###### DCPI 400/2014

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 400 OF 2014

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##### BETWEEN

唐光明 Plaintiff

and

愉景樓業主立案法團 Defendant

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Before : His Honour Judge Alex Lee in Chambers

Date of Hearing : 19 May 2015 & 15 June 2015

Date of Handing Down Decision : 11 September 2015

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DECISION

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*INTRODUCTION*

1. This is the application of the defendant to strike out the whole of the plaintiff’s claim on the ground that it is time-barred by virtue of s 27 of the Limitation Ordinance, Cap 347 (“the Ordinance”), even though the plaintiff’s cause of action against the defendant is one of defamation.

2. Therefore, the issues for this court to decide include whether s 27 of the Ordinance is applicable to the present case and if so, whether the whole or any part of the plaintiff’s action should be struck out or whether this court should exercise its discretion to disapply the time limitation pursuant to s 30 of the Ordinance so as to allow the case to proceed.

*BACKGROUND AND PROCEDURAL HISTORY*

3. By way of background, the plaintiff had been employed as the supervisor of the management office of the defendant’s building. His employment, however, was terminated by the defendant on 14 July 2009 for some alleged misconducts. Shortly after the termination, the defendant posted in the building certain notices[[1]](#footnote-1) which, the plaintiff alleges, contained libellous statements against him. That caused the plaintiff to eventually institute the present action against the defendant for defamation on 27 August 2013 by way of a Writ of Summons.[[2]](#footnote-2)

4. At the time the writ was taken out, the plaintiff was acting in person. In his homemade Statement of Claim, which was filed with the writ, he alleged that the defendant’s act had caused him to “suffer sleepless nights very often and also loss of appetite, resulting in great mental and physical harm such that he cannot lead a normal life and has depression to the extent of disability”.[[3]](#footnote-3) The plaintiff went on to say that he had received consultations at Lady Trench General Out Patient Clinic, Yan Chai Hospital, West Kowloon Psychiatric Centre and so forth.[[4]](#footnote-4) Regarding Yan Chai Hospital and West Kowloon Psychiatric Centre, he said that between 20 January 2010 and the date of the writ he had received consultation from the two institutions for 10 odd times.[[5]](#footnote-5) Based on the above, the plaintiff sought, among other things, “economic remedy”.[[6]](#footnote-6)

5. At the Checklist Hearing on 27 January 2014, in view of what the plaintiff had asserted in the Statement of Claim the learned master asked him to confirm whether his case involved a claim of personal injury.[[7]](#footnote-7) On 29 January 2014, the plaintiff replied by saying, “In view of what my case and my demand are about, I now apply to change DCCJ 3257/2013[[8]](#footnote-8) into a case of personal injury in order to proceed with the claim.”[[9]](#footnote-9) Therefore, on 24 February 2014, with the consent of the defence, the learned master made an order transferring the case from the Civil Jurisdiction List to the Personal Injuries List, giving leave to the parties to amend their pleadings and directing that the parties were to compile with Practice Direction 18.1 which governs personal injury cases.[[10]](#footnote-10)

6. Subsequent to the transfer, the plaintiff was granted legal aid and since then has the benefit of legal representation. On 3 October 2014, an Amended Statement of Claim was filed on his behalf[[11]](#footnote-11) and his cause of action remains one of defamation.[[12]](#footnote-12) Moreover, the plaintiff pleads that by the reasons of the aforesaid alleged defamatory acts of the defendant, he “has sustained injuries and has been suffering loss and damage” and he seeks, among other things, “[d]amages for personal injuries”.[[13]](#footnote-13) In the Amended Statement of Damages filed on 18 December 2014,[[14]](#footnote-14) the plaintiff seeks, among other things, general damages for pain, suffering and loss of amenities, pre-trial loss of earnings, future loss of earnings and loss of earning capacity.[[15]](#footnote-15)

7. On 6 January 2015, the defendant filed their Amended Defence.[[16]](#footnote-16) In that document, apart from denying the plaintiff’s allegation and pleading fair comment, the defendant also raises the issue of limitation.[[17]](#footnote-17)

8. On 17 February 2015, the defendant took out the summons for the present application and that was the reason why the case came before me.

*CONTENTIONS OF THE PARTIES*

9. The contention of Ms Au, counsel for the defendant, is that notwithstanding that the plaintiff’s sole cause of action against the defendant is one of defamation, the applicable time limitation for his action is three years as provided by s 27 of the Ordinance. This is because, Ms Au argues, the phrase “action for damages for … breach of duty” in that section should be given a wide interpretation so as to cover the tort of defamation. Ms Au submits that as can be seen from the plaintiff’s pleadings the damages claimed consist of or include damages in respect of personal injuries. Moreover, the evidence shows that as early as 15 October 2009 the plaintiff had already had the relevant knowledge of his psychiatric condition which he alleges was caused by the defendant’s defamatory statements and therefore it is from that date that time should start to run. In any event, it would not be later than 17 November 2009 when the plaintiff was diagnosed to have been suffering from depression. Furthermore, Ms Au argues that the court should not exercise its discretion under s 30 of the Ordinance to disapply the time limitation. Lastly, Ms Au submits that the effect of the expiry of the time limitation is that the whole of the plaintiff’s action should be struck out, as there has never been any attempt on the part of the plaintiff to remove the personal injuries element from his claim.

