## DCPI 3504/2019

[2022] HKDC 1202

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 3504 OF 2019

BETWEEN

CHEN JUAN Plaintiff

and

LAM KIN SAM Defendant

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Before: Deputy District Judge Alfred Cheng in Court

Dates of Hearing: 7, 10 & 11 October 2022

Date of Judgment: 1 November 2022

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JUDGMENT

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1. The defendant owns a male German Shepherd called “Donut”. He is a keeper of Donut under the Dogs and Cats Ordinance (Cap 167). In the circumstances to be described in this Judgment, Donut bit the plaintiff’s face shortly after midnight on 6 January 2018 (“the Accident”). The plaintiff now claims damages against the defendant for the Accident.

*The facts*

1. The defendant explains that Donut was the puppy that he was assigned with when he attended a dog trainer program organised by Carver Kennel from December 2011 to September 2012. Since then, he kept Donut as his pet. By January 2018, Donut was 6 years old, and weighed 42kg. The defendant estimates that it was 2 feet tall when it stood on its 4 legs.
2. The plaintiff worked as a masseuse. The defendant was her customer. They befriended each other around mid-2017.
3. There is no dispute that the plaintiff met Donut the first time in November 2017. The parties also agree that, in that instance, the plaintiff accompanied the defendant to walk Donut near the defendant’s house in Hung Shui Kiu. Donut was on a leash held by the defendant. It was calm and not hostile towards the plaintiff.
4. The parties disagree as to how and when the plaintiff met Donut the first time. The plaintiff claims that she and the defendant went for a massage in Shenzhen, and only returned to Hong Kong close to midnight. Before the defendant drove her home, they stopped by at the defendant’s place as he said he needed to feed Donut. When she went inside the defendant’s house and stayed in the living room, the defendant kept Donut behind a wooden gate installed at the entrance of the living room. In the living room, the defendant kissed and hugged her. On the other hand, the defendant claims that he walked Donut with the plaintiff during the day before they went up to Shenzhen. The plaintiff did not go inside his house. He took Donut from his house, and walked it with the plaintiff. I will comment on the significance of this incident later in this Judgment.
5. The parties agree that the plaintiff next met Donut in the evening of 5 January 2018, ie the evening during which the Accident happened. They had dinner in Tsuen Wan. Whilst there is a dispute as to what happened after dinner, they ultimately headed to the defendant’s house, and arrived after 11:00 p.m..
6. It is the plaintiff’s case that, when she arrived at the defendant’s house, she heard Donut bark inside the house. Therefore, she asked the defendant to fence up Donut before she went inside.
7. The defendant initially denied that plaintiff ever made any request to separate Donut from her before she entered his house. But under cross examination, he accepted that the plaintiff did make such a request on their way back to Hung Shui Kiu.
8. Anyway, there is no dispute that the plaintiff and the defendant went to sit in the living room after they entered the defendant’s house. Donut was allowed to roam freely within the living room as well.
9. The plaintiff says that she and the defendant sat next to each other on the sofa in the living room. Whilst she played with her mobile phone and watched the television, the defendant hugged her and gave her kisses. The defendant did that 4 to 5 times, and the plaintiff pushed him away every time after he did that. Then the defendant tried to throw himself on her, and remove her pants. She understood this to mean that the defendant wanted to have sex with her. She did not want to do so, so she pushed the defendant away. Soon afterwards, Donut suddenly came to her and bit her in her face.
10. The defendant gives a vastly different account as to what happened prior to Donut biting the plaintiff. He claims that the plaintiff was eager to play with Donut. She started patting and playing with Donut for a few minutes. But she then held on Donut’s ears with her hands, and shook its head for a few seconds. When the plaintiff was shaking its head, she even said that Donut was very cute. It was at this juncture that Donut bit the plaintiff, before the defendant had the time to warn her not to shake Donut’s head.
11. It is this factual dispute that I am tasked to resolve to see whether the defendant ought to be found liable for the Accident.
