# DCPI 3510/2021

[2023] HKDC 581

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 3510 OF 2021

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BETWEEN

MAK, RACHEL WING NAM Plaintiff

and

CHING KAI CHUNG Defendant

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Before: His Honour Judge Andrew Li in Chambers (Open to Public)

Date of Hearing: 2 March 2023

Date of Decision: 5 May 2023

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DECISION

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*INTRODUCTION*

1. By way of a summons filed on 11 January 2023, the plaintiff applied for leave to appeal against the judgment which I had handed down on 15 December 2022 in this case (“the Judgment”) and for a stay of execution.
2. An affidavit of the plaintiff in support of the application was filed on 11 January 2023. In her affidavit, the plaintiff exhibited a draft notice of appeal prepared by her solicitors, proposing a total number of 36 grounds of appeal. She specifically states in §12 of her affidavit that her legal advisers advised her that the intended appeal has reasonable prospect of success.



1. The defendant opposes the application.

*Relevant legal principles*

1. The legal principles of granting leave to appeal are trite and parts of which have been very briefly set out in §§7 to 9 of the plaintiff’s skeleton submissions prepared by her solicitors (“P’s Submissions”) as follows:-

“7. According to section 63A(2) of the District Court Ordinance, Cap.336 (“**the DCO**”), leave to appeal shall be granted if the Court is satisfied that:-

1. the appeal has a reasonable prospect of success; or
2. there is some other reason in the interest of justice only the appeal should be heard.

*(See section 63A(2) of the DCO)*

1. Reasonable prospect of success involves the notion that the prospects of succeeding must be “**reasonable and therefore more than** “**fanciful”,** “**without having to be probable**”.

*(See SMSE v KL [2009] 4 HKLRD 125)*

1. It is trite law that it only requires the appellant to show “**a more than just arguable case**” without demonstrating that “**the appeal will probably succeed**”.

*(See Chan Chi Tung v Cheng Ka Fai Philip & Others [2021] HKDC 1416)*”

[emphasis as appeared in original text]

1. The defendant does not dispute with the above general principles.
2. However, as Mr Simon Wong for the defendant has submitted, the plaintiff has conveniently overlooked the important principle that, in respect of a challenge against factual findings made by a trial judge, the appellant has to overcome a very high threshold in order to succeed. The Court of Appeal would only intervene if, despite the fact that it does not enjoy the advantages available to the judge who received the evidence at first-hand, it is nevertheless satisfied that his or her conclusion on the facts is wrong: *Ting Kwok Keung v Tam Dick Yuen & others* (2002) 5 HKCFAR 336, §42. It has been said that an appeal is not a forum for the appellant to repeat the submissions which are (or should be) submissions advanced by way of closing submissions at the trial. The appellant must have to identify “palpable errors” in the judgment below sufficiently material to warrant the intervention by the Court of Appeal: *China Gold Finance Ltd v CIL Holdings Ltd and Others* (unreported, CACV 11/2015, 27/11/2015), §§14 to 15.
3. Mr Wong further submits that the trial court is the primary tribunal for assessment of the evidence and making relevant findings of fact. The appeal court should defer to the trial judge’s conclusion even if in some doubt as to its correctness, because it is unlikely to gain as much insight to the facts from seeing how the evidence unfolded, or be as familiar with the evidence as the primary judge, who has lived with the trial from beginning to end: *Shine Grace Investment Ltd v Citibank NA & another* [2022] HKCA 1341 at §60(2).
4. I fully agree with Mr Wong’s submissions above.

*No reasonable prospect of success*

1. There are 36 proposed grounds of appeal, covering almost every single paragraph under the heading of “Discussion” in the Judgment. In essence, the plaintiff contends that I was wrong in almost everyaspect of the analysis and findings I made in this case.
2. Grounds 1 to 29 are related to liability, while Grounds 30 to 35 and Ground 36 are related to quantum and costs respectively. Ground 28 is based on the serious allegation of the court’s supposedly “bias” but with no details provided.
3. I shall deal with them in the above order accordingly.

