# DCPI 1503/2012

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# PERSONAL INJURIES ACTION No. 1503 OF 2012

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BETWEEN

TAM WAI FUN Plaintiff

and

LEUNG KA CHEONG 1st Defendant

HOP LEE LOGISTIC CO., LIMITED 2nd Defendant

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Before: His Honour Judge Kent Yee in Chambers (open to public)

Date of Hearing: 2 July 2013

Date of Decision: 3 July 2013

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DECISION

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Introduction

1. This is an application of the plaintiff (“**Tam**”) by her summons dated 7 February 2013 for an order that the time limit applicable to her personal injuries claim be overridden pursuant to section 30 of the Limitation Ordinance, Cap. 347 (“**LO**”).

*Background Facts*

1. Briefly stated, the non-controversial background facts leading to the present application can be summarized as follows. On or about 31 May 2008, whilst crossing Playing Field Road, Mongkok, Kowloon, Tam was knocked down by a light good vehicle driven by the 1st defendant (“**Leung**”) in the course of his employment with the the 2nd defendant (“**Hop Lee**”). As a result, Tam sustained multiple injuries including head, shoulder and rib injuries. At the time of the accident, Tam was 68 years old.
2. Ever since the accident, Tam and her children had made enquires with the police to follow up the matter. In October 2008, Tam received a letter from the police dated 16 October 2008 whereby she was informed of the completion of the police investigation of the accident and their intended prosecution of Leung for the offence of careless driving. Despite further enquires, Tam did not hear from the police about the progress of the criminal prosecution.
3. On 12 May 2012, Tam for the first time consulted Messrs. Au & Vrijmoed (“**A & J**”) after her friend told her that she could claim damages in respect of her injuries sustained in the accident some time in early 2010. The legal advice obtained from A & J was to make a phone call to the police station to find out the outcome of the criminal prosecution. On the very same day, Tam’s daughter made an enquiry with the police and was told that the documents relating to the prosecution of Leung could be collected at the police station.

1. Tam’s daughter then went to the police station and collected an unsigned letter dated 13 November 2009 wherein it was stated that Leung was convicted of the offence on his own plea at Kowloon City Magistracy on 8 September 2009. Tam had not seen this letter before. According to Ms Lau, counsel for the defendants, Leung was unrepresented when he pleaded guilty to the charge.
2. As the letter was unsigned, Tam’s daughter requested the police to stamp on the same. Eventually, two days later, she collected a copy of the letter appended with a signature and a stamp.

1. The Writ herein endorsed with the Statement of Claim was filed on 24 July 2012. Exhibited to the Statement of Damages were a medical report prepared by Dr Albert Wong of the Department of Surgery of Kwong Wah Hospital dated 26 June 2012 and a medical report prepared by Dr Cheung Yan Kit of the Accident & Emergency Department of Kwong Wah Hospital. Mr Lam, appearing for Tam, confirmed that no further medical report has been prepared on behalf of Tam.
2. Pursuant to section 27 of the LO, Tam’s claim should be time-barred by 31 May 2011. The Writ came about 14 months late. It was only served on Leung on 20 September 2012 and Hop Lee on 16 October 2012 on the second attempt. Mr Lam explained to this court that he previously handled this matter for his ex-employer A & J and that he was busy setting up his own firm (Tam’s present solicitors) in the summer of 2012. That accounts for the further delay.
3. The defendants duly pray in aid the LO as the first averment in their Defence filed on 18 January 2013.
4. The present application is supported by the affirmation of Tam dated 7 February 2013. Despite leave to file an affirmation in opposition was granted by a master on 15 February 2013, neither Leung nor Hop Lee has adduced any evidence to oppose this application.

*Applicable Legal Principles*

11. Section 30 of the LO provides the court with a wide and unfettered discretion to disapply the time limits set out in section 27 where it would be equitable to do so in all the circumstances. Section 30(3) sets out 6 specific matters to which the court should have regard when acting under section 30. Those 6 matters are not exclusive considerations and all the circumstances of the case should be assessed.

12. Both Mr Lam and Ms Lau have cited to me relevant authorities showing how such matters should be considered against their own particular background facts. I have studied all of the authorities and they are all helpful, particularly Master Marlene Ng’s decisions in *Cheung Yin Heung v Hang Lung Real Estate Agency Ltd* [2010] 3 HKLRD 67 and *Mok Lai Fong v Ng Po Sui* [2011] 3 HKLRD 67 when the learned judge reviewed a number of authorities (both English and local) relating to applications for disapplication of the limitation period. As the parties do not differ from each other in regard to the established general principles, I see no need to set them out in this decision.

*Analysis*

13. In the present case, the delay cannot be said to be slight. The explanation proffered by Tam in her affirmation is that due to her worsened concentration and impaired memory after the accident, she could not remember details of the accident and had delayed in the commencement of the present proceedings.

14. This is hardly a satisfactory explanation. I fail to see how poor concentration and impaired memory would in any way prevent Tam from making a claim against Leung and Hop Lee within the 3-year time limit.