12. The approach to be adopted by the court to assess the credibility of a witness is settled. I bear in mind the relevant legal principles when I make the assessment in the present case.
13. Mr Newman Wong, counsel for the plaintiff, submits that the defendant’s credibility is severely compromised by his belated admission that the plaintiff did ask him to fence up Donut before she entered his house. I find Mr Wong’s submissions on this point forceful. Although the defendant did not positively assert in his witness statements that plaintiff never made this request, he has therein sought to convey the message that she was the person raising the idea of playing with Donut after they finished dinner in Tsuen Wan, and she was very much looking forward to it. I agree that the defendant’s belated admission constitutes an abrupt change in his evidence. Furthermore, it also casts serious doubt on the inherent likelihood of the defendant’s account on how the Accident happened. As Mr Wong submits, the plaintiff’s request to fence up Donut does not sit well with the defendant’s claim that the plaintiff was eager to play with Donut when they were on their way back after dinner. I do not accept the defendant’s explanation that he did not see the need to include the plaintiff’s request in his witness statement, as this has already been mentioned by the plaintiff in her witness statement. The defendant must know that his factual account is vastly different from that of the plaintiff. I do not think he would simply forgo the opportunity to explain himself when he saw the plaintiff mentioning the request.
14. I also find it difficult to accept the defendant’s assertion that he and the plaintiff were just pure friends. I have been provided with the WeChat messages exchanged between the plaintiff and the defendant since the Accident (with some redacted as being inadmissible). A few hours after the Accident, the plaintiff expressed her worry that she would be disfigured, and would be unwanted by others. She then teased the defendant that he would need to take her up if she was left single. I am aware that the plaintiff’s messages may be self-serving, and a lack of direct response from the defendant does not necessarily mean that he accepted what the plaintiff said. But the overall impression I get from reading the WeChat messages is that the plaintiff and defendant were more than just friends at the time of the Accident. This tends to show the plaintiff’s version of the events is more likely to be true.
15. In addition, I give weight to Mr Wong’s criticism about the defendant’s explanation on why he would allegedly not allow his friends to visit his house without them having met Donut in some other places first. The defendant claims that he wanted his friends to first have an idea how big Donut was, so that they could be sure that they would like to play with it. As Mr Wong submits, the defendant’s evidence does not sit well with §6 of his supplemental witness statement, in which he states that the wooden gate installed at the entrance of his living room was to keep Donut out of reach from his guests when the latter entered his house. If the defendant were truthful, there ought to be no need to install the wooden gate, as his friends would already have been “acclimated” to play with Donut. In my judgment, the wooden gate was installed to reduce the risk that Donut might have exaggerated reactions when visitors came into the defendant’s house. I find that the defendant tries to present his evidence to avoid focus on the risk Donut might have on people except his owner. I do not think the defendant’s evidence should be preferred over the plaintiff’s evidence.
16. Mr Alvin Cheng, counsel for the defendant, points to various matters to invite this court to disbelieve the plaintiff. I am afraid I cannot agree with him.
17. First, Mr Cheng stresses that the Statement of Claim does not mention that, prior to the Accident, the defendant made advances on the plaintiff. Further, the same allegation was also absent in the WeChat messages. In particular, Mr Cheng focusses on the defendant’s WeChat message sent at 20:38 hours on 28 January 2018, in which he said that the plaintiff went to his house at the time of the Accident, and had fun playing with Donut. She even hugged and kissed Donut. Mr Cheng submits that these lend credibility to the defendant’s evidence.
18. Whilst Mr Cheng is right that the WeChat messages and the Statement of Claim did not mention the advances made by the defendant, and I do take these matters into account when I compare the respective credibility of the witnesses, I conclude that they were not so significant that I should form a dim view on the plaintiff’s evidence. As I set out above, the overall impression is that the WeChat messages are more consistent with the plaintiff’s evidence. Further, the plaintiff has already set out the fact that the defendant made advances on her in her witness statement. I do not see it as an allegation that the plaintiff only made up under cross examination.
