situations between cleaners. The defendant did not educate or train her how to deal with the disharmonious problems between cleaners.
      6. Prior to the Assault, Man had never received any complaint from the plaintiff that Chan had done anything wrong or improper to her. Had Chan done so, Man would definitely report the incident to her supervisor and give Chan the warning.
      7. After the Assault, Man asked Chan about how the incident happened. Chan replied that the plaintiff came to the Toilet to get the plastic bags, the flower pot and other miscellaneous stuffs. Chan said those were her belongings. She prevented the plaintiff from so doing. An argument occurred. The plaintiff swore at Chan that her children would die. Chan was angry and so she pushed the plaintiff.
      8. Man is of the view that Chan was not a person of violence character. She is a bit stubborn. When she is provoked, she gets agitated easily. Man said the present incident was unforeseeable and it was impossible for the defendant to know that there been an Assault. She had allowed both the plaintiff and Chan to work in different floors for 4 to 5 months. They had worked well.

*DISCUSSION*

*Analysis of evidence*

* + - 1. On balance, I prefer the evidence of Man who gave accounts that was generally consistent and was unshaken in cross-examination on the core issues. She appeared to be forthcoming and reliable. On the other hand, I find the plaintiff’s evidence to be inherently inconsistent and unreliable. I do not think that she had told the whole truth. Where there are inconsistencies between the plaintiff’s evidence and that of Man, I have no hesitation to prefer Man’s evidence.
      2. Miss Leung for the plaintiff has highlighted the fact that Man suggested to the plaintiff and Chan to resolve the duties on 11/F and CP2 by drawing lots in her witness statement. This contradicted her oral evidence in court that it was not her suggestion. I find that such inconsistency is not material which would affect my assessment of her evidence.

*The duration of the Arrangement that had been carried out*

* + - 1. At the commencement of the trial before the plaintiff adopting her statement as evidence-in-chief, she changed the time of when the loan was made to Chan. In her statement, it was in late 1999. She corrected it to early 2000. Further, it did not feature in her pleadings nor her witness statement of when the loan was repaid. However, she told the court precisely that it was 3 days prior to the Lunar New Year. It is doubtful as to why her recollection could be better off on the trial day than she gave the statement 10 months ago. I find that it was her recent fabrication in an attempt to shorten the period that the Arrangement had been carried out. On balance, I prefer Man’s evidence that the Arrangement had carried on for 4 to 5 months before the Assault.

*Supply of plastic rubbish bags/equipment distribution*

* + - 1. It is common ground that the stock of the plastic rubbish bags was put in CP2 where they had lunch together. The cleaners could get the required plastic bags and kept in the place where they worked.
      2. The plaintiff claimed that she returned to the Toilet because there were no more bags in CP2. She intended to get the bags for her cleaning duty. On the other hand, Man said that there was an ample supply of rubbish bags in the resting area in CP2. When the stock of plastic bags ran out, she would make order from the defendant. The cleaners were free to take the plastic bags that they needed.
      3. On balance, I prefer Man’s evidence that the defendant had ample supply of rubbish bags in CP2.
      4. First, the stock of bags was to be used by all of the cleaners including Man in the Building. Had there been a running out of stock, there was no reason why Man did not make an order from the defendant. Further, it would be unlikely that the other cleaners did not report to Man when the stock of the bags was getting low.
      5. Secondly, the plaintiff worked in CP2 and had lunch in the resting room at CP2. If she had no plastic bags for use in her duty, she should have told Man during the lunch time for Man to make the necessary arrangement. It is against logic that she did not ask Man during the lunchtime first before she turned up to the Toilet herself.
      6. Thirdly, according to the plaintiff’s statement, the defendant had allocated a large batch of plastic rubbish bags to Chan and the plaintiff prior to the Arrangement. Both agreed to put them in the Toilet. There was no evidence in the trial as to: how long before the Arrangement the bags were allocated to them; how long those bags could last for if the bags were used by both of them and so on. However, in my view, it is reasonable to assume that the stock of plastic rubbish bags should have been used up well before 4 May 2010 as the Arrangement had been carried out for 4 to 5 months (I reject the plaintiff’s assertion of 2 odd months). I ask myself a rhetorical question. Did the plaintiff replenish the stock of plastic bags in the Toilet after the Arrangement? The answer must be “no”. The plaintiff’s area of work was 8/F to 10/F and CP2 of the Building. The supply of plastic bags was put in CP2. It was more easy and convenient for the plaintiff to obtain the bags that she required from CP2 and brought them back to her area of work on 8/F to 10/F directly. It defies common sense that she would replenish the supply of plastic bags in the Toilet on 5/F even after the Arrangement. 5/F was not her area of work.
      7. For the above reasons, I reject the evidence of the plaintiff that there was no bag in CP2. I accept Man’s evidence that there had been ample supply of bags in the staff resting area in CP2. The cleaners were free to take the bags that they needed for their cleaning. In my view, the plaintiff is the best person to know the reason why she took the plastic bags in the Toilet after the Arrangement had been carried out for 4 to 5 months.

