DCPI 1098/2016

[2019] HKDC 927

**IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.1098 OF 2016

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BETWEEN

LEE CHI CHIU by LEE SHUK FAN,

his next friend Plaintiff

and

WU TAI ENGINEERING LIMITED 1st Defendant

MANHING ENGINEERING COMPANY,

a firm 2nd Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Before: Deputy District Judge S.H. Lee in Chambers (Not open to public)

Date of Hearing: 19 June 2019

Date of Decision: 12 July 2019

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**DECISION**

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1. Should a plaintiff of personal injuries proceedings who had a next friend appointed by court for him in the middle of the proceedings be awarded costs of the action on common fund basis all along or as from some cut-off date in the middle when parties’ compromise of the action is approved by court?
2. This issue was hotly argued before me by Mr Wong appearing for the plaintiff (**Mr Wong**) and by Mr Yeung appearing for the 1st defendant (**Mr Yeung**) (and arguing for both defendants)[[1]](#footnote-1) when I heard plaintiff’s inter parte summons[[2]](#footnote-2) (**the Summons**) taken out under O.80 rr.10-12, Rules of District Court (**RDC**)[[3]](#footnote-3).

*The Summons*

1. By para 1 of the Summons, the plaintiff seeks an order that the defendants pay $X[[4]](#footnote-4) (inclusive of $Y being employees’ compensation) in full and final settlement of his common law claim against them for injuries he sustained in an accident in May 2013 (**the 1st Accident**). Para 2 thereof provides for credit to be given for $Y already received and for the balance of settlement sum in the sum of $Z (**the Balance**) to be paid into court by the defendants. Para 3 & 4 thereof deal with the disposal of the Balance paid into court.
2. Para 5 of the Summons is in issue. The plaintiff asks that the defendants “do pay the Plaintiff’s costs of this Action (including the costs of this Application) on a common fund basis, on District Court Scale, to be taxed if not agreed”.
3. Para 6 of the Summons provides for discharge of the defendants from all their liabilities in respect of plaintiff’s claim for the 1st Accident upon payment of the Balance and plaintiff’s costs.
4. By para 7 of the Summons, the plaintiff asks for taxation of plaintiff’s own costs in accordance with Legal Aid Regulations.
5. In their memorandum for approval of settlement lodged on 31 May 2019, the plaintiff’s solicitors confirmed[[5]](#footnote-5), pursuant to para 190 of Practice Direction 18.1 (**PD18.1**), that “there is no non-recoverable disbursementthat we seek to charge against the Plaintiff” and they further confirmed that they “would waive common fund costs against the Plaintiff since such costs is recoverable from the Defendants”.
6. Subsequently, in their supplemental memorandum lodged on 18 June 2019, the plaintiff’s solicitors referred to letter received from 1st defendant’s solicitors disagreeing with costs being taxed on common fund basis and said[[6]](#footnote-6): “Whilst we remain willing to waive costs that may not be recoverable from the Defendants, we are not able to confirm that there is no non-recoverable disbursement under such circumstances, in particular given that the Plaintiff is under the assistance of the Director of Legal Aid (underline supplied)”.