10. On the other hand, Ms Lau, counsel for the plaintiff, contends that the applicable time limitation should be six years as provided by s 4 of the Ordinance which is the common time limitation for an action founded on tort, the plaintiff’s cause of action being one of defamation throughout. Ms Lau argues that s 27 is not applicable as the tort of defamation does not depend on any proof of “breach of duty”. If the court is not with her on the applicable time limitation, then as regards the issue of knowledge, the plaintiff’s original position as put by Ms Lau was that he did not know that his psychiatric disability constituted a cause of action for personal injury against the defendant until he was asked by the learned master during the Checklist Hearing on 27 January 2014 to confirm whether or not his case involved a claim for personal injury.[[18]](#footnote-18) Subsequently, Ms Lau seems to have changed her position and submits that the day the plaintiff first had knowledge for the purpose of s 30 of the Ordinance was 23 August 2010 when the plaintiff wrote a letter to the defendant reserving his right to sue.[[19]](#footnote-19) Ms Lau argues that all along the plaintiff has made it clear to the defendant so that the latter should know that his case is that the distress, anger, insult and worries was the result of the alleged defamatory acts which manifested themselves in the form of psychiatric symptoms. Mr Lau submits that the fact that the plaintiff has, in compliance with Practice Direction 18.1, included in his claim heads of damages commonly found in cases of personal injury does not cause it to be caught by s 27 of the Ordinance. Ms Lau further submits that by not objecting to and not challenging the learned master’s order to transfer and by consenting, after the plaintiff was granted legal aid, to an extension of time for the plaintiff to file an amended statement of claim and statement of damages, with a corresponding extension of time for the defendant to file an amended defence, it is unfair for the defendant now to take the point of time limitation. Lastly, if need be Ms Lau would ask the court to exercise the discretion to disapply the time limitation under s 30 of the Ordinance.

*THE ISSUES*

11. In view of the contentions of the parties, the issues in the present application can be summarised as follows:-

1. whether s 27 of the Ordinance applies to the plaintiff’s action even though his sole cause of action is one of defamation;
2. if so, when it was that the plaintiff first had the relevant knowledge about his psychiatric condition;[[20]](#footnote-20)
3. if the plaintiff’s action was instituted after the expiry of the relevant time limitation, whether the defendant had consented to the continuation of the proceedings by agreeing to and not challenging the transfer of the case from the Civil Jurisdiction List to the Personal Injuries List;
4. whether the effect of the time limitation is such that the whole of the plaintiff’s action should be struck out or just a part of it; and
5. whether the court should exercise its discretion to disapply the time limitation.

*THE RELEVANT STATUTORY PROVISIONS*

12. It would be convenient for me to first set out the relevant provisions of the Ordinance:-

“2 (1) In this Ordinance, unless the context otherwise requires-

“personal injuries” (人身傷害) includes any disease and any impairment of a person’s physical or mental condition, and “injury” (傷害) shall be construed accordingly;

4 (1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say-

1. actions founded on simple contract or on tort;

…

27 (1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an Ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Section 4 shall not apply to an action to which this section applies.

(3) Subject to section 30, an action to which this section applies shall not be brought after the expiration of the period specified in subsections (4) and (5).

(4) Except where subsection (5) applies, the said period is 3 years from-

1. the date on which the cause of action accrued; or
2. the date (if later) of the plaintiff's knowledge.

…

(6) In this section, and in section 28, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts-

1. that the injury in question was significant; and
2. that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
3. the identity of the defendant; and
4. if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(7) For the purposes of this section an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) For the purposes of this section and section 28 a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

1. from facts observable or ascertainable by him; or
2. from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

…

30 (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-

1. the provisions of section 27 or 28 prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

…

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-

1. the length of, and the reasons for, the delay on the part of the plaintiff;
2. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 27 or 28, as the case may be;
3. the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
4. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
5. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
6. the steps, if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

…

(7) In this section "the court" (法院) means the court in which the action has been brought.

(8) References in this section to section 27 include references to that section as extended by any provision of this Part and Part IV.”

*CONSIDERATION*

*As to (a): applicability of s 27*

13. In order for s 27 to apply, the action in question has to meet the following conditions, namely that it is one:

1. for damages;
2. for negligence, nuisance or breach of duty (whether the duty is contractual, statutory or otherwise); and
3. where the damages claimed consist of or include damages in respect of personal injuries.

Furthermore, the question of whether an action is for damages in respect of personal injuries is one of substance, not a matter of pleading: see *Hong Kong Civil Procedure 2015*, at §F1/29/2.

*Claim for damages*

14. As regards condition (i) above, in the present case there can be no dispute that the plaintiff’s action against the defendant is one for damages.

*Claim for damages for personal injuries*

15. As regards condition (iii) above, Ms Lau submits that the plaintiff’s claim is not a claim for personal injuries in that the various heads of damages pleaded in Amended Statement of Damages are simply an attempt made to synchronize his claims for reparation for the tort of defamation with the generally recognized heads of claim in personal injury claim. With respect, I am unable to accept this submission.

16. First, although the plaintiff had not been explicit in his homemade Statement of Claims as to what he meant by “economic remedy”, reading that document as a whole it can readily be seen that he was seeking compensation for his alleged disability resulting from depression which he said was caused by the defendant’s defamatory conduct. Therefore, the plaintiff was in substance seeking damages for his depression which falls within the meaning of “personal injuries” as defined in the Ordinance in that depression is a disease or impairment of his mental condition.