*LIABILITY*

*A. Breach of duties*

* + - 1. The following breach of duties are pleaded:-

1. Negligence;
2. Breach of employer’s duty;
3. Breach of employer’s duty; and
4. Breach of statutory duties under section 6 of the Occupational Safety and Health Ordinance, Cap 509, Laws of Hong Kong.
   * + 1. The particulars of the above causes of action are essentially the same. They are general. The issue on breach of duties turns on whether the defendant has failed to provide a safe system of work and prevent the plaintiff from the risk or danger of injury by Chan. Here are the essential ones:-
5. Failure to provide education and/or training of the colleagues including Chan and the said supervisor so as to prevent any employee such as the plaintiff suffering personal injuries.
6. Failure to provide proper or any procedure and/or system to assess the aggressive behaviour of Chan at work against colleagues including the plaintiff causing the plaintiff to suffer personal injuries.
7. Failure to provide a safe system of work under which the employees including the plaintiff would be protected against battery and/or assault by co-workers.
8. Exposing the plaintiff to an unnecessary risk of injuries which is known or ought to have known by the defendant.
   * + 1. I agree with the defendant’s submission that the allegation that the defendant’s failure to provide proper education and training to the colleagues for the prevention of assault must be rejected because it is against common sense. Everyone knows that we should not assault others. It is a criminal offence. It is artificial by the defendant to hold a meeting and training for its colleagues so as to prevent assaulting other employee.
       2. In *Wong Wai Ming v The Hospital Authority* [2001] 3 HKLRD 209, a psychiatric nurse was assaulted by a visitor to the psychiatric clinic in the course of employment, the Court of Appeal held that:-

“8. An employer is under a duty to its workforce to take reasonable care for their safety. Where one employment happens to be more dangerous than another, a greater degree of care must be taken, but where the employer cannot eliminate the risk of danger, it is required to take reasonable precautions to reduce the risk as far as possible: see *Charlesworth & Percy on Negligence, 9th ed*, para 10-83. However, an employer is not required to take reasonable precautions to remove every risk which might confront its workforce. In a classic statement of the relevant principles, Lord Reid said in *The Wagon Mound (No.2)* [1967] AC 617 at pp. 642E-643A:-

“…… it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of …… a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, eg, that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it…… The general principle is that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man…… It is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.”

9. These principles have been applied to the employer’s duty to protect its workforce from attacks while they carry out their duties. The reported cases in this area tend to involve criminal attacks on staff whose duties include the handling or banking of cash …

10. There is no dispute in the present case about these principles. Two issues arise in the present case about their application. First, was there a real risk, as opposed to a mere possibility, which the Authority ought to have appreciated, that nurses carrying out duties at the reception counter in the waiting room might be attacked? Secondly, if so, what precautions, if any, should the Authority have taken to reduce the risk of injury to its nurses as a result of such an attack?”