*Background history*

1. For the present purpose, the background history can be given as follows.
2. Mr Lee Chi Chiu, the plaintiff, was a scaffolder. In May 2013, at the age of 35, he met the 1st Accident at a construction site involving the defendants. He fell from a scaffold and got injured.
3. In May 2016, plaintiff’s solicitors issued this action against the defendants on his behalf.
4. On 13 Feb 2017, the plaintiff unfortunately met another accident at work (**the 2nd Accident**).
5. According to medical report dated 31 Dec 2017 (**the 31/12/17 Report**) of Dr Jason Ho Man Kit (**Dr Ho**), a resident with the Department of Neurosurgery of the Prince of Wales Hospital (**PWH**), the plaintiff fell from height of 3 storeys whilst on duty at a construction site in the 2nd Accident (it is common ground that it had nothing to do with the defendants) and he was admitted under care of Neurosurgery of PWH via Accident & Emergency Department of PWH.
6. According to the 31/12/17 Report, the plaintiff sustained multiple injuries, including right temporal and parietal bone fractures, left temporal lobe contusion, falx and interpeduncular subarachnoid hemorrhage[[7]](#footnote-7).
7. For his traumatic brain injury, burr hole with external ventricular drainage was performed on the plaintiff immediately after admission. Intracranial pressure remained high despite medication. Left decompressive craniotomy with clot evacuation was performed on him on 14 Feb 2017[[8]](#footnote-8).
8. On the same date of 14 Feb 2017, legal aid was granted to the plaintiff[[9]](#footnote-9) for this action with plaintiff’s solicitors being his assigned solicitors. And directions were given by Master on 22 Feb 2017 for orthopedic experts of plaintiff and 1st defendant[[10]](#footnote-10) to examine the plaintiff jointly in Apr 2017 to prepare a joint expert report.
9. In Apr 2017, parties’ solicitors jointly informed Master of the 2nd Accident and obtained directions, inter alia, to defer joint medical examination to Aug 2017.
10. In July & Aug 2017, parties’ solicitors again jointly wrote to Master asking to defer joint medical examination with plaintiff’s solicitors advising court that they were not able to take instructions from the plaintiff.
11. In Nov 2017, counsel was assigned by the Legal Aid Department to act for the plaintiff.
12. At checklist review hearing in Dec 2017, the joint medical examination was ordered to proceed in Feb 2018. It took place as scheduled in Feb 2018 and the 2 experts completed their joint medical report dated 10 May 2018 (**the JMR**).
13. According to the JMR, the plaintiff attended the examination accompanied by his elder sister, Madam Lee Shuk Fan (**Mdm Lee**). Mdm Lee assisted the plaintiff in giving the history. On examination, while the plaintiff could answer questions[[11]](#footnote-11), he had considerable loss of memory regarding many aspects including his previous injuries and previous work. Some surveillance video footage capturing plaintiff doing scaffolding works in July 2016 was also reviewed by the 2 experts in preparing the JMR.
14. In June 2018, parties’ solicitors jointly wrote to Master enclosing the 31/12/17 Report and another medical report dated 17 May 2018 by Dr Ho (**the 17/5/18 Report**) with plaintiff’s solicitors advising court that they were *just* given to understand that the plaintiff was opined to have impaired mental capacity and time was required to obtain approval from the Director of Legal Aid to make application under O.80, RDC, to appoint Mdm Lee as his next friend.
15. According to the 17/5/18 Report, it was prepared by Dr Ho for providing further information to the 31/12/17 Report in response to request from plaintiff’s solicitors. It reads: “This patient has impaired mental capacity to handle his own matters or affairs and to make reasonable decision on his own. Please consider seeking opinion from … psychiatry if detailed mental capacity assessment is required”.
16. At checklist review hearing in June 2018, Master directed that O.80 application, if any, to appoint next friend for the plaintiff should be taken out before 1 Nov 2018.
17. On 18 July 2018, legal aid to the plaintiff for this action was discharged. On 1 Aug 2018, legal aid was granted to Mdm Lee[[12]](#footnote-12) *for the plaintiff* in this action with plaintiff’s solicitors remaining assigned solicitors for her.
18. On 31 Oct 2018, plaintiff’s solicitors took out application under O.80 r.3, RDC, to “add Mdm Lee as next friend of the plaintiff who since action brought has become a mentally incapacitated person (**MIP**) for purpose of O.80 of RDC”. An affirmation of Mdm Lee was filed in support on the same date, referring to the 2nd Accident and exhibiting the 31/12/17 and 17/5/18 Reports.
19. The usual consent to act as next friend and certificate of solicitor as required by O.80, RDC, were filed on the same date. In the latter certificate, plaintiff’s solicitors believed plaintiff to be MIP under O.80, RDC, based on viewing the 31/12/17 and 17/5/18 Reports.
20. On 13 Nov 2018, after hearing solicitors for all parties, a District Judge ordered that “Mdm Lee be added as next friend of the plaintiff who since action brought has become MIP for purpose of O.80 of RDC” and that this action be continued between the plaintiff by Mdm Lee as his next friend and the defendants.
21. On 9 May 2019, at a mediation session attended, inter alia, by Mdm Lee, parties reached full settlement of this action.
22. On 31 May 2019, the Summons was taken out by plaintiff’s solicitors. Mdm Lee filed another affirmation referring to defendants’ settlement offer of $X made at mediation session, which offer she accepted after considering counsel’s advice[[13]](#footnote-13), and she asked for court’s approval of the settlement.