19. As to the defendant’s WeChat message on 28 January 2018, I do not think I should give much weight to it. One can see that the plaintiff’s messages became hostile starting from 22 January 2018. Rightly or wrongly, by then she thought the defendant ought to compensate her for the injuries she sustained in the Accident. She raised the possibility of reporting the Accident to the police, informing the media of it, and commencing a legal action against the defendant. One cannot say for certain whether the defendant sent the message on 28 January 2018 with the plaintiff’s proposed actions in mind. I do not think one can simply conclude that what the defendant said on 28 January 2018 must represent the truth – there is certainly no evidence one way or the other allowing me to draw an inference on the likely truthfulness of this message.
20. Mr Cheng similarly attacks the plaintiff’s failure to mention in her witness statement the details of her visit to the defendant’s house in November 2017. In §5 of her witness statement, she refers to Donut being fenced up by wooden board(s). She expands her evidence in her supplemental witness statement, in response to the defendant’s evidence as to what transpired that day. I do not accept that the plaintiff can be criticized.
21. Secondly, Mr Cheng submits that the plaintiff’s evidence is inherently impossible. He argues that the plaintiff gives inconsistent answers as to her relationship with the defendant around the time of the Accident. As I see it, the plaintiff’s answers have largely been consistent. According to the plaintiff, she was hopeful that she might develop a romantic relationship with the defendant. I find the plaintiff was just being honest, when she said she thought the defendant was her boyfriend by the time she visited his house in November 2017. Thus, she did not view the kisses and embraces repugnant; indeed, I think the plaintiff’s perception and the defendant’s action fed off each other. Since there was no explicit conversation between the plaintiff and the defendant by then as to whether they considered themselves as lovers, I do not think it harms the plaintiff’s credibility when she was not precise in her description, during cross examination, as to her status with the defendant in November 2017 and January 2018. And as such, I also do not find it extraordinary that the plaintiff did not protest about going to the defendant’s place after dinner on the night of the Accident.
22. Based on the analysis above, I find it more probable than not that the Accident happened in the way as the plaintiff has described. Donut probably misunderstood the plaintiff as being aggressive towards the defendant, when the plaintiff rejected the defendant’s attempt to remove her pants, particularly after the plaintiff had already pushed the defendant away several times prior to that. This probably prompted Donut to react to protect the defendant.
23. Before I analyse the issue of liability, there is a further matter I need to explore. On 7 November 2017, a police report was made against Donut. It allegedly bit a 92-year old lady not far from the defendant’s house. I am not provided with any documents showing the details of this incident; no prosecution was laid against the defendant because the lady could not be contacted by the Agriculture, Fisheries and Conservation Department.
24. The defendant explains that it was a minor incident with a heavy dose of misunderstanding. He claims that the old lady was his neighbour and knew Donut well. On that day, when he walked Donut, he met the old lady. Donut appeared to be excited to see the old lady so it ran towards her, and raised its chin to reach the old lady’s hand. But the old lady moved her hand, seemingly to push Donut away. Since Donut had its mouth open, its teeth grazed the old lady’s little finger. Whilst the old lady thought it was a minor matter, a passer-by called the police and reported the matter.
25. It is not possible for me to assess how accurate is the defendant’s account of this incident. I agree with Mr Wong that, even accepting the defendant’s evidence as true and accurate, it tends to show Donut having the chance to cause injuries to others even when it was in its best spirits. Mr Wong also reminds me that this incident happened relatively shortly before the plaintiff’s visit to the defendant’s house.