* + - 1. The above principles was endorsed in *Chung Pak Cheong Rigo v Cheung Wai Chung & Anor*, DCPI 2301/2009 (13 April 2012), HHJ Leung held that:-

“17. …… if an employer knew or reasonably foresees that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, he may be in breach of his duty to that particular employee.”

* + - 1. Therefore, to consider whether the defendant was in breach of its to duty, the real issue is whether the defendant knew or ought to have known that there was a real risk of exposing the plaintiff to physical violence in allowing the Arrangement to be carried out. If there was a real risk, what the defendant should reasonably have done to avoid that risk.

*Any real risk of assault*

* + - 1. Man had testified that she did not know why there had been an Arrangement between the plaintiff and Chan. I do not accept that. On Man’s account, she helped the two to resolve the allocation of 11/F and CP2 by drawing lots. As a supervisor, it was only natural and reasonable for her to ask why they needed the Arrangement. I find that Man knew it was the result of the $100 loan between Chan and the plaintiff but that had been repaid. Even if I were wrong in this finding, Man was at least aware of the disharmonious relationship as she noticed that Chan and plaintiff did not talk to each other. They were not getting on during lunch hours in the resting room in CP2.
      2. Chan has no history of violence behavior in the past. Nor there any record of fights happened between the plaintiff and Chan. There had been no confrontation nor did argument occur before the Assault happened. The plaintiff admitted that she would never have thought Chan would hit her. She found Chan to be gentle. The plaintiff further accepted that there was no chance for them to argue and have friction after the Arrangement. In that case, on what basis that the defendant should be reasonably under the duty to take precautionary steps. It could not have been reasonably foreseeable to the defendant that there was a real risk of violence of Chan and therefore injury would result.
      3. Miss Leung for the plaintiff submitted that the defendant did not enquire at all about whether there were remaining unresolved job-related matters between Chan and the plaintiff after the Arrangement. This amounts to the defendant’s breach of duties.
      4. According to the plaintiff, if there was anything she was scared of, she would report to Man. Had the plastic bags really been run out as alleged by the plaintiff (which I reject), she should report to Man. It is totally unforeseeable to the defendant that she would turn up to the work area of Chan in 5/F after the Arrangement.
      5. The Arrangement, which was suggested by the plaintiff and Chan, had been sufficient and carried out smoothly for more than 4 to 5 months. They worked well on different floors. Their areas of duty were not in common. I therefore find that the Arrangement, in effect, amounts to separation of duties and place of work. The implementation of the Arrangement made Chan and the plaintiff no longer had any direct work relationship. I find that there is no real risk of exposing the plaintiff to physical violence in allowing the Arrangement to be carried out.
      6. In my judgment, the risk of Chan assaulting the plaintiff was neither real nor reasonably foreseeable. The defendant could not reasonably have foreseen that something like the incident in question would take place. I find the plaintiff has failed to establish the liability of the defendant in the circumstances of the present case.
      7. Hence, liability of the defendant under the breach of duties must be dismissed.

*B. Vicarious Liability*

*Close connection test*

* + - 1. In a House of Lords case of *Lister and othrs v Hesley Hall Ltd,* [2001] 2 WLR 1311, where it was held that an employer is liable for the tort committed by its employee if such tortious act is so closely connected with the employment that it would be fair and just to hold the employer vicariously liable.
      2. This “close connection test” was approved by the Court of Final Appeal in *Ming An Insurance Co (HK) Ltd and Ritz-Carlton Ltd* (2002) 5 HKCFAR569. In that case, Bokhary PJ said at P 581J:-

“25. …… I regard close connection as the basic criterion for vicarious liability in regard to all torts committed by an employee during an unauthorised course of conduct, whether intentional wrongdoing or mere inadventence is involved. This is not to say that this criterion is to be treated like a statutory formula. Its application is always to be undertaken in context. I dare say that the requisite connection will prove in practice to be more readily found in certain types of case than in others. But the basic criterion having been applied, the disposal of each case will always turn ultimately on its own facts and the particular considerations which they raise. ”

* + - 1. In the same case, Litton NPJ also held at p 584B:-

“35. As stated in Winfield and Jolowicz on Tort *16th ed*. (2002) at para 20.9 the underlying idea is that the injury done by the servant must involve a risk sufficiently inherent in or characteristic of the employer’s business that it is just to make the employer bear the loss.”

