###### DCPI 1092/2010

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1092 OF 2010

--------------------

##### BETWEEN

#### TAM OI LIN Plaintiff

### and

#### SIU HON MING Defendant

--------------------

Coram : His Honour Judge Chow in Chambers

Date of hearing : 31 August 2012

Date of Decision : 3 October 2012

-----------------------

DECISION

-----------------------

1. This is the defendant’s application for leave to appeal against my judgment dated 10 February 2012. The grounds supporting the application centre on 3 heads of damages, namely, tonic food, acupuncture fees and loss of earning capacity.

*Tonic food*

1. The defence counsel, Mr Cheng, submits that it was not open for this court to allow the plaintiff’s receipted amount in full, stating:

‘The Court’s approach to tonic food has been definitively laid down by Roberts CJ in *Yu Ki v Chin Kit Lin* [1981] HKLR 419, as approved by the CA in *Kings Light Industrial Limited v Lo Wai Keung* [1994] 3 HKC 54 at 65:-

“Nourishing food:

……….

At p.479, McMullin J expressed the view that there should be some evidence put before the court to support the advisability of special food.

In this instance, there was no evidence that any doctor, or herbalist or person with any special medical knowledge, had suggested that the nourishing food which was supplied was advisable or suitable; only the son himself …

However, it seems to me to be proper, even in the absence of the necessary evidence required as to the advisability or suitability of the food, to allow a nominal sum, where relatives have spent this on food which the injured person or the relative reasonably believes to be helpful to the plaintiff’s recovery …”’

Mr Cheng submits that if the sum claimed is challenged, it must be proved that the sum claimed was suitable. In this regard, the court would require some evidence to support the suitability of the sum claimed. This involves evidence from any doctor, herbalist, or person with medical knowledge. The plaintiff’s own evidence is blatantly insufficient.

1. In *Mui Ling Kwan and anor v Wong Yin Wah & others* [1973] HKLR 465, McMullin J expressed the following view at p 479:-

“What is important in every case is that there should be some evidence put before the court, where a special food is the subject of a claim, to support the advisability of that form of treatment. In the present case no evidence of that kind was given not even by the plaintiffs themselves.”

Thus, evidence of the advisability of tonic food can also be given by the injured person. The plaintiff did give evidence relating to the advisability of taking the tonic food. The tonic food taken by her were fish maw, deer tendon, radix astragali, root of pilose asiabell, dried dioscorea, birds nest, tonic alcohol to strengthen bones, ucommia ulnoides, pseudo ginseng. She testified on the advisability of the tonic food. When she was consuming the tonic food, she could feel that her leg had recovered some strength. The following extract of evidence shows that this is the case:-

“Q. And why did you – who recommended you to take these items of tonic food?

A. The acupuncture practitioner.

Q. And was there any use in taking these items?

A. My wounds could recover sooner.

Q. Did you actually notice the difference between the healing before you started to consume this, is it?

A. Because all along when I was consuming those items, I could feel that my leg had recovered some strength.

……….

Q. And what was the benefit of these items, just remind us.

A. So that the bones would become stronger and the wound would heal better.”

(Underlines provided)

1. The plaintiff was advised to take the tonic food by an acupuncture practitioner, a Mr Cheng Po Hang. He is a registered Chinese medical practitioner (p 137 of trial bundle). He recommended her to buy the tonic food. Thus there is ample evidence to support the advisability of taking the tonic food.
2. Mr Cheng submits that the plaintiff admitted under cross-examination that she was not advised to purchase the tonic food (transcript p 43M-W). Thus, this court could only allow a nominal sum to recover the expenditure on tonic food. The transcript at p 43M-W shows the cross- examination relevant to this issue:-

“Q. In the present case you were not asked by a Chinese doctor to purchase those tonic food?

A. No.”

The question was wrongly asked. The document at p 137 of the trial bundle is self-explanatory. The transcripts from p 137 to p 216 show the number of times of acupuncture administered and the charges made by Mr Cheng Po Hang. It is common knowledge that Chinese medical practitioners often advise patients to take tonic food. Mr Cheng Po Hang recommended the plaintiff to take tonic food. He is a registered Chinese medical practitioner; so the plaintiff was advised by a Chinese doctor to purchase those tonic food.