*Grounds 1 to 29 (on issue of liability)*

1. These grounds can be dealt with together. They challenge the primary factual findings made by me in the Judgment.
2. With respect to Mr Sun, the solicitor who now appears for the plaintiff in the present application (the plaintiff was represented by counsel during the trial), the plaintiff essentially complains about the factual findings made by me which are not in her favour.
3. With respect, I do not think that the plaintiff has identified any errors, let alone any “palpable errors”, which are plainly wrong in my reasoning. The fact that a litigant does not like the outcome of a case after the trial does not necessary mean that some errors have been made by the trial judge, let alone some “palpable errors”. In this case, I do not agree that I have made any of those errors as identified by Mr Sun in P’s Submissions.
4. I agree with Mr Wong that despite the grounds were drafted with phrases “*the Learned Judge was wrong in law in …”*,the plaintiffhas not identified any mistakes *in law* which I supposed to have made. Mr Sun merely repeats his observations and conclusions that he or the plaintiff wants me to find in her favour *factually*. Again, with respect, this is plainly insufficient for the present purpose.
5. I further agree with Mr Wong that while the plaintiff complains about my reasoning in a “microscopic” manner, namely, bit by bit and paragraph by paragraph, the plaintiff fails to appreciate that the factual findings of a trial judge are made after due consideration of *all* aspects of the evidence, including the internal consistency of their evidence; the consistency of witnesses’ evidence with undisputed or indisputable evidence especially contemporaneous documents; the inherent likelihood or unlikelihood of an event having happened; the apparent logic of events; and the witnesses’ demeanour in court. In other words, it is a holistic and not a piecemeal approach.
6. With respect to Mr Sun*,* I did not reach a conclusion upon just one or two pieces of evidence or observations in this case. I have considered all aspects of the case before I come to my conclusions on liability in this action. I would like to think that I have given careful consideration and detailed analysis of the issues raised by the plaintiff and her counsel at the trial before I come to those conclusions in the 46-page Judgment, of which at least half of which was dedicated to the discussion on the issue of liability.
7. In my view, the proposed grounds are akin to making closing submissions at the hearing for the application all over again. It is like having a second bite of the cherry when their first attempt made by counsel was unsuccessful. In my judgment, such an approach is clearly inappropriate and a waste of the court and the parties’ time and resources.

*Findings on the plaintiff’s specific draft grounds of appeal*

1. Without repeating each and every single allegation made under the draft grounds of appeal and in P’s Submissions, I shall deal with them briefly below by following the order of the grounds and the corresponding paragraphs under P’s Submissions:-
   1. Grounds 1 to 11 (§§12 to 30 of P’s Submissions)
2. I agree with Mr Wong that many of the plaintiff’s submissions are simply logically unsound and do not require to be specifically dealt with. While the plaintiff submits that the court erred in failing to make those inferences the plaintiff suggested, I agree with Mr Wong that the opposite is true. In my view, the court would have made a “palpable error” had I made those suggested inferences, as those inferences were against both the evidence and logic.
3. For example, the fact that the defendant overtook the Scooter would only mean the speed of the defendant’s motorcycle was higher than the speed of the Scooter *at the time* of the overtaking. It does not logically follow that the defendant’s motorcycle was all along at a higher speed than the Scooter and, more relevantly, the plaintiff’s motorcycle (§§13, 16 of P’s Submissions).
4. Similarly, the fact that the defendant once saw 2 motorcycles ahead of his motorcycle does not logically follow that the 2 motorcycles were moving at the same or similar speed and was relatively slow in order to keep them moving together at same/similar pace (§§ 14 to 15 of P’s Submissions).
5. Equally, the fact that the defendant overtook the Scooter does not logically follow that the defendant was in a hurry (§17 of P’s Submissions).
6. Contrary to what has been submitted in §§21 & 22 of P’s Submissions, the court was entitled to reject the plaintiff’s evidence and to accept the defendant’s evidence. Again, the plaintiff did not identify what “palpable error” there was.
7. §23 is not understood. It is exactly the court’s analysis that the defendant could have easily overtaken the plaintiff’s motorcycle before the Accident and hence there was no logical explanation as to why the defendant would choose to follow the plaintiff instead (see §59 of the Judgment).
   1. Grounds 12 to 16 (§31 to 32 of P’s Submissions)
8. Regarding §31 of P’s Submissions, contrary to what has been submitted, I never said there were inconsistencies between the police statement and the plaintiff’s evidence (see §§42 to 45 of the Judgment). I think I was entitled to comment that if the plaintiff was being forced to cross the double white lines she would have told the Police about this, as part of the analysis of overall credibility.
9. As to §32, again, I never said that the plaintiff’s guilty plea was conclusive (see §§46 to 47 of the Judgment). Contrary to what the plaintiff has submitted, I think I was fully entitled to form a view that it is difficult to believe that if the plaintiff’s version in this trial was true, she would not have chosen to say something to the magistrate about the defendant’s driving manner when invited by the magistrate to do so, as part of the analysis of overall credibility.
   1. Grounds 17 to 19 (§§33 to 34 of P’s Submissions)