*The rival contentions*

1. Mr Yeung for the defendants asks this court to order the defendants to pay the plaintiff the costs of this action before 17 May 2018[[14]](#footnote-14) (i.e. the date of the 17/5/18 Report) on party and party basis and the costs of this action thereafter on common fund basis.
2. The primary stance of Mr Wong for the plaintiff is to ask for an order in terms of para 5 of the Summons. If so ordered by this court, as confirmed in a letter dated 21 June 2019, plaintiff’s solicitors offered to undertake to this court that they “will not charge the plaintiff any further legal costs or disbursements in this action not recoverable from the 1st and 2nd defendants after taxation thereof on a common fund basis” (**the Primary Undertaking)**.
3. By way of fallback submissions, Mr Wong asks this court to adopt the date of the 2nd Accident i.e. 13 Feb 2017 as the cut-off date to award costs on party and party basis before and on common fund basis *thereafter* and plaintiff’s solicitors offered in the same letter dated 21 June 2019 that “they will not charge the plaintiff any further legal costs or disbursements in this action not recoverable from the 1st and 2nd defendants after taxation thereof on a party and party basis and/or a common fund basis as and where applicable in accordance with the Orderherein below” (**the Fallback Undertaking**).

*P’s submissions*

1. In arguing for an order in terms of para 5 of the Summons, Mr Wong relied on the general rule or practice of the court awarding costs on a common fund basis in approving settlement involving persons under disability.
2. Mr Wong prayed in aid: -

1) the judgment of Suffiad J. in *Tai Chau Yung & Another v Ng & Another* [1999] 2 HKLRD 549, 552H-553H;

2) the decision of Bharwaney J. in *Fong Yau Hei by next friend v Gammon & Others*, unreported, HCPI 1222/2003, 25 Oct 2017, para 20 to 27; and

3) the practice note of Bharwaney J. in *Lam Yin Pok Bosco, a minor by next friend v Dr Chan Yee Shing* [2019] HKCFI 1025, para 9,

to ask for the usual costs order on common fund basis from this court in giving approval to the settlement set out in the Summons.

1. The reason, said Bharwaney J. in *Fong Yau Hei*¸ supra, at para 20, is to ensure that the settlement sum is not diluted by any costs and disbursements that the plaintiff’s solicitors cannot recover from the defendant. The court cannot assess the reasonableness of the settlement sum and grant approval for the settlement if it does not know how much of that sum would be required to pay the plaintiff’s legal costs and disbursements.
2. The usual order after trial is that the winning party gets his costs to be taxed, if not agreed, on a party and party basis[[15]](#footnote-15). In the case of a settlement involving a person under disability, the court will not approve the settlement unless costs are taxed on a common fund basis. Without such an order as to costs, the court would not know how much of the settlement sum will be diluted by the need to pay the plaintiff’s solicitors costs that are not recovered from the defendant and, therefore, cannot assess the reasonableness of the settlement sum: per Bharwaney J. in *Lam Yin Pok Bosco*, supra, at para 9 at p.10.
3. Mr Wong referred to the commentary at para 80/12/14 of *Hong Kong Civil Procedure 2019*, Vol.1, where it is said that:

“A compromise of a claim on behalf of a minor or an infant has to include an agreement in respect of costs… without such agreement it is not a full compromise to put before a court for its approval. The court is asked to approve a fixed sum of money as reflecting a proper settlement. If there is any *uncertainty* as to whether the proposed settlement figure may be *reduced* by any liability for costs, it may not be approved. In any event, the solicitors representing the plaintiff will be required to explain such potential liability fully. In *normal circumstances*, *where the settlement provides for costs on a common fund basis*, solicitors will be expected to waive any claim for further costs. This is because the basis of common fund costs is a reasonable amount in respect of all costs reasonably incurred. The corollary is that any costs not recoverable from the defendant on this basis are deemed to be not reasonable and not reasonably incurred (italics added)”.

1. Mr Wong further referred to commentary at para 80/12/17 of *Hong Kong Civil Procedure 2019*, Vol.1, where it is said that:

“The court’s expectation that costs will be paid on a common fund basis is predicated on the basis that such basis is *reasonable and proper remuneration* (on a more generous basis than party and party costs) and that the settlement figure proposed is the sum that the plaintiff under a disability will receive (italics supplied)”.