*Liability*

1. The parties agree that the applicable legal principles are those discussed in *Chiang Ki Chun Ian, a minor suing by his mother and next friend Chow Yuen Man Louise v Li Yin Sze* [2011] 5 HKLRD 727. Bharwaney J, giving the judgment of the Court of Appeal, referred to the judgment of Greer LJ in *Sycamore v Ley* (1932) 147 LT 342 at 345:

“He may, in my judgment, be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause damage to people ...

… There may be cases in which a defendant may be liable for the bite of a dog even if the dog does not belong to the class of ferocious animals, if it be proved that the dog is put in such a position that a reasonable man would know that it was likely to cause danger and therefore he ought to regard himself as under an obligation to do something by way of precaution.”

1. I note that the Court of Appeal stressed that the factual circumstances in each case dictate whether there is a real risk, and not a fanciful risk of untoward reaction by a dog, such that there is an obligation on the owner’s part to do something to mitigate the risk.
2. Mr Wong also refers me to *Pun Tung King v Wong Sing Fat* HCPI 486/2013 (To J; 28 August 2015) for the proposition that the court should assess objectively whether there is a foreseeable danger created by a dog. In that case, the dog was a Tibetan Mostiff weighing 50kg, and was ferocious by origin. The learned judge held that the defendant owner ought to have realized that the dog retained its hidden natural behaviour and temperament, and that environmental conditions might stimulate it to exhibit such temperament and instinct, leading to unpredictable conduct: see the judgment at §37. It was in these circumstances that the court found that a danger to cause harm to other people when the dog was walked in the public was foreseeable by the defendant.
3. In my judgment, a duty of care did arise in the circumstances of the present case, so that the defendant ought to positively ensure the plaintiff’s safety when she was in her house during the night of 5 January 2018. I take into account that the plaintiff requested the defendant to fence up Donut before she entered his house; even though the defendant claims that Donut was tame and disciplined, it appeared to be able to cause injuries to others innocently; the defendant knew the plaintiff was to stay for some time inside his house, and he might have body contact with the plaintiff that might be misinterpreted by Donut. I find that the defendant had to ensure that Donut would not be able to reach the plaintiff, either being leashed at a distance, or simply fenced up away from the living room.
4. I find the defendant in breach of his duty of care towards the plaintiff in allowing Donut to roam freely around the living room when he and the plaintiff were there. He did not do anything to minimize the risk of harm Donut might bring to the plaintiff, even when Donut might simply be doing what its instincts told it to do. The risk materialized in the present case, and the plaintiff suffered damage as a result.
5. As a matter of completeness, I do not think the plaintiff’s experience in keeping pet dogs is relevant to the issue of liability. There is no evidence on what exactly was her experience when she had dogs – any cross examination stopped way short of establishing any fact concerning that. It is difficult to see how one can then derive any argument to say that the plaintiff could have avoided the Accident.
6. On the basis of my factual findings, I do not think there can be any argument that the plaintiff ought to be found contributorily negligent in any way.
7. Given my conclusion above, there is no need for me to discuss the plaintiff’s pleaded cause of action under the Occupiers’ Liability Ordinance (Cap 314). Mr Wong sensibly makes no submissions on it. Indeed, I do not think it can be relevant at all, as the particulars of breach in the Statement of Claim do not even allege any fault in the structure or design of the defendant’s house. I do take this opportunity to remind practitioners acting for plaintiffs to think twice before pleading multiple causes of action in the alternative in a personal injuries claim. A set of “standard” pleas cannot possibly be applicable to all claims indiscriminately. I cannot see why legal representatives should recover costs for prolix and wasteful pleas, when these can be avoided by exercising some sense.

*The medical evidence*

1. As mentioned above, the plaintiff sought treatment at the A&E of Tuen Mun Hospital after the Accident. Physical examination revealed a 2cm laceration wound below the plaintiff’s right eyelid; and a 1cm laceration wound over her right cheek. She was admitted to the surgical ward after receiving anti-rabies injection.
2. Further examinations by the surgeons at Tuen Mun Hospital confirmed that the plaintiff had a 1cm wound at her right upper eyelid, deep to the subcutaneous layer; a 1.5cm wound at her right lateral canthal, deep to the muscle layer; a 2cm C-shaped wound on her right cheek, deep to the subcutaneous fat layer but with the oral mucosa intact; and a 2cm wide wound at her right lower eyelid involving the lid margin. There was also abrasion on her right cornea.
3. The right lower eyelid wound was repaired by an ophthalmologist. The surgeons repaired the other wounds on 6 January 2018. The plaintiff was discharged on 9 January 2018.
4. The plaintiff returned to Tuen Mun Hospital on 23 January 2018 for a follow-up by the surgeons. The right upper eyelid wound healed well. The plaintiff complained of notching (i.e. an indentation) and retraction of her right lower eyelid.
5. On 13 July 2018, the plaintiff further received a surgery to reconstruct her right lower eyelid. When she returned to Tuen Mun Hospital on 13 August 2018, the ophthalmologists there noted that the right lower eyelid wound healed with scarring.
6. Dr Ian Nicolson (appointed by the plaintiff) and Dr Walter King (appointed by the defendant) were appointed as the experts to opine on the plaintiff’s cosmetic injuries. They prepared a joint report on 24 March 2020, which was supplemented by clarifications dated 27 April 2020.
7. When the experts examined the plaintiff on 3 March 2020 (ie more than 2 years after the Accident), they opined that the scars in the plaintiff’s right eyelid region and on her cheek could go unnoticed on casual observation. It was only on closer observation that one would see that the plaintiff’s right lower eyelid had a slight pull-down deformity in the middle 1/3, which would be more apparent when the plaintiff looked upwards. There was also a faint 3cm L-shaped scar along the lid margin. There were also faint scars on the plaintiff’s right upper eyelid. For her right cheek, there was a fine, pale, and slightly depressed scar of 2cm in length.
8. The experts enclosed photographs of the plaintiff’s front and side profiles in the joint report. I agree that the scars were not conspicuous.
9. The experts opined that sick leave would be appropriate from 6 to 23 January 2018; and for another week after the surgery on 13 July 2018. Her condition would become stable within 3 months after the surgery.

