#### DCPI 1970/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1970 OF 2008

BETWEEN

CHAN KIN MAN Plaintiff

and

CHEUK SIU TONG Defendant

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

Date of Hearing: 12 January 2010

Date of Delivery of Decision: 12 January 2010

## D E C I S I O N

1. The Defendant seeks leave to appeal from my Judgment of 16 November 2009. Essentially, from the Grounds of Appeal, the Defendant is seeking to challenge the court’s findings of fact made as to the court’s preference of the evidence of the Plaintiff over the evidence of the Defendant.
2. The Defendant was not legally represented at the trial. Counsel who now appears for the Defendant seeks to challenge the Plaintiff’s evidence and has referred to various parts of the Plaintiff’s testimony in the proceedings before the magistracy proceedings in November 2007 when the Defendant was charged, and to parts of the Plaintiff’s police statements. Counsel now submits that the Plaintiff’s evidence is contradictory and inconsistent.
3. Unfortunately, these parts of the Plaintiff’s evidence was never put to the Plaintiff at the trial, and the Plaintiff was never given the opportunity to explain any alleged contradictions. Nor did the Defendant address the court at the trial in October 2009 on all the inconsistencies which his counsel now has discovered and seeks to rely on. It is unfair for the Defendant now to seek to argue that the Plaintiff’s evidence should not have been accepted, and that the alleged inconsistencies should have been considered by the court as casting doubt on the Plaintiff’s case.
4. In the context of appeals against findings of fact made by the trial judge, the principles are clearly set out by Bokhary PJ in the Court of Final Appeal decision in *Ting Kwok Keung v Tam Dick Yuen* FACV 12/2001from paragraphs 35 to 42.
5. I can add very little to the following passage from paragraph 39 of this judgment, which I quote:

“As Lord Shaw of Dunfermline said in *Clarke v Edinburgh Tramways* at p.36 and Lord Edmund-Davies repeated in *Whitehouse v Jordan* at p.257 C-D, the great respect due to a trial judge’s choice of whom to believe is ‘quite irrespective of whether the judge makes any observation with regard to credibility or not.’ The same point was made McHugh J in *Abalos v Australian Postal Commission* (1990) 171 CLR 167. There, in a judgment with which all the other members of the High Court of Australia hearing that appeal agreed, His Honour said (at p.179) that: ‘It does not follow that, because [the trial judge] made no express reference to the demeanour of credibility of either [of the two witnesses who gave evidence on the issue of fact concerned], demeanour or credibility played no part in her findings on [that issue of fact].’ ”

1. In paragraphs 41 and 42 of his judgment, Bokhary PJ had this to say, and I quote:

“41. ‘On an appeal against a judgment of a judge sitting alone’, Lord Sankey LC said in *Powell v Streatham Manor Nursing Home* at p.249, ‘the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way.’ I would reinforce that by respectfully adopting what Lord Hoffman said in *Biogen Inc v Medeva Plc* [1997] RPC 1 at p.45 and repeated in *Piglowska v Piglowski* at p.1372 D-F:

‘The need for appellate caution in reversing the trial judge’s evaluation of the facts is based upon much solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge’s overall evaluation.’

42. Where the judgment turns on an issue of fact, the Court of Appeal must have regard to the nature of that issue of fact. And it must have regard to the advantages enjoyed by a trial judge who received the evidence on such an issue at first-hand, in other words, in whose presence the whole of the evidence unfolded in its living state. Such advantages can be, as Lord Shaw of Dunfermline put it in *Clarke v Edinburgh Tramways* at p.36, ‘sometimes broad and sometimes subtle.’ The question for the Court of Appeal is whether, even though it does not enjoy the advantages enjoyed by the trial judge who received the evidence at first-hand, it is nevertheless satisfied that his conclusion on the facts is plainly wrong. The Court of Appeal should intervene if so satisfied. If not so satisfied, the Court of Appeal should defer to the trial judge’s conclusion even if in some doubt as to its correctness.”

1. On these principles and for the reasons I have given, I consider that the proposed appeal has no realistic prospects of success and must decline to give leave. Nor do I see any other reason in the interests of justice why the appeal should be heard.
2. This application is dismissed with costs, with Certificate for Counsel.

# (Mimmie Chan)

# District Judge

Mr. Charles Wong, instructed by Messrs. Fongs, for the Plaintiff

Mr. Victor Luk, instructed by Messrs. Wong & Co., for the Defendant