## DCPI 569/2015

[2018] HKDC 542

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 569 OF 2015

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BETWEEN

ERWIANA SULISTYANINGSIH Plaintiff

and

LAW WAN TUNG Defendant

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Before: Her Honour Judge Winnie Tsui in Chambers (Open to Public)

Date of Hearing: 11 May 2018

Date of Decision: 11 May 2018

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DECISION

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*Introduction*

1. This is the defendant’s application for leave to appeal against the assessment of damages dated 21 December 2017.
2. In her amended summons, the defendant also sought leave to appeal against the order which I made at the assessment hearing on 4 December 2017 refusing her application to rely on documents not previously disclosed by her at the assessment. However, in the course of her submissions this morning, Ms Stephanie Wong, counsel for the defendant, confirmed to the court that the defendant no longer wishes to pursue that application and would accordingly withdraw the first proposed ground of her appeal, ie para 1(a) of the amended summons.
3. That leaves only one proposed ground of appeal, namely that I erred in awarding excessive damages under the head of pain, suffering and loss of amenities. In addition, the defendant also applies for stay of execution pending appeal.

*Legal principles*

1. The principle governing the threshold for granting leave to appeal is not in dispute. The applicant needs to show that the appeal has a “reasonable prospect of success” or there is some other reason in the interests of justice why the appeal should be heard: section 63A(2) of the District Court Ordinance, Cap 336.
2. On the “reasonable prospect of success” limb, “an applicant is required to show more than just an arguable case, but an appeal that has merits and ought to be heard, although he does not have to demonstrate that the appeal will probably succeed”: *Wynn Resorts (Macau) SA v Mong Henry* [2009] 5 HKC 515 at para 19, *per* Chu J. In *SMSE v KL* [2009] 4 HKLRD 125, Le Pichon JA observed that “reasonable prospect of success” involves the notion that the prospects of succeeding must be “reasonable” and therefore more than “fanciful”, without having to be “probable” (at para 17).

*The only proposed ground of appeal*

1. In the assessment, I awarded the sum of $450,000 for PSLA – see paras 33 to 35. In her written submission, Ms Wong submits that the circumstances and my factual findings did not amount to a sufficient basis for the award.
2. She refers to the four categories of disablement set down by the Court of Appeal in *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657. Her submission is that the injuries suffered by the plaintiff in the present case fell below the “serious injury” category, given that no permanent physical disability was sustained.
3. In this regard, Mr Tony Ko, counsel for the plaintiff, cites the decision of Bharwaney J in *Wong Man Kin v Golden Wheel (C & HK) Transportation Co Ltd* [2015] 5 HKC 570 in which the figure for the starting point for an award in the “serious injury” category (which is the least serious category amongst the four) was revised upwards to $510,000 to allow for inflation – see para 48 at footnote 3.
4. Ms Wong accepts that to be the latest position. Her submission is that the PSLA award which I made was excessive because an appropriate award should have been *well* below any award under the “serious injury” category.
5. It must be noted at this juncture that the award which I made in the sum of $450,000 is indeed below the lowest figure for any injury falling within the “serious injury” category. It is not marginally lower. There is a difference of $60,000.
6. In support of her submission that the award should have been *much* lower, Ms Wong relies on three cases, namely:-

(1) *Chan Chung Lop v Chan Yun Sun* [1999] 3 HKLRD 442;

(2) *Cheng Lai Kwan v Nan Fung Textiles Ltd* [1998] 2 HKLRD 729; and

(3) *Lee Yuk Lan v Royaltelle International Ltd t/a The Royal Garden* HCPI 187/1995, 5 August 1999.

1. She highlights that the similarity between these three cases and the present case is that none of the plaintiffs suffered from any permanent disability. Yet, the awards in these three cases are *much* lower than the present award. They were $140,000, $150,000 and $150,000 respectively.
2. I do not consider that the three authorities provide any useful comparison in the present case. The first case involved an one-off incident of assault. The second involved minor injuries as a result of a fall when the plaintiff was trying to put out a fire in a factory. In the third case, the plaintiff slipped in a corridor in her workplace and sprained her back. They are a far cry from the present case, in terms of the extent of injuries, their severity, and the circumstances in which the injuries were sustained. They are also dated decisions, which all go back to the late 1990’s.
3. There is bound to be a range of appropriate PSLA awards even if the injuries in question do not result in any permanent disability.
4. The three authorities cited by the defendant are of no assistance to the court in assessing PSLA in the present case.
5. Mr Ko points out that in making a PSLA award, the starting point is a comparison of the injuries in the case in question with injuries in similar cases in which awards have already been made. Consideration should then be given to any special feature which might influence the award in the particular case and only then, when a tentative conclusion will already have been reached, should attention be turned to the established guidelines. It has been made clear that the categories of injuries laid down in *Lee Ting Lam* are not meant to confine damages in a straitjacket: *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2 HKLR 650 at 653. The remark was repeated by the Court of Appeal more recently in *Chan Yuk v Dragages Et Travaux Publics (H.K.) Ltd* [2000] 3 HKLRD 1 at para 10.
6. At the assessment hearing, in line with the above approach, Mr Ko invited the court to look at the PSLA awards in a number of comparable cases. I highlighted two of them in my judgment and came to the award of $450,000.
7. At today’s hearing, Mr Ko refers the court to the approach adopted by the Court of Appeal when considering an appeal from an assessment of damages, *Cheung Kai Chi v Chun Wo Contractors Ltd* [2008] 1 HKLRD 102 (at paras 69 to 72):-

“69. Assessment of damages can never be absolutely accurate and the Court of Appeal must respect the decision of the trial judge who had heard the evidence.

70. The Court of Appeal would only interfere with the assessment of damages if the trial judge was found to be in serious error or acting upon a wrong principle of law or that the amount awarded was so high or so small as to make it, in the judgment of the appellate court, an entirely erroneous estimate.”

1. It is therefore for the defendant here to specify the error which has been committed in the course of the assessment, such error being of the nature as envisaged in *Cheung Kai Chi*.
2. In her oral submission, Ms Wong contends that the PSLA award which I made was so high that it was an entirely erroneous estimate. However, at the same time, Ms Wong expressly confirms that she does not take issue with my reliance on the two cases cited in the assessment. In the circumstances, I fail to see how the award which I arrived at can be said to be so high as to be entirely erroneous.
3. I consider that the proposed ground concerning PSLA has no reasonable prospect of success.

*The stay application*

1. Ms Wong accepts that if the defendant has no arguable appeal, then no stay of execution should be granted. As Ma J said in *Star Play Development Ltd v Bess Fashion Management Co Ltd* [2007] 5 HKC 84 (at para 9(6)), the existence of an arguable appeal (that is, one with reasonable prospects of success) is the minimum requirement before a court would even consider granting a stay.
2. In the present circumstances, I refuse to grant the stay as sought by the defendant.

*Order*

1. The proposed ground of appeal pursued by the defendant has no reasonable prospect of success. There being no other reason why the appeal ought to be heard, I dismiss the defendant’s application seeking leave to appeal. I also dismiss her application for stay of execution pending appeal.

*( Discussion re costs )*

1. The plaintiff do have costs of the amended summons. The plaintiff’s solicitors having waived their right under Order 62, rule 9C(1)(b) of the Rules of the District Court, I summarily assess the costs in the sum of $70,000, payable within 14 days from today.

( Winnie Tsui )

District Judge

Mr Tony Ko, instructed by Boase Cohen & Collins, assigned by the Director of Legal Aid, for the plaintiff

Ms Stephanie Wong, instructed by Ching & Co, for the defendant