17. Secondly, the nature of the plaintiff’s claim has not been changed by the Amended Statement of Claim or Amended Statement of Damages. Although the plaintiff used the word “change” in his reply to the learned master’s enquiry,[[21]](#footnote-21) it is plain that he used it in a loose sense which did not represent any variation of stance or position. As put by his counsel Ms Lau,[[22]](#footnote-22)

“5. Throughout, the Plaintiff has been consistent in the underlying reasons of his claim against the Defendant. The Plaintiff, who was then acting in person, specifically pleaded the psychiatric symptoms he suffered as a result of the defamatory acts committed by the Defendant and that the severity of his depression had rendered him disabled in his Statement of Claim filed in the preceding action of DCCJ 3257/2013 on 27th August 2013. He claimed against the defendant for, inter alia, economic compensation as a result.”

Ms Au for the defendant also accepts that despite the use of the word “change” by the plaintiff, he was simply confirming with the learned master that his case involved a claim for personal injury.

18. Thirdly, that the tort of defamation is capable of giving rise to damages for mental or physical injury which was proved to flow naturally and directly from the tort is aptly illustrated by *Chu Siu Kuk Yuen v Apple Daily Ltd* & *Others[[23]](#footnote-23)*, where the claimant (a solicitor by profession) was able to recover damages for depression and pre-term delivery of her baby which she suffered as a result of the defamatory act of the defendant.

19. Based on the above, I have no doubt that the damages the plaintiff is claiming consist of or include damages in respect of personal injuries.

*Breach of duty*

20. As regards condition (ii) above, however, the answer depends on whether the phrase “breach of duty” in s 27 refers, as Ms Lau contends, only to a legal or equitable duty. If Ms Lau was correct on this, then s 27 would not be applicable to an action of defamation as the tort does not depends on the existence of any legal or equitable duty between the claimant and the defendant.

21. Ms Lau seeks to distinguish the judgment of the House of Lords in *A v Hoare*,[[24]](#footnote-24) a case of trespass to person on which Ms Au for the defendant heavily relies. Ms Lau argues that the tort of trespass to the person “arises from the breach of a general duty not to cause direct injury to the other either intentionally or negligently in the absence of a lawful excuse”. Ms Lau submits that by looking from that perspective, it is thus understandable why the House of Lords holds that the phrase “breach of duty” was intended by the legislature to cover intentional torts including trespass to the person.

22. With respect to Ms Lau, there are several difficulties with the above submission of hers in that:-

1. the tort of trespass to the person may take three forms, namely assault, battery and false imprisonment. However, none of them includes any “breach of duty” as its element: see generally *Clerk & Lindsell on Torts.[[25]](#footnote-25)* Similarly, the tort of defamation does not require any “breach of duty” as its element. In this regard, there is no difference between trespass to the person and defamation. However, it has been held that s 11 of the Limitation Act, which is the English equivalent of s 27 of the Ordinance, applies also to the tort of false imprisonment: See *Smith v Surrey Hampshire Borders NHS Trust[[26]](#footnote-26)* and *Azaz v Denton[[27]](#footnote-27)*.
2. Ms Lau does not specify whether the “general duty not to cause direct injury to the other” is the same as the common law duty of care as formulated in *Caparo Industries Plc v Dickman*,[[28]](#footnote-28) and if not, what the nature of that duty is; and if there is a general duty not to cause physical harm to others, then why there should not also be a similar general duty not to harm to one’s reputation. In my view, if “breach of duty” refers to a general duty not to cause harm, then it may not sufficient for Ms Lau to merely point out that the tort of defamatory does not depend on the tortfeasor being negligent or reckless or having knowledge that the words he used were in fact defamatory of another person, as it can be said that the tortfeasor still has breached the general duty not to cause harm if his or her words in fact damaged another’s reputation; and
3. even if the ratio in *A v Hoare* is, as Ms Lau submits, primarily about the applicability of the English equivalent of our s 27 to intentional tort as contrast with negligence and nuisance, it does not necessarily follow that what the House of Lords has said on “breach of duty” is not also pertinent to the tort of defamation.

23. It is noted that for present purpose the statutory regimes in UK and in Hong Kong regarding time limitation are almost identical. The time limitation for tort in UK is also six years. Similarly, there is a different statutory regime for action for “damages for negligence, nuisance or breach of duty”, where the damages are in respect of personal injuries. For those cases, the limitation period is three years from either the date when the cause of action accrued (“the primary time limitation”) or the “date of knowledge” (“the secondary time limitation”) whichever is the latter. However, there is also a provision similar to s 30 of the Ordinance which gives the court a discretion to extend the period when it appears that it would be equitable to do so.

24. In *A v Hoare*, there were six appeals heard together and all of them were about claims for sexual assaults and abuses which took place more than 6 years before the commencement of respective proceedings. Although the cases of the claimants were clearly ones of trespass to the person, they sought to argue that their respective cases involved a “breach of duty” so that they could benefit from the discretionary regime under the English equivalent of s 30 of the Ordinance.

25. In *A v Hoare*, Lord Hoffmann, whose judgment the other law lords agreed, noted that the phrase “negligence, nuisance or breach of duty” first appeared in the [Personal Injuries (Emergency Provisions) Act 1939](http://login.westlaw.com.hk/maf/wlhk/app/document?src=doc&linktype=ref&&context=6&crumb-action=replace&docguid=I60B84BD1E42311DAA7CF8F68F6EE57AB) which extinguished common law claims for compensation for “war injuries” when they were attributable to “negligence, nuisance or breach of duty”. His lordship considered that when Parliament subsequently used the same phrase in the Law Reform (Limitation of Actions, etc) Act 1954 with respect to time limitation, it must have in mind that the phrase had already been judicially construed as having a wide meaning. Moreover, his lordship was of the view that Parliament added the parenthetical words “(whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)” to stress its breadth.