1. Mr Cheng submits that the tonic food was purchased between September 2009 and January 2010. The plaintiff did not explain why the tonic food was only purchased more than 1 year after the accident, and when she almost recovered. He submits that she recovered 80-90% by December 2008, and the whole person impairment ranged between 2% and 5-6%. In September 2009, the metal plate in her leg had just been taken out the second surgery and the nerves had been affected and she wanted to go more frequently for acupuncture, so that there was a chance that she could recover sooner. So it must be that Mr Cheng Po Hang advised her to purchase the tonic food around the time she had her second surgery, so as to help her to regain bodily strength. During this time she did purchase tonic food, for the purpose of improving her strength. She is absolutely entitled to do that. Her claim for tonic food is totally justified.

*Acupuncture fees*

1. Mr Cheng submits that the court can award damages for Chinese medical treatment sought if it established that the cost of treatment was reasonable, that the plaintiff had some faith in its possible efficiency and that the money claimed was in fact spent. In the absence of the advisability of such treatment, the court again should award a nominal sum. The plaintiff admitted that she just heard that acupuncture was beneficial, and following the case of *Lam Pik Kuen v Lee Fai Ming* HCPI 7/1998, this court erred in not just awarding a nominal sum to the plaintiff, which the defendant suggests to be $2,000. In any event, the amount claimed cannot be reasonable or justified. The following pieces of evidence given by the plaintiff shows that the treatment of acupuncture had a good effect on her:-

“Q. So what do you say about the effectiveness of the acupuncture?

A. Acupuncture was able to ease my pain from cramps, sometimes that happens.

Q. Right. Why did you attend so regularly between 3 November and 10 December?

A. The practitioner came to my home to see me. I never went there.

…..

Q. And you see from page 44 that from February onwards it was about twice a month.

A. Yes.

Q. Why did the frequency change?

A. Because the extent of pain had lessened compared to the beginning and so I want to go less because acupuncture itself is a painful thing.

…..

Q. And how much did you pay for each session?

A. Over 1,000.

Q. And we see in fact you have receipts in the total sum of over $78,000, in fact, 7-8-6-2-0. Do you confirm you did, in fact, spend this sum?

A. Yes, I confirm that.

Q. And what would you say overall has been the effect of the acupuncture treatment?

A. My cramps happened less frequently because at the very beginning after the operation I had cramps about two times a week, or over two times a week. After I started the acupuncture treatment the situation improved. Sometimes I did not experience any cramps at all in a week.

Q. Any other benefits?

A. The stretching movements of my leg was better, more flexible.

Court: Did you have cramps prior to the accident?

A. No.”

(Underlines added)

The treatment was done by Mr Cheng Po Hang. It is effective to reduce or to eliminate the cramps she suffered.

1. To support his contention for objecting to the award relating to acupuncture fees, Mr Cheng cited the case of *Chan Sze Ki v Department of Justice* [2005] 3 HKLRD 520. In that case, Suffiad J disallowed the claim for acupuncture entirely, because there was no evidence that the plaintiff had been advised to seek acupuncture treatment particularly when the plaintiff had all along been treated by conventional western medicine. In the case of *Chan Sze Ki*, there is scanty evidence set out in relation to the treatment of acupuncture. So Suffiad J could not be laying down a general rule of law. In the present case, the plaintiff’s explanation for consulting an acupuncturist is as follows:-

“Q. Why did you start to consult an acupuncturist?

A. Because at the beginning I was doing physiotherapy sessions and the effect was not so good. The progress had not been very good and I heard from others that acupuncture was a good thing so I tried it out.”

The plaintiff of course turned to acupuncture when the conventional western medical treatment could not help to improve further. It turns out that it is effective. It is more than reasonable for her to seek the treatment of acupuncture when physiotherapy was not so effective. She is entitled to protect her health.

1. Mr Cheng refers to paragraph 17 of the judgment. He says that this court refused to find the plaintiff’s claim excessive because the defendant did not show what ought to be the yardstick of reasonableness in the present case. This court must have wrongly shifted the burden of proof onto the defendant. He states that this court must have wrongly tainted the court’s assessment as to whether the plaintiff’s claim was reasonable. Under paragraph 17, the sentence is “the defence counsel did not put forward a yardstick to show how the number of acupuncture is excessive”. There is nothing in the sentence relating to “what ought to be the yardstick of reasonableness in the present case”.