1. This court is referred to para 189 of PD18.1 (in Part X: “Actions by Persons under Disability”) which reads: “*Save as is otherwise ordered by the Judge* the *proper order* for costs in respect of such compromised proceedings is on a common fund basis” (italics supplied).
2. It is submitted that *cause* or *fault* has no bearing on the exercise of court’s discretion to award costs in approving compromise of persons under disability. In any event, it is not suggested that the plaintiff has inflicted injuries on himself to cause him to become a MIP. He was also a victim in the 2nd Accident.
3. The undeniable fact is that Mdm Lee has by order of court been appointed next friend of plaintiff, with him as MIP under O.80, RDC, on the basis of medical evidence put before the court and that the said order has not been opposed at the hearing it was obtained, has not been set aside nor appealed therefrom afterwards.
4. The protection of the interest of a person under disability is, plaintiff’s solicitors argued, the *primary* consideration in approval of compromise by court. For the same consideration, Master Barnes, after having considered *Tai Chau Yung*, supra, varied a costs order nisi to require the defendant to pay the costs of an assessment from originally party and party basis to common fund basis in the case of *Wai Yin Wa by her next friend v Laminate Enterprises Ltd*, unreported, HCPI 514/1997, 23 Dec 1999.
5. The fact that a MIP is involved in this application for approval alone, it is submitted, triggers the general rule in the case law, the commentary and PD18.1. There is nothing (such as unreasonable conduct on plaintiff’s part that has increased the costs of the action) that requires this court in this case to depart from the general practice or the usual costs order in approving this compromise involving a MIP i.e. the plaintiff.
6. An order in terms of para 5 of the Summons, it is submitted, will not dilute the agreed settlement sum payable to the plaintiff by reason of any costs or disbursements of plaintiff’s solicitors not recoverable from the defendants. With the Primary Undertaking offered by plaintiff’s solicitors, no order of legal aid taxation of plaintiff’s own costs is required by way of para 7 of the Summons.
7. In the event this court disagrees with an order in terms of para 5 of the Summons, Mr Wong submitted that the proper cut-off date should be the date of the 2nd Accident i.e. 13 Feb 2017, after which, and as a result, the plaintiff’s mental capacity was impaired such that he became a MIP under O.80, RDC. And, with the Fallback Undertaking offered by plaintiff’s solicitors, there is no need of any legal aid taxation of plaintiff’s own costs either.

*D1’s submissions*

1. Mr Yeung referred this court to the procedural history. He stressed that the defendants had nothing to do with the 2nd Accident or plaintiff’s alleged impaired mental capacity. The defendants are totally faultless in these matters. He stressed that the plaintiff was able to give, and had himself given, instructions to plaintiff’s solicitors until mid-2018. There was no reason to order the defendants to pay common fund costs for the *earlier* period.
2. Mr Yeung pointed out that there is no qualified expert medical evidence to prove that the plaintiff is MIP as alleged. The 1st defendant never confirmed nor accepted that. At the hearing on 13 Nov 2018, the 1st defendant did not object to Mdm Lee’s appointment as, in *Chan Ka Yi v DBS Bank (Hong Kong) Ltd* [2010] 2 HKLRD 528, the court declined in that case to deal with the trial of a preliminary issue whether the applicant is a MIP as alleged or not, holding that O.80, RDC, deals with procedural issue of solicitors’ authority and that the issue remains susceptible to challenge at trial.
3. And the appointment of Mdm Lee, it was stressed, has no retrospective effect. The wordings of the order of the District Judge are that the plaintiff has become a MIP *after the action was brought* and Mdm Lee was allowed to *continue* it against the defendants as next friend of the plaintiff.
4. Under para 189 of PD18.1, it is argued, a judge can also order *otherwise* that the costs in respect of compromised proceedings be paid on basis *other than* common fund basis.
5. The circumstances of this case, it is emphasized, are not normal such that the normal rule can be departed from. It is unique in that the plaintiff sustained another accident and allegedly became a MIP in the middle of proceedings.
6. The plaintiff, it was pointed out, was mentally sound at least before mid-2018. The surveillance footage of plaintiff taken in July 2016, and plaintiff’s answering questions at joint medical examination in Feb 2018, were good proof of that. And medical opinion of plaintiff having alleged impaired mental capacity was not forthcoming until the 17/5/18 Report was made available.
7. Awarding costs on common fund basis for the *earlier* period is, Mr Yeung argued, in effect penalizing the defendants for additional costs which should not have been paid out but for alleged subsequent change in plaintiff’s mental capacity. It is a windfall gain to plaintiff’s solicitors which is most unfair to the defendants.
8. When plaintiff’s application for employees’ compensation[[16]](#footnote-16) regarding injuries he received in the 1st Accident was *earlier* settled with the same defendants, with the 1st defendant paying the plaintiff the settlement sum of $Y, the 1st defendant, it was pointed out, also paid the plaintiff the costs of the application on party and party basis.
9. This court is referred to *Hong Kong* *Civil Procedure 2019*, Vol.1, para 80/11/1, where it is said that O.80 rr.10-12, RDC, provide a comprehensive code the objects of which include one to ensure that solicitors acting for minor or MIP are “paid their *proper* costs *and no more* (italics supplied)”. The plaintiff’s solicitors, it is submitted, should not be paid *more than* their *proper* costs.
10. On the Fallback Undertaking offered by plaintiff’s solicitors, the agreed settlement sum, it is submitted, would also not be diluted even had costs of this action been awarded on party and party basis for an earlier period (and there would not be any windfall to plaintiff’s solicitors to the prejudice of the defendants).
11. The appropriate and fair cut-off date in this case, it is submitted, should be 17 May 2018 as the 17/5/18 Report is the only piece of medical evidence proffered by plaintiff to prove the time when he allegedly started to suffer from alleged impaired mental capacity and that party and party costs should be awarded before this date under para 5 of the Summons without legal aid taxation of plaintiff’s own costs sought under para 7 of the Summons.