26. One of the case authorities which Lord Hoffmann relied upon to say that the phrase had been given a wide meaning was *Billings v Reed*,[[29]](#footnote-29) where the husband of a woman who had been killed by a negligently piloted RAF aeroplane argued that s 3(1) of the 1939 Act did not bar his claim in trespass because trespass was not “negligence”, “nuisance” or “breach or duty”. However, that argument was rejected by Lord Greene, who gave the leading judgment of the Court of Appeal:-

“It seems to me that in this context the phrase ‘breach of duty’ is comprehensive enough to cover the case of trespass to the person which is certainly a breach of duty as used in a wide sense.”[[30]](#footnote-30) (Emphasis supplied)

27. In my view, it is plain that by breach of duty in “a wide sense”, Lord Greene was not referring to the common law duty of care (as in a case of negligence) or any other duty existing at law or in equity, bearing in mind (as aforesaid) that the tort of trespass to the person does not contain any of those as its element. The point is considered upfront in *Kruber v Grzesiak*,[[31]](#footnote-31) a case from Victoria which was also expressly approved in *A v Hoare*. *Kruber v Grzesiak* was about the construction of a provision materially identical to s 27 of the Ordinance. The claimant in that case, who had issued a writ seeking damages for personal injuries caused by negligent driving more than three years after the accident, wanted to amend the writ by adding a claim for trespass to the person based on the same facts. Adam J said,

“… I would see no sufficient reason for excluding [an action for trespass to the person] from the description of an action for damages for breach of duty, especially when it is provided that the duty may be one existing independently of any contract or any provision made by or under a statute. After all, do not all torts arise from breach of duty-the tort of trespass to the person arising from the breach of a general duty not to inflict direct and immediate injury to the person of another either intentionally or negligently in the absence of lawful excuse? The substance of the matter appears to be that section 5(6) is intended to provide a special limitation period of three years for actions in which damages for personal injuries are claimed. No doubt, as was pointed out in argument, this intention might have been achieved by the use of other and perhaps simpler and more direct language, but that does not seem to be a sufficient reason for not giving to the language chosen its full meaning.”[[32]](#footnote-32) (Emphasis supplied)

In my view, by asking rhetorically “do not all torts arise from breach of duty”, clearly Adam J was not referring to any specific duty at law or in equity but a general duty not to infringe the civil right of the others. In other words, the Victorian provision is held to be wide enough to embrace all actions for damages for personal injury.[[33]](#footnote-33) It is also clear that the learned judge was not making any distinction between trespass to the person and other torts. Moreover, Adam J was only giving an illustration when he referred to “a general duty not to inflict direct and immediate injury to the person of another either intentionally or negligently in the absence of lawful excuse” and he was not trying to restrict the meaning of “breach of duty” by that illustration. It is plain that the learned judge was of the view that the provision under consideration covered all tortious actions in which damages for personal injuries were claimed.

28. In the judgment of the English Court of Appeal in *Letang v Cooper*,[[34]](#footnote-34) another case approved in *A v Hoare*, the reasoning in *Kruber v Grzesaik* was adopted. *Letang v Cooper* was concerned with an unintentional trespass to the person, the defendant having negligently driven his car over the plaintiff’s legs. Lord Denning MR, when referring to “Actions for … breach of duty (whether they exist by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision), said,

“Those words seem to me to cover not only a breach of a contractual duty, or a statutory duty, but also a breach of any duty under the law of tort. Our whole law of tort today proceeds on the footing that there is a duty owed by every man not to injury his neighbour in a way forbidden by law. Negligence is a breach of such a duty. So is nuisance. So is trespass to the person. So is false imprisonment, malicious prosecution or defamation of character.”[[35]](#footnote-35) (Emphasis supplied)

Danckwerts LJ said,

“In my view, trespass to the person involves a breach of duty, as in the case of any other torts …”[[36]](#footnote-36)

Diplock LJ said,

“In their ordinary meaning the words “breach of duty” as so explained are wide enough to cover any cause of action which gives rise to a claim for damages for personal injuries, as Lord Greene MR in *Billings v Reed* said of very similar words in the Personal Injury (Emergency Provisions) Act, 1939. Why should one give them a narrower and strained construction? The Act is a limitation Act; it relates only to procedure. It does not divest any person of rights recognised by law; it limits the period within which a person can obtain a remedy from the courts for infringement of tem. The mischief against which all limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depends upon oral testimony. This mischief, the only mischief against which the section is directed, is the same in all actions in which damages are claimed in respect of personal injuries. It is independent of any category into which the cause of action which gives rise to such a claim falls. I see no reason for approaching the construction of enactment of this character with any other presumption than that Parliament used in the words it selected in their ordinary meaning and meant what it chose to say.”[[37]](#footnote-37) (Emphasis supplied)

“Counsel for the plaintiff has … submitted that an action for trespass to the person is not an action for “breach of duty” at all. It is, he contends, an action for the infringement by the defendant of a general right of the plaintiff; there is no concomitant duty upon the defendant to avoid infringing the plaintiff’s general right. This argument or something like it, for I do not find it easy to formulate, found favour with Elwes J…”[[38]](#footnote-38)

