DCPI 158/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 158 OF 2007

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

BETWEEN

CHEUNG YIU KWONG Plaintiff

and

YU WING HONG Defendant

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

Coram: His Hon Judge Leung in Chambers (open to public)

Date of hearing: 28 July 2008

Date of handing down decision: 20 August 2008

**DECISION**

1. Cheung (the Plaintiff) claims damages for personal injuries caused by Yu (the Defendant) in a traffic accident on 30 November 2005. Liability was conceded and damages were assessed before this court. On 26 June 2008, I handed down my judgment on the quantum. Cheung applies for leave to appeal against my assessment.
2. Cheung has since applied for legal aid, and therefore invoked the statutory stay of proceedings. However, parties agreed that the stay should be lifted to enable them to proceed. Mr So, who did not appear during the assessment hearing, appeared on behalf of Cheung in this hearing.
3. Leave to appeal would normally be granted unless the grounds of the intended appeal have no realistic prospect of success: see *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.
4. The draft Notice of Appeal has 6 grounds

**Ground 1: PSLA**

1. Mr So took issue as to my citing 2 cases in my judgment: *Chang Ping Nam v Choi Kwai Kim* (1981) and *Yu Man Chui v Chow Chi Fun* (1983). He submitted that by relying on these 2 cases without giving opportunity to the parties to submit on them, this court arrived at the conclusion on PSLA that is unsound and unsafe.

1. Reading the relevant part of the judgment (paras.16-19), one should find that this court arrived at the conclusion on the award for PSLA after analysing the authorities relied on by counsel for both parties and considering Cheung’s personal circumstances and the degree of genuine pain and suffering. This conclusion was reached even before this court cited these 2 other cases, which even this court described as relatively older cases and those one could simply “see also”.
2. Perhaps with hindsight, this court could have refrained from adding such references and thus preventing the current red herring from arising. But I do not agree that in the circumstances of this case, this per se gives rise to a ground for appeal.
3. Apart from labouring on how the present case differs from *Yu Man Chui*, Mr So for Cheung did not in his written submissions argue that the award ought to be different on the basis of the authorities cited during the assessment hearing. It was only when I pointed this out during the hearing that Mr So added that this court has failed to give any or adequate weight to one of those cases – *Ko Kam Wai v Sze Hak Fung Company & Anor* (2006). But in fact I did specifically consider that case (para.18 of the judgment).
4. This is a case of minor injury, which was remarkably different from that projected by Cheung and his legal representatives. Nevertheless, I would not rule out that the appellate court might, as they are entitled to, arrive at a different award after considering the authorities including *Ko Kam Wai*.

**Ground 2: Loss of earning capacity**

1. The principles in *Moeliker v A Reyrolle & Co. Limited* (1977) 1 WLR 132 are well known. Mr So essentially submitted that there was no reasonable foundation for this court to deny an award for the loss of earning capacity just because the degree of loss might be slight.
2. In my view, Mr So missed a fundamental point in the judgment. This court’s consideration of Cheung’s alleged future loss of earnings and loss of earning capacity upon recovery was based on the *assumption, rather than actual finding,* that Cheung had a regular daytime job as a decoration worker as he alleged (paras.32-35 of the judgment). This court did not actually accept that Cheung had a regular daytime job as a decoration worker prior to the accident as he alleged. Nor did this court accept that Cheung would have worked as a regular decoration worker either during or after the reasonable sick leave period but for the accident as he alleged (paras. 27 and 31 of the judgment). There is no intended appeal against these findings.
3. When the experts expressed their opinion on Cheung’s ability to resume work and his loss of earning capacity, they did so on the basis that Cheung did have the alleged regular daytime job as decoration worker as well as the night time job as a pizza deliveryman. And even on that basis, they believed that Cheung should be able to resume his alleged daytime and night time job, subject to simply modest activity limitation. This court’s findings based on such expert evidence are to be treated on appeal as findings of fact too.
4. I fail to see how Mr So translates the findings and expert opinion into any loss of earning capacity or any loss significant and permanent enough to attract an award. I am not satisfied that the prospect of success in the intended appeal in this respect is realistic.