15. In her uncontradicted evidence, Tam did not obtain legal advice until May 2011. She is currently legally aided and it appears to me that she is not a person of substantial means. Before May 2011, inexplicably, she had waited for the notification of the outcome of the criminal prosecution of Leung. This is another reason for the delay. Nevertheless, the wait was in my view entirely unnecessary and Tam could and should have commenced legal proceedings against Leung and Hop Lee even in the absence of the conclusion (and, indeed, the commencement) of any criminal prosecution. In her evidence, this elderly lady says nothing about her education background. Mr Lam informed this court from the bar table that Tam received little educated. It is obvious to me that her inaction within the limitation period is down to her sheer ignorance and lack of proper legal advice regardless of her education level.

16. Ms Lau argues that Tam should have been informed of the prosecution result within the 3-year time limit and her explanation that she had not received the undated notification letter is merely a pretext. I do not agree. First, Tam’s explanation is not in the circumstances inherently improbable. In all likelihood, Tam’s daughter would not have gone to the police station and made further enquiries on the very same day Tam obtained legal advice from A & J if Tam had actually been notified about the conviction previously. If the undated notification letter had indeed been issued to Tam, I see no reason why the police would have agreed to issue to Tam a signed and stamped copy two days later. In any event, her explanation is not contradicted by any contrary evidence. I accept her explanation to be genuine. Nevertheless, as I have said, the criminal prosecution does not really justify the delay.

17. With respect to the merit of Tam’s claim, Ms Lau sensibly does not argue that her claim is unmeritorious or not reasonably arguable at this stage. The criminal conviction of Leung would shift the legal burden onto the defence though the weight to be given to the conviction itself is another matter for the trial judge.

18. Ms Lau further agrees with Mr Lam that to a large extent, the focus of this litigation would be the question of contributory negligence and quantum. For the former, the burden of proof is on the defence.

19. I should proceed to consider whether the defence would suffer any forensic prejudice, which renders a fair trial impossible. The evidential burden is on the defence to prove that the evidence to be adduced by the defence is less cogent because of the delay since the expiry of the limitation period: *Cheung Yin Heung*, supra, at §94.

20. In this regard, the defence is handicapped by the lack of evidence filed in opposition to the present application. Doing the best she can, Ms Lau argues that the professed memory impairment of Tam allegedly caused by the accident would (a) make the fact-finding exercise difficult in relation to the plea of contributory negligence and (b) likely to be inseparable from the natural deterioration of Tam’s mental condition due to her advanced age and hence the quantum of damages could not be assessed fairly.

21. I am not persuaded by her arguments. First, as shown in the brief facts, to which Leung agreed in the criminal proceedings, Tam did make a witness statement to the police about the accident. There was no other eye-witness of the accident and it is more likely than not that the narrative of the accident in the brief facts supporting the charge of careless driving was based on the account in Tam’s witness statement. Despite her professed impaired memory about the accident, I believe Tam would be substantially assisted by her witness statement in her preparation of the trial of this action.

22. Indeed, Tam signed the Statement of Truth appended to the Statement of Claim filed herein wherein a detailed account of the accident was given. I am not convinced that Tam is unable to recall the accident now.

23. In any event, as accepted by Ms Lau, the onus of proof relating to contributory negligence rests on the defence. There is no suggestion that Leung is now unable to prove those specific accusations set out in the Defence due to the post-limitation period delay. It is not uncommon in fatal accident claims that contributory negligence is proved in the absence of live evidence of the victims. Leung should not be concerned about whether Tam is able to refute his accusations by cogent evidence.

24. I further do not accept that the mental condition of Tam has significantly deteriorated during the delayed period. There is simply no evidence in this regard. In spite of her age, I cannot assume that her memory has been materially worsened due to her natural aging process over the delayed period.

25. In any event, if the medical evidence turns out to be supportive of the contention of the defence, that is, Tam has suffered memory impairment and/or worsened concentration also due to her natural aging process which are indistinguishable from those she suffered as a result of the accident, it would only mean that Tam would fail to prove causation to a certain degree and she would face difficulties in her claim of damages. Tam alone, and not Leung nor Hop Lee, would be prejudiced. I fail to see how a fair trial is thereby rendered impossible.

*Conclusion*

26. Guided by the established principles and having considered all the circumstances of the present case in the round, I come to the conclusion that it is equitable that I should exercise my discretion in favour of Tam and accede to her application though, as accepted by Mr Lam, her evidence could have been more cogent. I grant Tam leave to continue this action and I expect that she should proceed with her claim expeditiously to make up for the delay.

*Costs*

27. In her summons, Tam asks for costs of and occasioned by this application be in the cause. Ms Lau finds this acceptable save that she would also ask for certificate for counsel. I accede to her request and I make such a costs order *nisi* accordingly.

28. Lastly, I thank Mr Lam and Ms Lau for their assistance in this matter.

(Kent Yee)

District Judge

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Mr Kenneth Lam, of Messrs Kenneth Lam, Solicitors, for the plaintiff

Ms Julia Lau, instructed by Messrs Munros, for the 1st and 2nd defendants