“In the context of civil actions a duty is merely the obverse of a right recognized by law. The fact that in the earlier cases the emphasis tended to be upon the right and in more modern cases the emphasis tends to be upon the duty merely reflects changing fashions in approach to juristic as to other social problems, and must not be allowed to disguise the fact that right and duty are but two sides of a single medal.”[[39]](#footnote-39)

29. After having reviewed the aforesaid case authorities as well asthe legislative history of a series of English limitation Acts, Lord Hoffmann came to the view that it was right for the House of Lords to depart from its previous contrary decision in *Stubbings v Webb*.[[40]](#footnote-40) His lordship concluded by saying,

“I therefore think that it would be right to depart from *Stubbings* and reaffirm the law laid down by the Court of Appeal in *Letang v Cooper* [1965] 1 QB 232.”[[41]](#footnote-41)

30. Based on the above, it can be seen that the reasons why Lord Hoffmann said that the English equivalent of our s 27 is applicable to the tort of trespass to the person are that the phrase “breach of duty” has consistently been construed judicially as having a wide meaning; that the provision can, as held in *Letang v Cooper*, be applicable to all torts, which concern the infringement of civil rights of others; and that in this context, “right” and “duty” are but two sides of the same medal.

31. In view of the weight of the aforesaid authorities, in my judgment s 27 of the Ordinance is applicable to an action of defamation in which damages for personal injury are claimed and therefore in the present case condition (ii) above is also satisfied. As such, the applicable limitation period here is one of 3 years.

*As to (b): date of knowledge*

32. In the present case, assuming that the plaintiff has in fact been suffering from depression (and there seems to be no dispute about it), references to the date of knowledge under consideration are references to the date on which he first had knowledge of the following (“the relevant knowledge”):

1. that his depression was significant; and
2. that his depression was attributable in whole or in part to the alleged defamation,

there being no issue about the identity of the defendant and no suggestion that the alleged defamatory acts were those of another person: see s 27(4)(b) and (6).

33. It is well-established that knowledge that set the time running for the secondary limitation period comprised both actual and imputed knowledge. If the claimant lacked actual knowledge of the matters set out in s 27(6), but could reasonably be expected to have acquired the relevant knowledge pursuant to s 27(8), it is imputed to him. The relevant legal principles have been neatly summarized in *Cheung Yin Heung v Hang Lung Real Estate Agency* which I gratefully adopt.[[42]](#footnote-42)

34. Ms Au for defendant relies on the following to show that the plaintiff first had the relevant knowledge more than 3 years before the present action commenced on 27 August 2013:-

1. by a letter dated 15 October 2009[[43]](#footnote-43) from the plaintiff’s former solicitors[[44]](#footnote-44) to the defendant’s former solicitors[[45]](#footnote-45), the plaintiff asserted that the alleged defamation as contained in the notice had caused him “extremely big mental damage” and “may in law have already constituted civil libel or even criminal libel” and he demanded compensation in the sum of $100,000; [[46]](#footnote-46)
2. in the consultation summary prepared by the Lady Trench General Out Patient Clinic dated 17 November 2009,[[47]](#footnote-47) the plaintiff was already diagnosed to have been suffering from “depressive disorder”;
3. by a letter from the plaintiff in person to the defendant dated 23 August 2010,[[48]](#footnote-48) the plaintiff alleged that the notices containing the alleged defamation “had taken away my right to work continuously and had caused me “extremely big mental damage”.[[49]](#footnote-49) The plaintiff said he “reserves the right to pursue”;[[50]](#footnote-50) and
4. it was in the above context that the plaintiff in his homemade Statement of Claim said that the defendant’s act had caused him to suffer depression “to the extent of “disability” and because of that he sought “economic remedy”. Up to now, the plaintiff has never pleaded any lack of the relevant knowledge on his part: see *Hong Kong Civil Procedure 2015*, §18/12/21.

35. Based on the evidence before me, I am unable to accept Ms Lau’s submission for the plaintiff that the treating doctor at Lady Trench might have not advised the plaintiff of her diagnosis of his condition. That, in my view, is inherent improbable. Besides, Ms Lau’s submission sits ill with what the plaintiff has said in his affirmation[[51]](#footnote-51) which he filed to resist to the present application. The plaintiff said,

“I first received treatment at Lady Trench General out-patient Clinic on 17th November 2009 for my insomnia, depressed mood, headache and dizziness. I was diagnosed as suffering from depression. I was given medication for two weeks. … My symptoms persisted. I became worried about my financial situation as I lost my job and I felt useless and hopeless. I went to seek treatment with my wife in Shenzhen between July and September 2010 for five times but my condition did not improve. …”[[52]](#footnote-52)

36. I also reject Ms Lau’s submission that 23 August 2010 was the day on which the plaintiff could reasonably be said to first have knowledge that his psychiatric condition was significant and that it was sufficient serious to justify his instituting proceedings for damages against the defendant.

37. I note that in the plaintiff’s Statement of Damages filed on 3 October 2014, it is asserted that he was “diagnosed [by] Lady Trench GOPC to have been suffering from depressive disorder, but he was unable to accept the psychiatric label, which he perceived as a sign of weakness, in contrast to his self-portray of a fighter against adversity.”[[53]](#footnote-53) I do not find this assertion of unwillingness to accept the psychiatric label as being inconsistent with the plaintiff having actual knowledge of what he had been told by his treating doctor in unambiguous terms. It is not the plaintiff’s case that he disagreed with the diagnosis of the treating doctor. In any event, in my judgment the aforesaid assertion does not assist him as regards imputed knowledge which is based on an essentially objective test.[[54]](#footnote-54)

38. I am satisfied and I find as a fact that the plaintiff first had the relevant actual knowledge on or before 17 November 2009. In any event, I also find that the plaintiff should be taken to have the relevant knowledge by that date pursuant to s 27(8) of the Ordinance. Therefore, I find that the action of the plaintiff, which commenced on 27 August 2013, is outside the secondary time limit from the date of knowledge.