*Discussion*

1. I would start off by noting the award of costs is always a matter left to the discretion of the court: see s.53(1) of District Court Ordinance[[17]](#footnote-17) and *Tai Chau Yung*, supra, 552H.
2. Hence, this decision is no more than exercise of my discretion in the circumstances, and on the submissions, of this case and I do not purport to lay down any rule for other cases whose circumstances may well be quite different from this case.
3. Nonetheless, I have to exercise my discretion judicially, having regard to relevant RDC (such as O.62 rr.3 & 5, RDC, which none referred me to by way of submissions), relevant case law and past practice of the court.
4. In the context of the O.80 Summons before me, I think it cannot be disputed that it is a long standing practice of the court to award costs on common fund basis when approval is given to compromise involving persons under disability i.e. minor ad MIP.
5. As early as in 1998, Suffiad J. in *Tai Chau Yung*, supra, 551H-552A, 552H-553B, was referred to this long standing English practice by reference to marginal note para 80/12/16 of *The Supreme Court Practice (1985 Edition)* which reads:

“If the claim is disposed of by compromise or settlement out of Court, the costs awarded to a successful infant or patient are almost *invariably* on a common fund basis. The reason for this *practice* is that it is *difficult* for the Court to judge on the *adequacy* of the settlement *without knowing how much* the plaintiff will receive *net of costs*. This can *practically* be achieved *only* by awarding costs on a common fund basis rather than as between party and party. Defendants are almost always willing to follow this practice except, perhaps, where the plaintiff or his advisers have added greatly to the costs by unreasonable conduct. In the last resort, the Court has the right to decide on whether party and party or common fund costs should be awarded without the consent of the parties (O.62, r.28(2)) (italics supplied).”

and his lordship had suggested that this long-adopted English practice be taken note of by practitioners locally and should, “in views of judges dealing with PI List”, be “applied with much more regularity in Hong Kong” than has been the case.