**Ground 3: Medical expenses**

1. Of the amount claimed, HK$510 was agreed. HK$6,350 was claimed for private consultation during the period between December 2005 and April 2007. I allowed a lump sum of HK$3,000 under this head of claim. Mr So primarily argued that all the medical expenses claimed should have been allowed, had this court applied the proper test.
2. The test Mr So referred to is what was stated in *Au Yeung Miu Sim v Tsang Kwong Wai & Anor*, CACV 90/2003, 13 February 2004. He submitted that all medical expenses honestly and reasonably incurred for treatment of injuries should be recoverable.
3. In my view, Mr So’s submission is an over-simplification of the principle. The principle that the appellate court applied in *Au Yeung Miu Sim* came from *Clippens Oil Company Limited v Edinburgh and District Water Trustees* [1907] AC 291. *Clippens* did not involve a claim for personal injuries; but the court there said at 304:

“……I think the wrong-doer is not entitled to criticise the course **honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after-events that another course might have saved loss**. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong……” (emphasis added)

1. The above principle was applied in the context of a claim for personal injuries in *Rubens v Walker* 1946 S C 215, which was also cited in *Au Yeung Miu Sim*. In *Rubens*, the injured child was subject to prolonged treatment as a result of the diagnosis and advice of the experts she consulted. The expert advice was later proved to be mistaken and the defendant argued that the prolonged treatment was therefore unnecessary and useless. Based on the principle in *Clippens* above, the court nevertheless found that the child’s father was entitled to recover the disputed treatment expenses in respect that they had been incurred honestly and reasonably on the basis of the expert advice then received.
2. Then came the case of *Au Yeung Miu Sim* where the appellate court was faced with a similar situation. The orthopaedic specialist at the private hospital that the plaintiff consulted diagnosed that he suffered from a cruciate ligament tear. The neurologist that the plaintiff consulted advised him that there was reflex sympathetic dystrophy in his leg. Such opinion was eventually not supported by other experts. Applying the principle mentioned above, the appellate court held that the disputed treatment expenses had been incurred honestly and reasonably on the basis of such medical expert advice. They should be allowed, even if with hindsight such advice turned out to be wrong.
3. There is therefore an essential element in the above principle. To be considered as honestly and reasonably incurred, the disputed medical expenses should at least be incurred, or continued to be incurred, as a result of the plaintiff’s acting on particular medical advice, though such advice may turn out to be mistaken or wrong. This is what the wrongdoer is not entitled to criticise.
4. To begin with, Cheung consulted Dr S K Wong in December 2005 upon introduction of a friend. According to his report, Dr Wong provided no special treatment other than analgesics and physiotherapy to address Cheung’s complaint about pain. In view of Cheung’s constant complaint, Dr Wong even urged Cheung to go back to consult the orthopaedic unit of the government hospital instead as soon as possible in March 2006. But Cheung did not follow Dr Wong’s advice. It was in 2007 when Cheung somehow revisited the government hospital but at the same time decided to resume consulting Dr Wong after some 10 months (see paras.4, 5, 13 and 14 of the judgment). The essential element in the principle explained above did not exist here.
5. Notwithstanding that, I decided not to rule that it was unreasonable for Cheung to consult Dr Wong *at all*. But I found that the number of consultations was more than what was reasonable and necessary (para.36 of the Judgment). I therefore made the lump sum award under this head of claim. I do not see how this should fail as a matter of principle.
6. Mr So for Cheung submitted that alternatively, the appellate court is entitled to differ from my conclusion as to the reasonable amount that should be allowed.

**Ground 4: Travelling expenses**

1. According to Mr So for Cheung, whether the travelling expenses should be increased hinges upon whether all the medical expenses should be allowed.

**Ground 5: The damaged motorcycle**

1. This court did not allow this item of claim, notwithstanding the undisputed fact that the motorcycle was damaged in the accident. Mr So submitted that there is no reasonable foundation for that because Pizza Hut, his employer and owner of the motorcycle, has confirmed that Cheung has repaired the motorcycle at his own cost.
2. What Mr So submitted is factually incorrect. Further, since Cheung was not the owner of the motorcycle, he would suffer loss due to its damage either because the owner held him to be liable or Cheung has himself paid for the damage or loss. This court found that Cheung was simply incredible and did not come up to proof that he has suffered loss either way (paras.38 to 40 of the judgment). The court is not bound to make a finding in the circumstances. Again, Mr So submitted that the appellate court is entitled to take a different view.

**Ground 6: Interest**

1. This intended ground of appeal in respect of my order as to interest has no basis. Mr So did not pursue this ground during the hearing.

**Conclusion**

1. In conclusion, on the basis that I would not rule out the prospect of Cheung’s appeal in respect of the reasonableness of the amount of PSLA award and special damages, I grant the leave to appeal. This will be subject to the order for security for costs of the appeal that I make separately today, namely, that Cheung shall pay into court within 21 days from today a sum of HK$120,000 as security for Yu’s costs in the appeal.
2. I order that:
   1. there be leave to appeal on condition that Cheung satisfies the order for security mentioned above;
   2. upon satisfaction of the condition, costs of this application for leave to appeal be in the cause of the appeal;
   3. in the event that Cheung fails to satisfy the condition, costs of this application be to Yu, to be taxed if not agreed.

Simon Leung

District Judge

Representation:

Mr K C So instructed by Messrs Alan Wong & Co for the Plaintiff

Mr Lam Kai Yu of Messrs Burke &Company for the Defendant