*Loss of earning capacity*

1. Mr Cheng submits that this court erred in accepting the plaintiff’s oral evidence-in-chief, that she estimated her chance of losing her employment at Keysun at 50%, and thereby concluding that there would be a real and substantial risk. He submits that such approach was not open to this court, as it was incongruous with the objective evidence that she has been employed by Keysun for nearly 20 years (and continuing). The fact that the plaintiff has been employed for nearly 20 years is no guarantee that she would not lose her employment. The annual profit of Keysun has been decreasing. In 2010-2011, the annual profit dropped from $100,000 to $50,000 - $60,000. In early 2010, 1 staff member was dismissed and no replacement has been made. There is no fresh capital injection. In light of its poor financial situation, the length of employment of the plaintiff cannot guarantee her continuation of employment with Keysun.
2. Mr Cheng submits that this court erred in not doubting the credibility of her oral evidence, because it is clearly contradicted by the objective, indisputable evidence. He further submits that the plaintiff failed to satisfy the test laid down in *Moeliker v Reyrolle & Co Ltd*. This court ought to have awarded no damages to the plaintiff. In my judgment her credibility could not be doubted.
3. Mr Cheng submits that this court erred in finding that the plaintiff lost her competitiveness as an accounts clerk. In para 22.1 of the written submission, Mr Cheng submits that at paragraph 10 of the judgment, this court referred to the allegation that the plaintiff would be limited when she travelled to and worked in Mainland China, and when she told her to carry files up and down to storeys of the building, and that the plaintiff was referring to her colleagues work. He submits that there is no evidence that other jobs as an accounts clerk would also involve extensive travelling and walking every day.
4. On p 28 of the transcript, the plaintiff said that that was what her colleagues in Mainland China told her when she communicated with them. She was referring to places far away from the place where she got off in Mainland China. If she is employed by a Hong Kong company as an accounts clerk to work in Mainland China, of course she may have to walk for some distance from the station where she gets off from the vehicle.
5. Mr Cheng refers to the surveillance tapes, which showed that the plaintiff had no difficulty to walk long distances after work, and to lift shopping bags etc. She explained that the things she lifted in the bags were not heavy. Mr Cheng submits that this could not discount her apparent ability to meet daily physical demands. The scenario she referred to is travelling to and working in Mainland China where she may have to carry files up and down the storeys of buildings. It is not just mere walking for long distances. Before the accident, she was still able to lift or move heavy account files, but after the accident, she was unable to do so. She had to get her colleagues to help her.
6. Mr Cheng submits that in cross-examination, the plaintiff admitted that her employer trusted her and she was competent, and this would not have been the case, if she had significant limitation in performing her work, or that she would require extensive help from her colleagues. The relevant cross-examination is set out below:-

“Q. Very well, do you agree that your boss, Mr Cheung (?) I suppose, trust you?

A. Yes.

Q. And you are – you were and you are competent in your job, do you agree?

A. yes.”

The cross-examination did not deal with “being trusted” and “being competent” in the context of her limitation in performing her work, or requiring extensive help from her colleagues. So the conclusion purportedly drawn by Mr Cheng is not supported by evidence.

1. In paragraph 23 of the defendant’s submission, Mr Cheng submits that this court erred to distinguish *Cheung Kwong Hon* from the present case. I have dealt with the case of *Cheung Kwong Hon* under para 15 of the judgment. The conclusion of the judgment that *Cheung Kwong Hon* involves an entirely different scenario cannot be faulted.
2. Mr Cheng submits that the award of $100,000 is simply excessive in the circumstances. At the time of judgment, the plaintiff was 45. She has about 20 years ahead of her for working, an award of $100,000 cannot be in any way excessive.
3. The defendant’s grounds have no merits at all. I dismiss the application for leave to appeal.
4. I make an order nisi, to be made absolute in 14 days’ time, that the defendant do pay costs of this application, to be taxed, if not agreed, with certificate for counsel.

(S. Chow)

District Judge

Mr Ashok K Sakhrani, instructed by Cheung & Liu, for the plaintiff

Mr Alfred C P Cheng, instructed by Winnie Leung & Co, for the defendant