1. The 2 decisions of Bharwaney J. in para 35, the commentary of *Hong Kong Civil Procedure 2019* in para 38 & 39, and para 189 of PD18.1 in para 40 are, I note, all to the same effect, though I accept defendants’ submissions that this court can depart from such practice or general rule if it is appropriate to do so.
2. In this respect, despite my directions to parties to make further research of local and overseas authorities dealing with the *same* situation in para 1, none was produced. The defendants have not produced any one single authority of the court *departing* from such general practice of awarding common fund costs in approving compromise in the said situation before this court.
3. And, notwithstanding defence submissions, including legal submissions, at para 48[[18]](#footnote-18), this court can, I think, *only* deal with the Summons taken out under O.80 rr.10-12, RDC, and treat the plaintiff as a MIP at the hearing of the Summons before this court[[19]](#footnote-19) as per the wordings of the court order of the District Judge appointing Mdm Lee as his next friend at para 28. On this point, I agree with plaintiff’s submissions at para 42.
4. It goes without saying that the plaintiff, as a MIP, is a person under disability, or a *vulnerable* litigant, that requires the *protection* of the court. That explains why the compromise reached among the parties requires the *approval* of this court in order for it to become *valid*. This court must oversee that it is in *best interest* of the plaintiff before giving my approval.
5. Plainly, as was explained in the case law and commentary above, the long standing practice of awarding common fund costs in approving compromise involving persons under disability was, I think, developed with that *protection* in mind. A reasonable settlement sum might not have been achieved. If achieved at all, it may be diluted by any costs and disbursements of plaintiff’s solicitors that cannot be recovered from the defence. In order to assess the reasonableness of the settlement sum, the court thus awards costs on common fund basis instead of on party and party basis.
6. To protect such vulnerable persons under disability, as was explained in details by Bharwaney J. in *Fong Yau Hei*, supra, at para 23-26, 50-51 thereof, O.62, r.30 of Rules of High Court (**RHC**)[[20]](#footnote-20) was enacted to provide that, unless the court directs otherwise to dispense with taxation[[21]](#footnote-21), costs of plaintiff’s solicitors in compromise involving persons under disability ***shall*** *be taxed* under O.62, r.29, RHC[[22]](#footnote-22), and plaintiff’s solicitors ***cannot*** *receive more costs than is* ***allowed on taxation***, and elaborate provisions are made in PD18.1 from para 190 to 192 for, inter alia, the court to be advised in a *written statement* prepared by plaintiff’s solicitors of the ***maximum*** *amount* of costs and disbursements that they consider may not be recoverable from defence[[23]](#footnote-23).
7. Under O.62, r.29, RHC, “all costs shall be allowed except in so far as they are of an *unreasonable* amount or have been *unreasonably* incurred (italics supplied)”. This is, I think, **not much different** from common fund basis in O.62, r.28(4) of RDC[[24]](#footnote-24), which reads: “… there shall be allowed a *reasonable* amount in respect of all costs *reasonably* incurred… in all cases where costs are to be taxed on the *common fund* basis the ordinary rules applicable on a taxation as between *solicitor and client*… *shall be applied, whether or not the costs are in fact to be so paid* (italics supplied)”.
8. This, I venture to emphasis, is why a court can assess the reasonableness or adequacy of agreed settlement sum of a compromise involving persons under disability by awarding costs on common fund basis (and not on party and party basis) and give its approval, as such costs payable to plaintiff’s solicitors *are* to be *taxed* on ***almost the same standard*** and *payable* to them *only after taxation* (such that there should not be any unrecoverable plaintiff’s costs that may dilute the settlement sum payable to persons under disability).
9. To recap, it is all designed and done to *protect* the person under disability. I therefore wholly agree with plaintiff’s submission at para 43 that the ***primary*** or ***paramount*** consideration for the exercise of my costs discretion in our context is the *protection* of the interest of the persons under disability *before the court*.
10. If any authority is required for the above, this court notices that Bharwaney J. spoke, at para 51 of *Fong Yau Hei*, supra, of “the court’s *paramount* duty is to safeguard and protect the interests of the mentally incapacitated plaintiff (italics supplied)” in scrutinizing the statement of costs prepared by plaintiff’s solicitors pursuant to para 190 of PD18.1. And Suffiad J. exercised his discretion to award common fund costs in *Tai Chau Yung*, supra, at 553F, “*primarily* on the basis to ensure that the plaintiff, particularly the two infants, are adequately compensated for (italics supplied)”.
11. As such, I also agree with plaintiff’s submissions at para 41 that cause or fault, in the sense of the defendant doing any wrongful act causing the plaintiff to become a person under disability, carries *no*weight or, if any, *little* weight in the exercise of my costs discretion in our present context.
12. On the long standing practice of the court, common fund costs are, one observes, *still* awarded in giving approval to compromise involving minor despite no defendant “causes” the plaintiff to become a minor by any “wrongful” act (and, for obvious reason, there cannot be a case of an adult plaintiff becoming a minor in the middle of proceedings but only the other way round).
13. Also, common fund costs are, one observes, *still* awarded in giving approval to compromise where money is recovered on behalf of *beneficiaries* under disability (minor or MIP) when the wrongful act of the defendant was not directed *against* them.
14. Furthermore, a plaintiff or beneficiary can be, or can become, a MIP *without* any wrongful act (e.g. he/she may be born mentally retarded or may suffer dementia in later life) and common fund costs are, one observes, *still* awarded in giving approval to compromise involving them notwithstanding the *absence* of any wrongful act of the defendant causing such unfortunate mental conditions.