* + - 1. He continued at p 586D:-

“42. Hence, in seeking an answer to the question …… it must be remembered that the issue is not free standing, and matters such as the servant’s duties at the time when the tort occurred, whether he was acting in the interests of the employer or solely for himself, et cetera, are still relevant. And, casting one’s eyes a little wider, the court should also have regard to the business activities of the employer broadly speaking and ask if the risk which gave rise to the damage … was created by those activities.”

* + - 1. In the application of the “close connection test”, both counsel in the present case had referred to the court the authorities on vicarious liability. They include but not limited to the followings: *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] 1 WLR 2158, *Ling Man Kuen v Chow Chan Ming & another*, DCPI 1445/2005 (21.8.2006), *Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25; *Reimer v Rooster’s Country Cabaret Ltd* [2013] ECSC 2211; *Li Hoi Shuen v Man Ming Engineering Trading Co Ltd* [2006] 1 HKLRD 84; *Cheung Chak Fui& another v Sun Hing Organization Plastic Management Ltd,* HCPI 91/2008 (30.9.2011); *Leanne Wilson v Exel UK Limited (t/a Exel)* [2010] CSIH 35; *Blake v JR Perry Nominees Pty Ltd* [2012] SACA 122; *Weddall v Barchester Healthcare Ltd* [2012] IRLR 307; *Mohamud v Morrison* [2014] 2 All ER 990; and *Yeung Mei Hoi v Tam Cheuk Shing & Another*, HCPI 901/2011 (6.6.2014).
      2. I find that all the above authorities have been helpful in the sense that they enabled me to see how matters were approached by the courts in other cases. However, in my view, each case must be decided upon its own facts.
      3. Some of the above decided authorities which involved the assaults committed by employees who were authorized to use violence in the course of their employment. They must be distinguished from our present case. Those employed as bouncers or security personnel, the nature of their job requires them to behave in an aggressive and intimidatory manner. Whilst the employment in the present case as a cleaner by nature did not involve the potential danger of the employees being attacked by colleagues in the course of work.

*Was the assault closely connected with Chan’s employment with the defendant*

* + - 1. It is undisputed that the defendant’s business is to provide cleaning service to the Building. The provision of rubbish bags to the cleaners for use is an important ingredient in its business.
      2. Miss Leung for the plaintiff submitted that the Assault by Chan was closely connected with Chan’s employment for two main reasons:-

1. The defendant created or enhanced the intimacy and the risk of confrontation by pairing up Chan and the plaintiff in a team and leaving the job and equipment distribution to be sorted out by them. This is a risk inherent in the business enterprise/setting of the defendant’s cleaning service company; and
2. Chan was performing her job duties immediately before the time of the Assault.
   * + 1. As I find in above paragraph (§50), the Arrangement itself has already amounted to a separation of duties. I do not accept that there is any intimacy and risk of confrontation between the plaintiff and Chan. The defendant is not to blame for taking no further measures.
       2. According to the plaintiff, the Arrangement was triggered off when she chased after Chan for the $100 loan. I find that their grudges were further deepened when it came to the division of job duties. Both the plaintiff and Chan were reluctant to carry out the duty on 11/F because the lift did not reach there. Upon hearing the plaintiff’s suggestion to settle the division by drawing of lots, Chan expressed her disappointment and said “I owe you $100. Does it mean that the entire live is owed to you!” As a result of the draw, the most unwanted duty of 11/F was left to Chan. In my view, the hatred towards the plaintiff escalated to the highest when the plaintiff cursed at Chan that her children would die before the Assault.
       3. I find the Assault was motivated as the result of the personal malice between the plaintiff and Chan. She was personally and intentionally inflicting punishment on the plaintiff. Chan was taking revenge for the personal vengeance against the plaintiff when she got the plastic bags from the Toilet. Though Chan committed the Assault in the working place during the office hours, she was not acting in the interests of the defendant but solely for herself. I am not satisfied that the risk of the assault can be said to be sufficiently inherent in or characteristic of the defendant’s business in cleaning. The tortious act of Chan is obviously not closely connected with her employment as a cleaner. I do not find it is fair and just to make the defendant as an employer vicariously liable.
       4. Hence, the vicarious liability against the defendant must be dismissed.
       5. For completeness, I go on to consider the issue of quantum.