*As to (c): the order of transfer*

39. Ms Lau submits that by not objecting to the transfer of the plaintiff’s action to the Personal Injuries List and not challenging the order of transfer, the defendant had consented to or acquiesced in the continuation of the plaintiff’s action and therefore they should not be allowed to raise the point of time limitation now. It is also argued that the learned master when making the order for transfer must have considered the issue of time limitation and exercised his discretion under s 30 of the Ordinance in favour of the plaintiff.

40. With respect, I am unable to accept any of the above submissions of Ms Lau. My reasons are as follows:-

1. listing is a pure administrative and case management matter: *Hong Kong Civil Procedure 2015*, §72/1/2;
2. it is trite that this point of law must be raised by an express plea: *Hong Kong Civil Procedure 2015*, §18/8/17. At the time when the order of transfer was made, the point had not been raised then by anyone and there is nothing to suggest that the learned master had considered s 30 of the Ordinance when he made the order of transfer;
3. the fact that the defendant did not object to the transfer does not mean that they agreed not to raise the time of limitation. They take issue of the limitation period, not the transfer of the action; and
4. there was nothing for the defendant to appeal against regarding the order of transfer.

41. In short, I see no substance in this point of the plaintiff.

*As to (d): the effect of time limitation on the action*

42. An issue arises as to whether the problem of time limitation taints the whole of the plaintiff’s action or just that part of his claims relating to personal injuries.

43. The point is discussed in McGee in his treatise *Limitation Periods*.[[55]](#footnote-55) The learned author says the following to which I gratefully adopt,

“The three year period applies where the damages include any claim for personal injuries. Thus the inclusion of a personal injuries element, however, slight, means that the three-year period applies to the whole action. Where the personal injuries claim is a small part of the claimant’s total loss it may therefore be thought more prudent to forego it.”

The learned author cites *Smith v Surrey Hampshire Borders NHS Trust* and *Azaz v Dento* in support of the above proposition.

44. Ms Lau submitted that *Azaz v Dento* is distinguishable on the ground that the claimant in that case relied on more than one cause of action and that he was making a number of other claims in additional to a claim of personal injury. With respect, Ms Lau seems to have misunderstood *Azaz*. Firstly, it was held in that case that s 11(1) of the Limitation Act 1980[[56]](#footnote-56) is not limited to causes of action, but applies to actions. It is manifest that the subsection is seeking to cover actions in which a claim for damages for personal injuries is one of a number of claims.[[57]](#footnote-57) Therefore, the fact that in the present case the plaintiff’s various heads of claim all stem out from the tort of defamation is not a distinguishing feature. Secondly, it was held that in multiple claims, the effect of the English provision was to render claims which were not for damages for personal injury also vulnerable to limitation defences to which they would not be vulnerable but for being packaged with the personal injury claim.[[58]](#footnote-58) As aforesaid, the damages which the plaintiff is seeking include a claim for damages for personal injury. As such, *Azaz* would also be applicable. Thirdly, it was held in *Azaz* that where a party has been invited to consider abandoning by amendment the personal injuries claim, and has made a considered decision not to do so, that party must expect s 11(1) of the English Act to be applied to him in its full rigour.[[59]](#footnote-59) Here, there is simply no question of saving the action by an amendment of the plaintiff’s claim, as he has at no stage indicated that he is prepared to abandon any part of his claim if the court rules against him on the issue of the applicable limitation period.

45. Applying *Azaz* to the present case, in my judgment the whole of the plaintiff’s action is tainted by the problem of time limitation. Therefore, subject to s 30 of the Ordinance, the whole of the plaintiff’s action would have been statute barred.

*As to (e): discretion*

46. The legal principles on the exercise of the discretionary extension of time limit under s 30 of Ordinance are well-settled. The court’s discretion is unfettered and it is a balancing exercise having regard to the following:-

1. the balance of prejudice to each party;
2. the six specific, but non-exhaustive, factors contained in s 30(3) of the Ordinance;
3. all the circumstances of the case to see whether it would be equitable to disapply the limitation period.

The above considerations are case specific. The onus of showing that it is equitable to allow the claim to proceed is on the plaintiff and that the onus is on the defendant to prove the prejudice they say they would suffer: see, eg, *Cheung* *Yin Heung v Hang Lung Real Estate Agency* *Ltd*.[[60]](#footnote-60)