15. In all these compromise examples that come before the court for approval from time to time, the focus is, I think, on the protection of these vulnerable persons *before* the court *as and when* their compromise *comes* *before* the court for approval.
16. While I note that the defendants were completely faultless in the past in relation to the 2nd Accident and plaintiff’s current impaired mental capacity as stressed by Mr Yeung at para 47, that, I am afraid, is not the main consideration in our context. The same applies, I think, to such matters he urged at para 52 and 54.
17. It is useful to remind oneself that such common fund costs order made in our context “was not intended in any way to be *punitive* (italics supplied)” on the defendant, as Suffiad J. reminded all at 553H of *Tai Chau Yung*, supra.
18. By paying common fund costs and obtaining approval of the court to the compromise, one thinks a defendant benefits by securing a valid compromise and discharge of its legal liabilities when otherwise the same is invalid or its validity open to doubt for the disability or alleged disability of the plaintiff/beneficiary.
19. It is true that the 1st defendant agreed to pay only party and party costs when the related employees’ compensation proceedings of the 1st Accident was settled. Indeed, one thinks they would also have paid costs of this action on the *same* standard had they settled it with plaintiff *before* the 2nd Accident. But such settlement was made, and would have been made, *at a time* when *no* court approval is required *for the purpose of protecting anyone*.
20. Were the defendants ordered to pay costs of this action on a common fund basis as per para 5 of the Summons, I cannot agree that *the plaintiff’s solicitors* would have obtained any alleged windfall as they complained at para 53.
21. Had this action been settled *without* court approval with the defendants paying only party and party costs of the action, the plaintiff’s solicitors would, I think, *still* be entitled *as against the plaintiff or their client* to be paid their costs on solicitors and own client basis during the earlier period of this action when the plaintiff was privately represented and on common fund basis after legal aid was granted to him (the difference in terms of costs not recoverable from defence would, of course, dilute the settlement sum received by him but, presumably, a *mentally sound* plaintiff can take care of that *himself*).
22. For reason explained at para 69 & 70,*the plaintiff’s solicitors* would, I think, still be paid *almost the same* amount of legal costs at para 83 if this court gives *approval* to the compromise in the Summons and orders costs of this action be paid by the defendants on common fund basis as per para 5 of the Summons.
23. All things considered (and there is no suggestion that the plaintiff or plaintiff’s solicitors had been guilty of any unreasonable conduct in increasing the costs of the action in the earlier stage of these proceedings), I agree there is nothing before me to depart from the general rule or long standing practice of the court in awarding common fund costs in giving my approval to the compromise set out in the Summons.
24. The plaintiff being a MIP before me on the Summons, I consider it my primary duty to protect his interest. In order for me to assess the reasonableness of the agreed settlement sum of $X in the Summons and to grant approval to the compromise in the Summons, I also consider it appropriate for me to follow the general practice to make an order in terms of para 5 of the Summons.
25. A costs order on common fund basis in this action, I think, *best* ensures that the plaintiff under disability be paid the Balance *net* of costs and disbursements of plaintiff’s solicitors not recoverable from the defendants, considering that they had once *declined* to confirm in their supplemental memorandum there are no non-recoverable *disbursements* and the *first charge* enjoyed by the Director of Legal Aid. Such costs order, I have also to emphasize as Suffiad J. did in *Tai Chau Yung*, supra, is not meant to penalize the defendants.
26. I therefore exercise my discretion to make an order in terms of para 5 of the Summons and accept the Primary Undertaking offered by plaintiff’s solicitors.
27. If I am wrong to exercise my discretion in the way above and that a cut-off date is called for in the circumstances of this case, for reasons below, I prefer Mr Wong’s submissions at para 46 to Mr Yeung’s submissions at para 57 and would have awarded costs of this action to the plaintiff on party and party basis before 13 Feb 2017 and on common fund basis thereafter together with the Fallback Undertaking offered by plaintiff’s solicitors.
28. Reading as a whole the contents of the 31/12/17 and 17/5/18 Reports at para 14, 15 & 23 both prepared by Dr Ho, I am satisfied that plaintiff’s current impaired mental capacity was caused by his injuries sustained in the 2nd Accident. For this reason, this is an appropriate date to be adopted. And the date of the 2nd Accident is a certain date that can be easily ascertained after the event in our context.
29. In contrast, the defence suggestion of using, in this case, the only piece of medical evidence in terms of the date of the 17/5/18 Report as the cut-off date suffers, I think, from uncertainty and arbitrariness. There are many variables affecting the preparation of medical report and its date, and it could take a long time for a medical report to be prepared after the event despite the mental capacity of a plaintiff has already been injured in an accident.
30. In this case, as early as in July & Aug 2017, plaintiff’s solicitors had already indicated to court that they were not able to take instructions from the plaintiff. That was prior to the preparation of both the 31/12/17 and 17/5/18 Reports. When the plaintiff attended joint medical examination in Feb 2018, he was already observed to have considerable loss of memory and Mdm Lee was required to assist him in giving the history.
31. I therefore do not find it appropriate to adopt 17 May 2018 as the cut-off date as submitted by Mr Yeung.

