#### DCPI 453/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 453 OF 2008

BETWEEN

LAI KA YIN Plaintiff

and

CHAN YIU KEI Defendant

##### Before: Her Honour Judge Mimmie Chan in Chambers (open to public)

Date of Hearing: 6 August 2009

Date of Delivery of Decision: 6 August 2009

## D E C I S I O N

1. This is the Plaintiff’s application for leave to appeal from the order of costs which I made on 9 March 2009 that the Plaintiff is to have 50% of the costs of the action, varying the costs order nisi which I made when granting judgment after trial of the action.
2. It is clear from the transcript of the hearing on 9 March that I had already made it clear that I would not regard the Calderbank offer made by the Defendant to be relevant, when he had failed to make payment into court, an option open to the Defendant in these proceedings. However, it is also clear from my judgment delivered on 7 January 2009 that I accepted Dr Lam’s opinion that the Plaintiff’s injury was a very minor sprain, and that according to the physiotherapist, the Plaintiff had magnified her symptoms.
3. The low award of damages for pain and suffering, $50,000; the restriction of the award of pre-trial loss of earnings to a period of 42 days of sick leave up to 1 November 2006 and an additional 4 days for physiotherapy treatment, compared with the Plaintiff’s original claim up to 15 July 2007; and the failure to make any award for the Plaintiff’s future loss of earnings and loss of earning capacity all reflect the fact that I disbelieved the Plaintiff’s claim of alleged inability to work before July 2007 as a result of the accident.
4. I also disbelieved the Plaintiff’s claim regarding the reasonableness or necessity of her consultation with Dr Chu, and the expenses incurred in connection with these visits (see paragraphs 7 to 10 of my Judgment). The claim in respect of the loss of the vehicle, which was not owned by the Plaintiff, was also rejected for lack of evidence.
5. In whole, the Plaintiff has failed in 3 of the 5 heads of claim for damages. Out of a claim for $589,309, she was awarded $61,171.
6. In the circumstances of the case, if the Plaintiff had not pursued the 3 discrete issues of loss of future earnings, loss of earning capacity and damages for the loss of the car, the Defendant’s costs of defending these discrete claims could have been saved.
7. Costs are in the discretion of the court. The authorities are clear that an appellate court would only interfere with a trial judge’s exercise of discretion where the judge has erred in law or in principle, or if the judge has taken into account some matter which he or she should not have taken into account, or has left out of account some matter which he or she should have taken into account, such that the judge was plainly wrong. The advantage of the personal experience of the proceedings that the trial judge has over the appellate court has been emphasised in all cases. See, for example, *Ho Shu Kwong Wilson v Chiang Chun Yuan* CACV168 of 2002. The fact that the appellate court may exercise a discretion differently on the same facts is no ground to substitute its discretion for that of the trial judge.
8. Counsel for the Plaintiff seeks leave to appeal on the essential ground that there was no material on which I could properly exercise my discretion in only awarding half of the Plaintiff’s costs of the action to her, and that I had erred in law in so doing. However, applying the principles outlined above as to the appellate court’s approach to an appeal against a discretion exercised by the trial judge, I am not satisfied that there are reasonable prospects of success of the intended appeal, and do not grant leave.
9. The Plaintiff’s application is hence dismissed with costs.

# (Mimmie Chan)

# District Judge

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

Mr. Felix Li, instructed by Messrs. Deacons, for the Defendant