#### DCPI 267/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 267 OF 2007

BETWEEN

JACKSON IVAN O’NEIL AMROL, Plaintiff

a minor, claiming by his

mother and next friend

MELISSA LIPPENCOTT AMROL

and

MARISOL RIVERA Defendant

##### Before: Deputy District Judge J. Ko in Chambers (Open to public)

Date of Hearing: 27 May 2008

Date of Delivery of Decision: 27 May 2008

## D E C I S I O N

1. This is a personal injury action involving an infant plaintiff. Following a trial lasting 4 days, I handed down judgment on 19 March 2008 granting judgment in favour of the Plaintiff. I made a costs order *nisi* that the Defendant should pay the Plaintiff’s costs of this action to be taxed if not agreed with certificate for counsel.

2. This is the Plaintiff’s application to vary the costs order *nisi*. The Plaintiff argues that the Plaintiff should be awarded costs on common fund basis. The application is opposed by the Defendant.

3. It is not disputed that costs is generally within the court’s discretion. It is also common ground that since the case of *Tai Chau Yung v. Ng Jim*, HCPI 753/2007, 30/9/1998 (Suffiad J), it has become the general practice of the courts in HK in cases settled or compromised in favour of an infant or a patient plaintiff to award costs on common fund basis as the courts need to be sure of adequacy of settlement.

4. What divides the parties is whether such approach should be extended to cases after trial or assessment such as this action.

5. The Plaintiff is relying on the judgment in *Ma Ka Lai v. Katafygiotis Lampros*, HCPI 982/2001, 21/1/2003 (Seagroatt J), to the effect that costs to be awarded after trial or settlement of an infant’s claim should normally be on a common fund basis: see paragraph 13 of the judgment. The Plaintiff’s counsel also cites other authorities to confirm that many courts in Hong Kong have adopted such practice.

6. On the other hand, the Defendant relies on the judgment in *Lily Tse Lai Yin v. The Incorporated Owners of Albert House (also known as The Owner Incorporation of Albert House)*, HCPI 828/1997, 24/2/2000 (Suffiad J). In paragraph 5 of that judgment, the learned judge said:

“Admittedly, where a court is asked to approve a settlement or compromise in a case in the Personal Injuries List involving a plaintiff under a disability (whether a patient or an infant), costs are normally awarded on a common fund basis. But where the action is tried and disposed of by judgment, the normal rule is that no special consideration is given to the fact that the plaintiff is under a disability and the usual party-and-party costs are awarded.”

7. The defence solicitor also relies on a passage from the Whitebook to the effect that to justify an order for costs on common fund basis, the case has to have some special or unusual feature: see *Hong Kong Civil Procedure 2008*, paragraph 62/App/8. So, he submits that the Plaintiff has to prove special or unusual feature before he can be granted costs on common fund basis.

8. Fortunately, I do not need to resolve this conundrum. This is because even if I accept the Defendant’s contention, the Plaintiff in this case has, in my view, succeeded in showing special and unusual feature justifying costs to be awarded on common fund basis.

9. The infant Plaintiff in this case is thankfully not seriously injured. Nonetheless, his injury is not trivial. He has been awarded about $120,000 in terms of damages. The Plaintiff is not legally aided. He will have to be responsible for his own legal costs insofar as it is not recovered from the Defendant as between parties. Given the modest sum awarded to him and the fact that there has been a full brown trial, there is a real likelihood that the Plaintiff will eventually receive less than what I considered to be adequate compensation to him.

10. On a taxation on the common fund basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred: see O.62, r.28(4) of the Rules of the District Court. This is a more generous basis than party and party basis and will, in my view, adequately cover the Plaintiff’s own costs payable to his own solicitors.

11. The Plaintiff’s counsel also observes that the Defendant in this case did not just put the Plaintiff to strict prove of his claim but put forward a positive defence in at least 2 respects: (1) that Coco was disabled; and (2) that it was someone else but not the Defendant who threw the ball. I have rejected both allegations. Whilst the Defendant may be said to be exercising her right to defend the Plaintiff’s claim in running such defence, much time was in fact spent at the trial in terms of examination of witnesses and submissions to deal with such allegations. Translate into monetary terms, much costs was spent at the trial to deal with them. This, in my view, makes it even more likely that the Plaintiff will not receive in full the amount of damages I awarded to him.

12. In order for this court to be reasonably sure of the adequacy of the compensation awarded to the Plaintiff, I consider that the circumstances call for an award of costs on common fund basis.

13. The defence solicitor criticizes the Plaintiff for not getting legal aid. He goes so far as to suggest that it was a conscious decision on the part of the Plaintiff’s mother not to get legal aid so as to get at the Defendant. There is simply no evidence as to why the Plaintiff was not on legal aid. I see no justification for this criticism.

14. On the other hand, if the Plaintiff’s contention is correct I shall be entitled to consider the fact that the Plaintiff in this case is an infant. It was necessary for him to be represented by a next friend, i.e. his mother. His mother did not meet with the injury but she will have to be responsible for the costs of this action even if the Plaintiff wins this case. This is because she will have to pay the difference between the costs recoverable from the Defendant and the costs payable to her own solicitors. This in my view is not fair to her.

15. Either way, I am satisfied that I should vary the costs order *nisi* and exercise my discretion to order costs on common fund basis.

16. I now deal with the costs of this application.

(Discussion re costs)

17. This application involves legal argument and I do see the justification for involvement of counsel. I am grateful to both Mr. Kwok and Mr. Burke for their research and submission. Costs normally follow the event. I order the costs of this application be to the Plaintiff, to be taxed on common fund basis if not agreed and with certificate for counsel.

# (J. Ko)

# Deputy District Judge

Mr. Tim Kwok, instructed by Messrs. So, Lung & Associates, for the Plaintiff

##### Mr. Burke, of Messrs. Burke & Company, for the Defendant