*Costs of the costs argument*

1. Both Mr Wong and Mr Yeung agreed (and this court will order below as agreed) that such costs incurred by parties on arguing para 5 & 7 of the Summons at the hearing before me should follow the event and be paid on common fund basis.

*Disposition*

1. On the basis of the Primary Undertaking offered by the plaintiff’s solicitors[[25]](#footnote-25) and not otherwise, I make orders in terms of para 1, 2 and 6 of the Summons and other orders as follows.
2. Instead of the order sought at para 3 of the Summons, I order as follows: “The balance of the Settlement Sum in the sum of $Z shall remain in the Court pending results of, and directions given in, intended proceedings to be instituted for the plaintiff under Part II of the Mental Health Ordinance”.
3. For para 5 of the Summons, I make an order that the 1st and 2nd defendants do pay the plaintiff the costs of this action, including the costs of the Summons and the costs of the entire hearing of the Summons before me on 19 June 2019, on a common fund basis on District Court scale, to be taxed if not agreed.
4. And I make no order on para 4 and 7 of the Summons.
5. Finally, I thank Mr Wong and Mr Yeung for their submissions.

(LEE Siu-ho)

Deputy District Judge

Mr Wong Wai Chun Wilson of Cheung & Liu, assigned by the Director of Legal Aid, for the plaintiff

Mr Ivan Yeung of Winnie Leung & Co. for the 1st defendant

Ms D. Yew of Deannie Yew & Associates for the 2nd defendant

1. Mr Yeung also argued for the 2nd defendant, who adopted the same stance of the 1st defendant. With agreement of Mr Wong and Mr Yeung, Ms Yew appearing for the 2nd defendant was excused by this court soon after the hearing began. [↑](#footnote-ref-1)
2. It is not a *consent* summons signed by all parties as is often the case in approval of compromise that comes before the court. [↑](#footnote-ref-2)
3. Cap.336H [↑](#footnote-ref-3)
4. All parties agreed that this decision be published but with all settlement figures redacted. [↑](#footnote-ref-4)
5. At para 25 [↑](#footnote-ref-5)
6. At para 6 [↑](#footnote-ref-6)
7. There were also fractures to maxillary bones, spine, ribs, humerus, femur and radius, and suspected injuries to other parties of his body, whose details are omitted for present purpose. [↑](#footnote-ref-7)
8. For present purpose, details of subsequent treatments and follow-ups of the plaintiff set out in the 31/12/17 Report are also omitted here. [↑](#footnote-ref-8)
9. Nil contribution is required from the plaintiff. [↑](#footnote-ref-9)
10. The 2nd defendant elected not to adduce expert medical evidence. [↑](#footnote-ref-10)
11. It was a bit slow and dull in response. [↑](#footnote-ref-11)
12. Nil contribution is required from Mdm Lee. [↑](#footnote-ref-12)
13. It is enclosed to memorandum prepared by plaintiff’s solicitors lodged on 31 May 2019. [↑](#footnote-ref-13)
14. The 1st defendant originally advanced in correspondence with plaintiff’s solicitors a cut-off date of 29 Oct 2018, allegedly the date before plaintiff’s summons to appoint Mdm Lee as next friend was taken out. But it was no longer maintained by Mr Yeung at the hearing before me. [↑](#footnote-ref-14)
15. And persons under disability do not enjoy special rights and privileges under the law. If a person under disability sues by next friend and obtains judgment and a costs order in his favour *after trial*, the normal order for costs will be made, namely, that the plaintiff’s costs are to be taxed on a party and party basis: per Bharwaney J. in *Fong Yau Hei*¸ supra, at para 20. [↑](#footnote-ref-15)
16. No next friend was appointed for the plaintiff in these proceedings. [↑](#footnote-ref-16)
17. Cap.336 [↑](#footnote-ref-17)
18. I do not find it necessary to decide on the validity or otherwise of these submissions. In any event, the matter never proceeds to trial when the defence seeks to challenge the MIP status of the plaintiff, let alone successfully doing so. [↑](#footnote-ref-18)
19. On defence submissions at para 49, the plaintiff has also become a MIP *after* this action was brought, though not from the *commencement* of the action. [↑](#footnote-ref-19)
20. Cap.4A. O.62, r.30, RHC, is applicable to proceedings in District Court by virtue of O.62, r.30 of RDC. [↑](#footnote-ref-20)
21. e.g. on plaintiff’s solicitors offering undertaking to waive costs not recovered from defence [↑](#footnote-ref-21)
22. This rule is absent in RDC because taxation of solicitors’ bills to own client is carried out in the Court of First Instance. [↑](#footnote-ref-22)
23. The court is to be informed afterwards and directions sought should a plaintiff under disability be required to pay costs *more than* such maximum sum after approval is given to the compromise. [↑](#footnote-ref-23)
24. See also O.62 r.28(4), RHC [↑](#footnote-ref-24)
25. Which shall be reproduced in sealed court order [↑](#footnote-ref-25)