## DCPI 2042/2016

[2019] HKDC 376

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2042 OF 2016

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##### BETWEEN

LUI KING TONG Plaintiff

### and

HOSPITAL AUTHORITY Defendant

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Before: Deputy District Judge Elaine Liu in Chambers

Date of Hearing: 15 March 2019

Date of Decision: 25 April 2019

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DECISION

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*The Application*

1. The defendant applied to vary the costs order *nisi* made by this court after the assessment of damages in respect of the plaintiff’s personal injuries claims herein (“**PI Action**”).
2. After trial for assessment of damages, this court awarded to the plaintiff on 10 January 2019 damages of HK$108,922.76 in the PI Action. The plaintiff shall give credit to the employees’ compensation in the sum of HK$104,591.26 which he had received. The net amount of damages awarded to the plaintiff in this action is therefore HK$4,331.50.
3. The defendant accepted that it should bear the plaintiff’s costs of the action. However, the defendant contended that the plaintiff should only be entitled to the costs assessed on a scale for the Small Claims Tribunal cases.

*Relevant facts*

1. The plaintiff commenced the employees compensation action (“**EC Action**”) against the defendant on 27 July 2016, and issued (but not served) a generally endorsed writ in the PI Action on 3 October 2016.
2. On 12 October 2016, the defendant made a sanctioned payment of HK$104,591.26 in the EC Action. The sanctioned payment was accepted by the defendant on 20 January 2017.
3. On 7 February 2017, the plaintiff served the writ with the Statement of Claim in PI Action. An interlocutory judgment on liability was entered by consent on 6 March 2017.
4. On 9 January 2018, the joint medical report was issued. Both medical experts concluded that the plaintiff has pre-existing or co-existing conditions, including frozen shoulders and mild right trigger thumb, trigger index, middle and ring fingers. The frozen shoulders and trigger fingers suffered by the plaintiff do not relate to the subject accident. The plaintiff’s social activities should not be affected by the accident and he does not require further treatments or operations.

*The defendant’s case*

1. The defendant contended that upon the plaintiff’s acceptance of the sanctioned payment, and on the fact that the plaintiff has to give credit to the sanctioned payment in the PI Action, there is no reasonable prospect for the plaintiff to recover in the present action a net amount of damages above $50,000, which is the then jurisdictional limit of the Small Claims Tribunal.
2. Alternatively, after the joint medical report dated 9 January 2018 was issued, it must be clear to the plaintiff that there is no reasonable prospect to recover in the present action a net amount of damages above the then jurisdictional limit of the Small Claims Tribunal.
3. The defendant contended that the plaintiff’s costs from 20 January 2017, alternatively from 9 January 2018, should be taxed on a scale allowed for cases in the Small Claims Tribunal.

*Relevant legal principles*

1. There is no dispute that the court has a wide discretion in the award of costs. The discretion shall be exercised judicially. The court has the power to award costs on a basis different from the basis for the taxed costs on the District Court scale. If a reasonable assessment shows that the recoverable damages would not be in a figure near the ceiling of the monetary jurisdiction of the Small Claims Tribunal, it would be unreasonable for the plaintiff to commence the action in the District Court and unjustifiably put the burden of footing the legal costs bill on to the defendant. In such case, the court could order that the plaintiff’s costs be assessed on a scale similar to that for the Small Claims Tribunal cases. (*Cheung Yu Tin v Ho Hon Ka* [2006] 2 HKLRD 674)
2. When determining the reasonableness of commencing a claim in this court, the court should consider the evidence available to the plaintiff at the commencement of the action. A claim will not be taken as unreasonable simply because it turned out to be unsuccessful or because it is ambitious. (*Lee Tsz Kin Ken v Climax Paper Converters Limited,* unreported, HCPI 504/2003, 23 July 2004; *Ho Wai Leung v Wan Chi Kuen* [2001] 2 HKLRD 284; *Wai Chun Incorporation Limited v Profit Choice (HK) Limited and other*, unreported, DCCJ 1980/2012, 26 November 2015)
3. The reasonable prospect test shall apply not only at the commencement of the action, but it shall continue to apply during the proceedings when further evidence and information become available. This is particularly applicable in personal injuries claims because certain key evidence relevant to damages will only be available in the course of the proceedings, for example the medical expert opinion, the plaintiff’s recovery from the injury, and the possible changes in the plaintiff’s employment situation, etc. The plaintiff shall continuously evaluate his case and where appropriate, make application to transfer the claims to the appropriate jurisdiction. (*Wong Chim Hing v Discovery Bay Transit Services* [2016] 1 HKC 491; *Leizel Dalere Ramones v Lee Kut Tung,* unreported, HCPI 1264/2015, 28 October 2016).

*Decision*

1. At the trial for the assessment of damages, the plaintiff heavily relied on the injuries suffered from the frozen shoulders and trigger fingers problems, as well as contention that his social activities were affected by the accident. However, by the time the joint medical report was issued on 9 January 2018, it must be clear to the plaintiff that these problems do not relate to the subject accident.
2. Having considered the nature of the injury, the joint medical opinions and the plaintiff’s then employment situation, by 9 January 2018, the plaintiff ought to know that there is no reasonable prospect for him to recover damages in a net amount near the ceiling of the monetary jurisdiction of the Small Claims Tribunal.
3. I therefore vary the costs order *nisi* made on 10 January 2019 and order that the plaintiff’s costs in this action be paid by the defendant with certificate for counsel, at an amount to be taxed if not agreed, on the following basis:-
4. the plaintiff’s costs for the period from 9 January 2018 onwards be assessed on a scale allowed for cases brought before the Small Claims Tribunal; and
5. all other costs of the plaintiff be assessed on the District Court scale.
6. The costs of this application be to the defendant to be taxed on the District Court scale if not agreed, with certificate for counsel.

( Elaine Liu )

Deputy District Judge

Mr C Chan of Cap Chan & Co, for the plaintiff

Mr Leo Wong, instructed by Deacons, for the defendant