*PSLA*

1. In his opening, Mr Wong revises the plaintiff’s claim down from $450,000.00 in the Revised Statement of Damages to $200,000.00 - $300,000.00. Mr Cheng submits that $50,000.00 to $80,000.00 would be appropriate.
2. On the authorities the parties invited me to consider, I find it the most useful to refer to the 2nd plaintiff’s case in *Susi Yanti v Chu Shiu Chuen* HCPI 1176/2000 (Master de Souza; 2 November 2001); *Chiu On Lung by his mother and next friend Shek Kam Kiu v Wong Yuet* DCPI 115/2006 (Deputy Judge A B bin Wahab; 22 February 2007); and *Chiang Ki Chun Ian* DCPI 2067/2009 (Deputy Judge C Lee; 8 October 2010)[[1]](#footnote-1). The damages awarded ranged from $80,000.00 to $130,000.00.
3. I do not think the scars on the plaintiff’s face cause significant deformity to her appearance. But I do accept that, since the scars are on her face, the plaintiff must have felt more worried than others. I also accept that she must also have suffered mental disturbances, even though there is no evidence showing that she developed any mental illness.
4. I assess the appropriate award for PSLA to be $180,000.00.

*Pre-trial loss of earnings*

1. The plaintiff was between jobs at the time of the Accident. She claims that she started to work as a masseuse in 2009. From September 2017 to early December 2017, she worked at Starry Night Sauna in Tsuen Wan. She took leave since early December 2017 because of persistent cough. But for the Accident, she planned to work as a masseuse at Windsor SPA in Yaumatei, which was due to open in February 2018.
2. The plaintiff claims that she earned an average of $24,000.00 per month as a masseuse prior to the Accident. She explained that she would receive $110.00 for providing a 1.5-hour massage treatment to a customer. A customer would also need to pay mandatory tips of $200.00, of which she would get 90%. Therefore, she would receive $290.00 serving a customer. She estimated that she had 4 customers per day, and she would work 19-20 days per month. Together with discretionary tips from customers, she earned roughly $24,000.00 per month.
3. The plaintiff further explained that since July 2021, she resumed working as a masseuse at Windsor SPA. She could earn $50,000.00 per month in the summer months. She explained that since Windsor SPA did not mandate the amount of tips to be given by a customer, she actually received more in discretionary tips than at other saunas. Windsor SPA also gave her more ($380.00 as compared to $290.00) for each customer she served.
4. As Mr Cheng points out, the plaintiff’s claim on her monthly income is not supported by any documentary evidence. This is despite the fact (as the plaintiff admits under cross examination) that she was sent tax returns by the Inland Revenue Department in the years prior to the Accident, and she sent back after filling in with her income details. She also accepted that her employers would have the details on her past income.
5. I do not think the plaintiff has offered any reasonable explanation to justify the absence of documents to support her claim on her monthly earnings. Hence, I draw the inference that her income prior to the Accident should be lower than $24,000.00 per month.
6. Mr Cheng points to 2 WeChat messages that the plaintiff sent to the defendant after the Accident. On 24 January 2018, the plaintiff told the defendant that she earned $15,000.00 per month, and claimed that this could be verified with her former employers. And on 25 January 2018, she told the defendant that she could earn $15,000.00 to $20,000.00 per month even if she took it leisurely at work.
7. I agree with Mr Cheng that this court should give weight to the figures mentioned by the plaintiff in her WeChat messages. I do not see any reason why the plaintiff would intentionally compress (rather than exaggerate) her income in those WeChat massages, as she was requesting the defendant therein to make compensation to her.
8. In my judgment, the defendant is right to suggest that the plaintiff should have earned around $17,500.00 per month at the time of the Accident. This would also be the level of income she would earn in 2018 but for the Accident.