*QUANTUM*

* + - 1. The plaintiff was aged 49 at time of the accident and is now 53 years old. After the assault, she was taken to the Accident and Emergency Department of the Caritas Medical Centre (“the CMC”). X-ray was taken and she was hospitalized to Department of Orthopedics and Traumatology for 10 days. She had CT scan on the low back and was treated conservatively by given a body jacket for over 6 months and then changed to a soft surgical corset.
      2. She was arranged follow-up and started physiotherapy soon after discharge from hospital for one year at CMC and then Kowloon Hospital for courses lasted for 2 months. Then she had occupational therapy for 2 months. She was referred to psychiatry. She sought treatment from bonesetter and private chiropractor.
      3. The plaintiff’s injuries were diagnosed as “mild wedge fracture of the T12 vertebral body without neurological deficit” and residual back pain was expected to remain.

*Pain, suffering and loss of amenities (“PSLA”)*

* + - 1. The plaintiff claims $350,000 under this head. The defendant suggested $250,000. Miss Leung for the plaintiff has submitted a number of authorities including *Xiao Ronghua v Chiu Yung*, HCPI 569/2011 (13 June 2013); *Wong Kwan Tung v Yetai Chemoplast Company Limited*, HCPI 103/2007 (1 April 2008); *Wu Choi Lan v Tonge (Hong Kong) Limited & Another* [2004] 2 HKLRD G14 and *Yu Kok Wing v Lee Tim Loi t/a Tim Wan painting and Decoration Works*, CACV 139/2000 (23.5.2001). All these cases involve back injury and awards in the region of $300,000 to $475,000 were made as damages in PSLA. I follow the case of *Wu Choi Lan* and assess the damages for PSLA in the sum of $300,000.

*Pre-trial loss of earnings and MPF*

* + - 1. The plaintiff was given sick leave of 423 days from 4 May 2010 to 3 August 2011. It is undisputed that the plaintiff’s pre-accident earning was $5,283 per month. After one-month period of unemployment, Miss Leung for the plaintiff submitted that the plaintiff has mitigated by engaging in part-time cleaning jobs from 1 September 2011 to 11 May 2014 for wages of $2,554 and increased to $2,752.39 per month. Accordingly, the plaintiff should be entitled to $171,065.48 in total under this head.
      2. The defendant disputes the reasonableness of the sick leave, alleging that the duration should be 181 days until 31 October 2010 as suggested by Dr Chun for the defendant.
      3. I have reservation in the length of time that the plaintiff says that she was unable to work after the accident. I find that the plaintiff had exaggerated her injury and the symptoms that she complained of were not reliable. Here are the reasons:-