47. As regards the six factors in s 30(3) as applied to the present case, I have the following observations:-

1. The length of the post-expiry delay is about 9 months.[[61]](#footnote-61) As regards the reason for the delay, I note that although the plaintiff once had a firm of solicitors acting for him, the involvement of the solicitors was limited to the writing of a letter. Subsequently, the plaintiff had tried to obtain legal assistance from various sources including the Legal Aid Department and the Bar Free Legal Service Scheme but to no avail.[[62]](#footnote-62) After that, for a substantial period of time up to the filing of the writ, the plaintiff had been acting in person. Legal aid was only granted to him on 15 April 2014. It appears to me that the delay, both before and after the expiry of the time limit, was mainly due to the lack of legal representation of the plaintiff.
2. As regards the effect of the delay on the cogency of the evidence, the defendant asserts that because of the delay, many records relating to the incident could no longer be traced, that a Mr Kwan whom the defendant described as its Chairman at the material time had passed away and that many of the then committee members of the defendant are no longer serving.[[63]](#footnote-63) However, I note that but for the inclusion of the personal injury claim in the plaintiff’s action, the original time limitation for the alleged defamation would have been 6 years and that period would not have expired until November 2015. Secondly, I note also that the defendant have not specified what documents they say have now lost, what the circumstances of the loss were given the fact the defendant had been warned of the potential lawsuit as early as 15 October 2009[[64]](#footnote-64) and how the loss would impact on their defence. Thirdly, the plaintiff is able to show, by the minutes of meeting of the defendant dated 21 April 2009, that the said Mr Kwan was not even a committee member, not to say its Chairman. Also, apart from one former committee member who is no longer an owner and apparently cannot now be traced, the other (former) committee members remain owners of the building.[[65]](#footnote-65) Lastly, as far as the personal injury claim is concerned, the major issue would likely to be whether the plaintiff’s depression was caused by the alleged defamation. I cannot see how the matters raised by the defendant in their affirmation could significantly impact on that issue which would depend mainly on medical and expert evidence.
3. As regards conduct of the defendant, I agree with Ms Au for the defence that this factor does not feature in the present case. I note that the Amended Statement of Claim were only filed on 3 October 2014 and after that there had been frequent exchange of correspondence between the parties regarding the issue of limitation in December 2014.[[66]](#footnote-66) The defendant’s summons for the present application was filed on 17 February 2015. I do not consider that the defendant has failed to raise the issue of limitation in a timely fashion. Although it is theoretically possible for the defendant to raise the issue of limitation immediately after the plaintiff had confirmed that his claim of damages included a claim of personal injury, I do not think that the defendant had acted unreasonably not to raise that point until after they had seen the plaintiff’s amended Statement of Claim and Amended Statement of Damages.
4. As regards the duration of any disability of the plaintiff arising after the accrual of the cause of action, Ms Lau said that the plaintiff had taken steps in trying to seek legal advice or assistance since October 2010 while he was still in receipt of treatment for his psychiatric illness at the time.[[67]](#footnote-67) It has not been suggested by Ms Lau that the plaintiff’s disability, if any, had contributed to the delay. So, this is a neutral factor in the present case.
5. As regards whether the plaintiff had acted promptly or reasonably, what I have said relating to (a) above is also pertinent here. I take into account the fact that the plaintiff had spent much time seeking free legal assistance and that he had for most of the time acting in person.
6. As regards the steps the plaintiff had taken to obtain medical and legal advice, I accept that he had taken steps to treat his psychiatric conditions both in Hong Kong and on the Mainland. I also accept that he had taken various steps to seek legal advice but to no avail.

48. Apart from the above observations, I note that it has all along been a major complaint of the plaintiff that he has, as a result of the alleged defamatory act of the defendant, suffered mental harm and depression. The defendant had been made aware of it. It is not the case that the plaintiff suddenly burst out the complaint of psychiatric injury. The defendant admit that they had not been paying too much attention to the plaintiff’s original claim which was relatively small and thought that it had been fully settled at the Labour Tribunal.[[68]](#footnote-68) That, in my view, is not a good reason for them not to better prepare for this case, especially bearing in mind that they have had the benefit of legal representation from the very beginning of their dispute with the plaintiff.

49. Having looked at this case in the round including but not limited to the balance of prejudice to each party and the six considerations in s 30(3) of the Ordinance, I am satisfied that the court’s discretion should be exercised in favour of the plaintiff by disapplying the time limitation and that it is equitable to do so in all the circumstances.

CONCLUSION

50. Based on the above, the defendant’s present application is dismissed.

COSTS

51. I note that the general rule is that costs should follow the event. However, in the present case, many of the plaintiff’s submissions are rejected by this court and that the defendant’s application is dismissed only on the narrow basis of this court exercising the s 30 discretion in favour of the plaintiff.

52. In the circumstances, I make an order nisi that there be no order as to costs for this application and that the plaintiff’s own costs be taxed in accordance with legal aid regulations.

( Alex Lee )

District Judge

Ms Julia Lau, instructed by Edmund Cheung & Co, assigned by the Director of Legal Aid, for the plaintiff.