I agree with Mr Wong’s submission that no error (let along any “palpable errors”) has been identified by the plaintiff.

* 1. Grounds 20 to 22 (§35 of P’s Submissions)

The plaintiff simply disagrees with my observations. Again, no error was identified.

* 1. Grounds 23 to 24 (§§36 to 39 of P’s Submissions)

I consider I was fully entitled to draw the adverse influence, in fact that is one of the primary functions of a trial judge. Regarding §37 of P’s Submissions, I have already rejected the plaintiff’s explanation that Chow refused to testify for her, in light of the plaintiff’s contradictory evidence at the trial (see §56 of the Judgment). As to §38, the plaintiff’s evidence was that Chow did witness the Accident (see §55 of the Judgment). The plaintiff’s submission is directly contradictory to the plaintiff’s evidence.

* 1. Grounds 25 to 27 (§40 of P’s Submissions)

I agree with Mr Wong that the submissions regarding overtaking the Scooter are irrelevant. The fact that the defendant overtook the Scooter does not logically follow that he would follow the plaintiff so closely as the plaintiff alleged.

* 1. Ground 29 (§41 of P’s Submissions)

I also concur with Mr Wong that none of the matters stated in sub-paragraphs (a) to (h) of §41 of P’s Submissions, separately or cumulatively, could logically lend any support to the plaintiff’s case. I think I have thoroughly considered all evidence before I made the factual findings.

*Ground 28 (on* “*apparent bias*”*)*

1. Despite the plaintiff did not make any submissions on Ground 28, I agree with Mr Wong that this ground deserves a special highlight.
2. Under this draft ground of appeal, the plaintiff (with the assistance of her solicitors) boldly made a complaint that “*throughout the trial and from the beginning of the trial and even before the D giving evidence, the Learned Judge had repeatedly expressed his bias in favour of the D 's credibility based upon his occupation and religion*”.
3. It is regrettable that the plaintiff or her solicitors saw fit to make such a serious allegation against the court but yet have not make any submissions on it, whether in writing or orally, at the hearing of the application. In my judgment, it is wrong and irresponsible for the plaintiff and her solicitors to make such a serious accusation against the court without any evidence in support, least to keep totally silence on the matter when it comes to making submissions on it.
4. In reaching the conclusions that the defendant was an honest and credible witness and that his version should be accepted, I had considered all the evidence and made what I would consider as a fair, logical and just decision in light of those evidence. I did give full reasons why the defendant’s version should be accepted, including the fact that the defendant’s evidence is fully supported by the contemporaneous statement he gave to the Police which is also consistent with his witness statement and evidence in court (§58 of the Judgment); the lack of logical reason for the defendant to follow the plaintiff so closely (§59 of the Judgment); the conduct of the defendant in staying behind the scene after the accident inherently more consistent with the defendant’s version (§60 of the Judgment), my observations of the defendant after hearing live evidence (§61 of the Judgment), and the fact that the defendant did not know the plaintiff, had never met her before and had no grudges against her (§61 of the Judgment). Mr Wong was right to point out that the reference to the defendant’s occupation and religion in §61 of the Judgment was merely background information and not a reason for the court to believe the defendant. Conversely, the fact that the plaintiff has sworn in as a Christian when taking her oath is not one of the reasons I have found against her.
5. While I can see why the plaintiff as a lay person and litigant is upset in losing the case, it really would not help the court in trying to *“safeguard the law and administer justice, without fear or favour, self-interest or deceit”* as all judges and judicial officers have all sworn to do under the judicial oath when the plaintiff’s solicitor as an officer of the court would make such a serious accusation without any substantive evidence or arguments to back it up. I regret that Mr Sun the plaintiff’s solicitor would choose to make such a serious allegation as one of the grounds of appeal prepared by him but yet failed to identify any particulars let alone elaborated on it in P’s submissions or at the hearing.