1. The plaintiff told the doctors in the preparation of the joint medical report that she lost consciousness and woke up at the site after the Assault. However, the fact of losing consciousness was not pleaded nor stated on her witness statement.
2. On 4 October 2010, the Functional Capacity Evaluation was done on the plaintiff at the Caritas Physiotherapy Department. The test indicated her ability to work at sedentary physical demand level but results were invalid. She failed 80% of her validity criteria, indicating submaximal effort during the evaluation.
3. Dr Chun for the defendant opined that the plaintiff’s complaint of 24-hour headache should be an exaggeration. Dr Tio opined that the headache should be more likely due to her psychiatric stress rather than directly. From the medical evidence available, there is no clinical evidence to support the basis of her headache. X-ray of skull shows no fracture. MRI of the brain was done showing no organic cause for pain.
4. Dr Chun opined that the “24-hour continuous nonstop back pain is not appropriate and is likely an exaggeration. There was no neurological deficit noted.” Dr Tio opined that patients with similar injury should present with an on and off pain over the fractured site. In other words, it supports Dr Chun’s statement that 24-hour continuous nonstop pain is unlikely.
5. In the agreed Joint Medical Report, Dr Tio for the plaintiff stated that:-
6. there was no documentation of any neck pain in the medical report so the plaintiff’s complaint on her neck should not be related to the injury;
7. the MRI did not reveal any nerve compression. Her alleged bilateral lower limb numbness should not be caused directly by the accident or the spinal injury; and
8. the current clinical examination showed residual back tenderness but did not correspond the fractured area. There was no genuine sign of any nerve compression over her lower limbs such as muscle wasting or reflex abnormality.
   * + 1. Dr Tio for the plaintiff opined that the period of about 14 months of sick leave granted by the treating doctors is appropriate due to the severity of her injury, the pre-injury job nature and the possible psychiatric illness. On the other hand, Dr Chun for the defendant is of the view that the sick leave period should be about 6 months. Mr Gidwani submitted that that Dr Tio’s opinion should not be relied upon as psychiatry is outside his expertise as an orthopaedic expert.
       2. In my judgment, the plaintiff’s injury is not as serious as she had alleged and she had exaggerated. There is no reason why she could not have worked at an earlier time. Hence instead of allowing the plaintiff for the total loss of earnings up to 3 August 2011, I only allow her to claim for loss of earnings up to 30 April 2011, which was about 12 months after the Assault. I find that the plaintiff should be able to secure full time employment by 12 months. The plaintiff’s pre-trial loss of earning can therefore be assessed as $66,566 ($5,283 x 12 month x 1.05)

*Loss of future earning*

* + - 1. The plaintiff has been engaging in full-time cleaner job with the government since 12 May 2014, earning $10,555. The plaintiff does not make any claim under this head.

*Loss of earning capacity*

* + - 1. The plaintiff claims $80,000 for loss of earning capacity on the basis that both medical experts opined that her working efficiency had been reduced as it is no longer advisable for her to do heavy lifting or carrying.
      2. The loss of earning capacity should only be awarded where there is a real and substantial risk: *Moeliker v A Reyrolle & Co. Ltd* [1977] 1 WLR 132. In my view, the plaintiff had worked part-time for ISS Facility Service Ltd and now even managed to find a new job with the government with a substantially higher income than her pre-accident work. She was never under a risk of losing of her employment. I agree with Mr Gidwani that despite her injuries, the plaintiff remained competitive and needed in the labour market. Her new job in the civil service is stable. The government seldom exercises termination on her employees. I find that the plaintiff is not justified to make a claim under this head.

*Special damages*

* + - 1. The plaintiff claims as follows:-

1. Medical expenses: $23,168;
2. Travelling expenses: $2,000; and
3. Tonic food: $5,000.
   * + 1. The plaintiff has not provided any copies of receipts to support the medical expenses incurred as a result of the Accident nor any breakdowns for the calculation of travelling and tonic food expenses. As discussed above, I find that her appropriate sick leave should be 12 months. I would allow a global sum of $25,000 for the plaintiff’s medical, travelling and tonic food expenses.
       2. Based on the aforesaid, if the plaintiff is able to establish liability on the part of the defendant, the quantum of her claim that I would have allowed will be as follows:-
4. PSLA $300,000.00
5. Pre-trial loss of earnings $66,566.00
6. Special damages $25,000.00

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

$391,566.00

Less employees’ compensation payment ($62,677.76)

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

Total: $328,888.24

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* + - 1. In view of my findings on the issue on liability, the plaintiff’s claim is hereby dismissed. I also make an order *nisi* for the costs of the action in favour of the defendant with certificate for counsel, and such order shall be made absolute 14 days after the handing down of this judgment.
      2. Lastly, I thank counsel for their helpful submissions.

( Amy Chan )

Deputy District Judge

Miss Eva Leung, instructed by B Mak & Co, for the plaintiff.

Mr Victor Gidwani, instructed by John Lam, Law & Co, for the defendant.