###### DCPI 1971/2013

[2018] HKDC 1491

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1971 OF 2013

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##### BETWEEN

KONG KAM YUEN Plaintiff

and

YIM TO KEUNG 1st Defendant

GUANGZHOU COURIER SERVICE 2nd Defendant

(H.K.) COMPANY LIMITED

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Before: Deputy District Judge Jonathan Chang in Chambers

Date of Hearing: 11 June 2018

Date of Decision: 30 November 2018

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DECISION

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1. In my Judgment dated 16 April 2018, I awarded damages in the sum of $159,025 to the plaintiff for his personal injuries sustained in the accident on 25 June 2011. Dissatisfied with the award, the plaintiff now seeks leave to appeal to the Court of Appeal.
2. The background facts are set out in my Judgment and are not repeated here. This Decision is to be read together with my Judgment.
3. Ground 1 in the draft Notice of Appeal contended that I had failed to consider the extent of the plaintiff’s physical and mental injuries caused by the accident. No particulars as to what I had purportedly left out were given. As Ms Lui had summarized in her skeleton argument, my consideration of the plaintiff’s physical and mental injuries were set out in, inter alia, [3] to [20], [21] to [22], [23] to [24], [26] to [27] and [33] of my Judgment. This ground has no merits.
4. Ground 2 in the draft Notice of Appeal contended that I had failed to consider the plaintiff’s inability to seek and secure employment as a result of his medication. In [19] and [20] of my Judgment, I noted the apparent different opinion of Dr Wong and Dr Chung on whether the use of psychiatric medication would prevent the plaintiff from driving. However, the point of real emphasis is that, as I noted in [33] of my Judgment, there was nothing to suggest that the plaintiff was not in a position to return to any gainful employment at all, particularly when I found in [24] of my Judgment that latest by February 2012 the plaintiff had fully recovered from all his physical injuries. The plaintiff’s psychiatric symptoms could be controlled by medication. I do not accept that the plaintiff had any “inability” to seek and secure employment by reason of his medication as the draft Notice of Appeal contended.
5. Grounds 3, 4 and 6 in the draft Notice of Appeal can be grouped together. They effectively contended that I awarded too low a figure for PSLA, and in so doing I was said to have failed to consider the authorities on damages put forward by the plaintiff but only accepted those put forward by the defendants.
6. In [28] of my Judgment I referred to the authorities cited by Ms Lui for the defendants in formulating my award on PSLA. This is because I consider these authorities to be relevant comparables to the plaintiff’s injuries. This certainly did not mean that I did not consider the authorities cited by the plaintiff which, with respect, involved injuries of much more serious nature than those suffered by the plaintiff.
7. At the hearing, I invited Mr Yuen to make submissions on which of the authorities he cited would be a good and direct comparable to the plaintiff’s circumstances. He referred me to *CMY v Tam Siu Wing* [2008] 4 HKLRD 604 where the award for PSLA was in the sum of $400,000. However, as rightly submitted by Ms Lui, that case was clearly distinguishable from the present case:-
   1. Some 14 months after the accident, the plaintiff still had multiple complaints including lower back pain and residual neck pain and stiffness.
   2. She was also diagnosed with adjustment disorder.
   3. She lost her promotion opportunity by reason of her physical and psychiatric injuries.
8. As I found in [33] of my Judgment, there is no evidence to suggest that the plaintiff’s psychiatric illness caused by the accident could not be controlled by proper medication and treatment. His on and off psychiatric conditions must be viewed in light of the fact that there were occasions when he had defaulted in his drug compliance. It was also not suggested in the joint psychiatric report that he was not in a position to return to any gainful employment despite his illness. In the premises, the plaintiff’s injuries were clearly less serious than those sustained by the plaintiff in *CMY v Tam Siu Wing* cited by Mr Yuen.
9. In any event, as Ms Lui rightly submitted, each case depends on its own facts and I am entitled to make an appropriate award for PSLA based on the plaintiff’s particular circumstances. The plaintiff has not demonstrated that he has a reasonable prospect of success in convincing the Court of Appeal to overturn my award for PSLA as being wholly out of reasonable range which justifies the appellate court’s intervention.
10. Ground 5 in the draft Notice of Appeal contended that my conclusion that the plaintiff was a credible witness on his medical and psychiatric condition ([23] of my Judgment) was inconsistent with my rejection of his evidence regarding his physical sufferings ([24] of my Judgment). It was open to me to accept and reject different parts of the plaintiff’s evidence. In particular, as I noted in [24] of my Judgment, I rejected the plaintiff’s complaint that he was still suffering from neck and back pain which prohibited him from seeking employment because such complaint was inconsistent with the surveillance footages and the medical records, in particular that he had defaulted in attending physiotherapy since 1 February 2012. Mr Yuen submitted that the surveillance footages were only snapshots and did not and could not show the plaintiff in his worst days. I could only act on the available evidence at trial, and it is not for me to speculate what could or would have been shown had a more “complete” footage were to be produced. In any event, this is a finding of fact based on my assessment and weight given to the evidence before me. I fail to see any palpable error which the Court of Appeal will intervene.
11. Ground 7 in the draft Notice of Appeal contended that I erred in denying the claim for loss of future earnings and loss of earning capacity. My reasoning was set out in [32] to [34] of my Judgment. The medical experts concluded that the plaintiff could resume gainful employment. The psychiatric experts opined that his psychiatric condition could be controlled by medication. There was no evidence that the plaintiff had sought alternative suitable employment. That being so, the plaintiff has not shown any responsible prospect of success that the Court of Appeal will intervene with my findings of fact and refusal to make an award for these two items claimed by the plaintiff.
12. Finally, Mr Yuen in his skeleton argument put forward an additional ground which was not set out in the draft Notice of Appeal. He contended that I had erred in my award for pre-trial loss of earnings, arguing that the plaintiff should have been entitled to more than 7 months of sick leave. I explained my reasoning in [29] to [31] of my Judgment. See also [24] of my Judgment where I found on the evidence before me that the plaintiff had fully recovered from his physical injuries latest by February 2012. These are findings of fact and I do not see that I have committed any palpable error based on which the plaintiff could convince the Court of Appeal to intervene.
13. For the above reasons, I refuse leave to appeal. There is no reason why costs should not follow the event. I order that the plaintiff do bear the costs of the leave application, to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.
14. I thank counsel for their assistance.

( Jonathan Chang )

Deputy District Judge

Mr Carl Yuen, instructed by Alan Wong & Co, assigned by the Director of Legal Aid, for the plaintiff

Ms Ann Lui, instructed by Munros, for the 1st and 2nd defendants