9. Mr Wong submits that this court should grant damages for full loss of earnings for at least 12 months. He emphasises that the plaintiff, rightly or wrongly, thought she was disfigured as a result of the Accident. She thought she would not be recruited by saunas or massage parlours, as they treated appearance of a masseuse as paramount. Mr Wong also points to the fact that the plaintiff worked for a few days as a dishwashing worker in November 2019 as evidence that the plaintiff did attempt to resume gainful employment as early as she thought she could.
10. I agree with Mr Wong that it would probably be unsuitable for the plaintiff to resume working as a masseuse between January and July 2018. During this period of time, the plaintiff’s right eyelid was yet to be reconstructed. I think it was reasonable for the plaintiff to fear that she would be discriminated against if she sought any job as a masseuse. I also find it reasonable for the plaintiff not to engage in some other gainful employment because of her low self-esteem and emotional disturbances.
11. However, in the absence of concrete evidence, I do not accept it as a reasonable decision for the plaintiff not to re-join the labour market after recovering from the reconstruction surgery in July 2018. On the basis of the expert evidence, I find that the scars should have become more or less unnoticeable, as seen from the photos attached to the joint report, in 2-3 months after the reconstruction surgery.
12. In my judgment, the plaintiff should be entitled to damages for full loss of earnings from February to September 2018. She is not entitled to any further damages for loss of earnings thereafter.
13. I award $140,000.00 as damages for pre-trial loss of earnings ($17,500.00 x 8 months). I refuse to award damages for MPF contributions from her employer, as the plaintiff confirmed that Winsor SPA (nor any previous saunas she worked in) did not make any contributions to her MPF account.
14. I note that the plaintiff no longer pursues her claim for damages for loss of earning capacity.

*Future medical expenses*

1. Dr Nicholson recommended the plaintiff to receive laser therapy and hyaluronic injections to improve the appearance of the scars. These will cost $34,000.00. The defendant does not appear to seriously dispute the same. I will award $34,000.00 as the cost for future medical treatment.

*Special damages*

1. The plaintiff claims $2,227.00 in purchasing medical consumables, $1,050.00 in travelling expenses, $5,265.00 as expenses for going to salons, and $619.00 for purchasing a pair of sunglasses.
2. The plaintiff explained that she could not wash her hair at home after receiving surgeries to her eye respectively in January and July 2018, so she had to go down to a salon every other day. In the absence of evidence corroborating the need for her to go to a salon, I will simply award $2,000.00 as agreed by the defendant. I cannot see how the plaintiff was prevented from washing her hair on her own, when she could (presumably) adopt different postures to avoid water running into her wound, or pressure building up around her eye area.
3. I award $5,896.00 as damages for expenses incurred by the plaintiff prior to trial.

*Conclusion*

1. In summary, the plaintiff is entitled to the following damages:
2. PSLA $180,000.00
3. Pre-trial loss of earnings $140,000.00
4. Special damages $5,896.00

Total $325,896.00

1. As for interest, I award the usual rates at 2% for general damages from the date of the service of the writ until judgment; and half judgment rate for special damages from the date of Accident to the date of judgment.
2. As for costs, I make an order nisi as follows:
3. the defendant do pay the plaintiff costs of this action (including all costs reserved, if any) to be taxed if not agreed, with certificate for counsel;
4. The plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.

( Alfred C P Cheng )

Deputy District Judge

Mr Newman Wong, instructed by Szwina Pang, Edward Li & Co, assigned by the Director of Legal Aid, for the plaintiff

Mr Alvin C H Cheng, instructed by C&Y Lawyers, for the defendant

1. The appeal heard by the Court of Appeal dealt with the issue of liability only. [↑](#footnote-ref-1)