*Conclusion on draft grounds of appeal on liability*

1. For the above reasons, I do not consider any of the draft grounds of appeal on liability have any reasonable prospect of success and therefore would refuse leave based on those grounds.

*Grounds 30 to 35 (on the issue of quantum)*

1. I agree with Mr Wong that if leave to appeal on liability is refused, the court should not grant leave to appeal on quantum alone.
2. However, for the sake of completeness, I shall deal with them briefly here.
3. The challenge in Ground 30 is on my finding that the plaintiff has fully recovered from the multiple injuries sustained by her in the Accident (§67 of the Judgment).
4. I agree with the defendant that the court’s finding on this matter ought to be read in context. At §65 of the Judgment, I made the comment that the plaintiff has achieved good recovery and that the residual disabilities, if any, do not have significant impact on her daily life and functional capacity. I consider that these are well evidenced from medical reports from the public hospitals, expert evidence, as well as the surveillance footages (§§66 to §67 of the Judgment). I think I was fully entitled to consider all the evidence as a whole to make my finding. I do not see any mistake/error has been identified by the plaintiff in this regard.
5. I consider that Grounds 31 to 35 also have no substance. The plaintiff has not identified any mistake/error that I supposed to have made. In my view, merely disagreeing with a trial judge’s assessment on damages is insufficient for the purpose of obtaining leave for the proposed appeal.

*Ground 36 (on the issue of costs)*

1. Again, the plaintiff has not identified any mistake/error on my part in the exercise of discretion to award costs on indemnity basis. To the contrary, I have given my reasons in §§109 to 110 of the Judgment for such ruling. If the plaintiff or her solicitors consider that I was “wrong in law” in granting costs on an indemnity basis in this case, they should spell out the reasons fully with in the grounds of appeal or in the written submissions instead of keeping silence on the matter.
2. For the above reasons, I would refuse leave based on the grounds in relation to the issue of quantum also.

*CONCLUSION*

1. In my opinion, the plaintiff’s intended appeal, which is purely based on the supposed errors made by the court on findings of fact and not on law, enjoys no prospect of success at all.
2. It is a hopeless application with no prospect of success at all right from the word go. I therefore would dismiss the application with costs in favour of the defendant with certificate for counsel.
3. As I have mentioned in §110 of the Judgment, this was a case which should not had been brought in the first place due to the dire lack of any credible and contemporaneous evidence. On that occasion, I ordered the plaintiff to pay for the costs on an indemnity basis.

1. Yet, despite of my comments, based on what the plaintiff’s solicitors have advised her (see §12 of the plaintiff’s affidavit), the plaintiff saw fit to pursue what I would consider as a hopeless and groundless application for leave to appeal. Since the plaintiff is not on legal aid and given her financial and social background, it is extremely doubtful whether she will be in the position to satisfy the costs of the defendant in this hopeless application.
2. I consider that, at least, *prima facie*, there is a case for the plaintiff’s solicitors to explain to the court as to why they should not be made personally liable for this hopeless application and wasteful exercise.
3. I therefore will make a costs order nisi that the plaintiff’s solicitors do show cause within 28 days as to why they should not pay the costs of the present application on an indemnity basis, such costs to be summarily assessed by the court and to be paid forthwith. Should any party wish to vary the above order nisi, they should make an application within 14 days from the day of handing down of this decision. The matter will be dealt with the court by way of paper disposal in order to avoid further unnecessary occurrence of costs.

( Andrew SY Li )

District Judge

Mr Sun Po, of Messrs Yu Sun Yau Mak & Lawyers, for the plaintiff

Mr Simon Wong, instructed by Messrs Hastings & Co, for the defendant