Ms Helen Au, instructed by Cheung & Co, for the defendant

1. Dated 16.7.2009 [↑](#footnote-ref-1)
2. The original case no was DCCJ 3257/2013. [↑](#footnote-ref-2)
3. See p 4 of the Trial Bundle (“TB”), at § 4: “經常澈夜難眠，寢食不安，精神和身體都受到極大傷害，不能再過正常人的生活，已患精神抑鬱症，達到 “傷殘” 程度。” [↑](#footnote-ref-3)
4. Ibid [↑](#footnote-ref-4)
5. Ibid [↑](#footnote-ref-5)
6. See p5, TB: “在經濟上作出賠償”. [↑](#footnote-ref-6)
7. See the order of Master Yip at p21, TB. [↑](#footnote-ref-7)
8. The original case number assigned to the plaintiff’s writ. [↑](#footnote-ref-8)
9. See p25, TB: “根據案情的需要和本人的要求，珼申請將訴訟2013年第3257號，轉為人身傷亡案進行申索。” [↑](#footnote-ref-9)
10. See p26, TB. [↑](#footnote-ref-10)
11. Pursuant to the order of Master Ho dated 3.10.2014. [↑](#footnote-ref-11)
12. See § 26 at p44, TB. [↑](#footnote-ref-12)
13. See § 32 and item (2) of the prayer, at p52, TB. [↑](#footnote-ref-13)
14. Pursuant to the order of Master Chow dated 16.12.2014. [↑](#footnote-ref-14)
15. See p142-143, TB. [↑](#footnote-ref-15)
16. Pursuant to the order of Master Chow dated 16.12.2014. [↑](#footnote-ref-16)
17. See p152, TB. [↑](#footnote-ref-17)
18. See Submission of the Plaintiff dated 8.5.2015, at §9. [↑](#footnote-ref-18)
19. Supplemental Submission of the Plaintiff dated 2 June 2015, at §§53-55. [↑](#footnote-ref-19)
20. If the applicable time limitation is 3 years, then the primary limitation period (running from around 16.7. 2009) would have already been expired by the time of the writ was taken out (27.8.2013). [↑](#footnote-ref-20)
21. p25, TB. [↑](#footnote-ref-21)
22. Submission of the plaintiff. [↑](#footnote-ref-22)
23. [2002] 1 HKLRD 1, at 171-J [↑](#footnote-ref-23)
24. [2008] 1 AC 844 [↑](#footnote-ref-24)
25. 21st ed, at § 15-01 [↑](#footnote-ref-25)
26. [2004] EWHC 2101(QB) [↑](#footnote-ref-26)
27. [2009] EWHC 1759(QB) [↑](#footnote-ref-27)
28. [1990] 2 AC 605 [↑](#footnote-ref-28)
29. [1945] KB 11 [↑](#footnote-ref-29)
30. Ibid, at pp 18 & 19 [↑](#footnote-ref-30)
31. [1963] VR 621 [↑](#footnote-ref-31)
32. Ibid, at 623 [↑](#footnote-ref-32)
33. See *Stingel v Clark* (2006) 228 ALR 229, as per Hayne J, at §132 [↑](#footnote-ref-33)
34. [1965] 1 QB 232 [↑](#footnote-ref-34)
35. Ibid, at 241C-D [↑](#footnote-ref-35)
36. Ibid, at 242F [↑](#footnote-ref-36)
37. Ibid, at 245G- 246C [↑](#footnote-ref-37)
38. Ibid, at 246C-D [↑](#footnote-ref-38)
39. Ibid, at 247B-C [↑](#footnote-ref-39)
40. [1992] QB 197. This case stood for the proposition that the English equivalent of our s27 of the Ordinance did not apply to intentional tort. [↑](#footnote-ref-40)
41. Ante, at 857D-E [↑](#footnote-ref-41)
42. [2010] 3 HKLRD 67, at §§ 41-61. [↑](#footnote-ref-42)
43. p 226, TB [↑](#footnote-ref-43)
44. Messrs Lau & Chan [↑](#footnote-ref-44)
45. Messrs S K Lam , Alfred Chan & Co [↑](#footnote-ref-45)
46. “對唐生造成極大的精神損害，在法律上可能已構成對唐先生的民事誹謗甚至刑事誹謗。” [↑](#footnote-ref-46)
47. p 261, TB [↑](#footnote-ref-47)
48. p 230, TB [↑](#footnote-ref-48)
49. “既剝了我今後繼續工作的權利，又使我在精神上受到極大損害。” [↑](#footnote-ref-49)
50. “我將保留追究的權利” [↑](#footnote-ref-50)
51. Dated 7.3.2015 and filed on 13.3.2015, p197, TB [↑](#footnote-ref-51)
52. Ibid, § 7, at p 201. [↑](#footnote-ref-52)
53. § 5, p 137, TB. [↑](#footnote-ref-53)
54. See *Cheung Yin Heung v Hang Lung Real Estate Agency Ltd*, ante, at §51-54. [↑](#footnote-ref-54)
55. 7th edition, at § 8-006 [↑](#footnote-ref-55)
56. The English equivalent of our s 27 of the Ordinance. [↑](#footnote-ref-56)
57. Ante, at §54 of the judgment. [↑](#footnote-ref-57)
58. Ibid, at §55 [↑](#footnote-ref-58)
59. Ibid [↑](#footnote-ref-59)
60. [2010] 3 HKLRD 67 [↑](#footnote-ref-60)
61. As between November 2012 and August 2013, counting the 3 years from 17 November 2009. [↑](#footnote-ref-61)
62. See the plaintiff’s affirmation, §§10-20, at pp 203-207, TB [↑](#footnote-ref-62)
63. See the defendant’s 2nd affirmation, §§11-12, at pp 220-221, TB [↑](#footnote-ref-63)
64. See the letter from the plaintiff’s former solicitors to the defendant’s former solicitors dated 15.10.2009, at pp 226,TB [↑](#footnote-ref-64)
65. See the plaintiff’s 2nd Affirmation, §§12-16, at pp 338-339, TB [↑](#footnote-ref-65)
66. pp 320-330, TB [↑](#footnote-ref-66)
67. See Submission of the Plaintiff dated 8.5.2015, at §22. See also Supplemental Submission of the Plaintiff dated 2.6.2015, at §§55-56 where Ms Lau urged the court to exercise its discretion in favour of the plaintiff on the basis (now rejected by this Court) that there had only been a few days delay. [↑](#footnote-ref-67)
68. See the Defendant’s 2nd Affirmation, at §13, p221. [↑](#footnote-ref-68)