###### DCPI 869/2004

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 869 OF 2004**

**--------------------**

##### BETWEEN

## KAM CHI FUNG Plaintiff

### and

#### GLORY SUCCESS

#### TRANSPORTATION LIMITED 1st Defendant

SZE KIN SHING 2nd Defendant

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Coram: H.H. Judge C.B. Chan in Court

Date of Hearing : 25th April 2005

Date of Handing down of Ruling : 19th May 2005

RULING

1. Having heard submissions from both sides, I was delivering my oral decision when the Defendants’ solicitor asked for an opportunity to clarify her submissions on the P.I. Practice Directions that had been referred to by the Plaintiff’s solicitor and I allowed her to do so after the lunch break. After the lunch break she resumed her submissions and handed up further authorities. At the end of this the Plaintiff’s solicitor stated that he had nothing to add. I adjoined for the ruling to be handed down to save time. This takes the place of the oral decision that I had been in the process of delivering but had not completed the delivery and this takes into account the further submissions of the Defendants’ solicitor.
2. The parties entered into an agreement on quantum of damages at $35,000. The Defendants agreed that it was liable for the costs of the action. The Defendants’ solicitor advanced the only contention between the parties and it is whether the Plaintiff should not be awarded costs beyond what a successful Plaintiff would have been awarded in the Small Claims Tribunal, as the amount of damages agreed herein is within the jurisdiction of the Small Claims Tribunal. The agreement between the parties related to the quantum of damages had been made an order of this Court. The parties’ solicitors submitted on the only issue before me aforesaid.
3. The Plaintiff’s solicitor referred me to the decision of H.H. Judge Carlson in Ho Wai-Leung and Wan Chi Kuen DCPI00011 of 2001. Relying on the Judgment he submitted that the Statement of Damages filed herein, claimed $78,190 and PSLA was claimed to be $65,000. It was because the Plaintiff wanted to arrive at a quick settlement and to save time that he decided to settle at the sum of $35,000. Originally the claim included $12,500 for loss of earnings. However, the Plaintiff could not locate sufficient documents to support his loss of earnings. He submitted that it is a marginal case. He further submitted that the Plaintiff’s solicitor had complied with P.I. Practice Directions 18.1 to issue the required letters before action. The Defendants did not respond with offers for settlement. Under paragraph, 2.3 of the P.I. Practice Directions under the aforesaid circumstances it is stated that he would be “entitled to commence proceedings forthwith without risk as to costs”. He stated that this is a case that involved a lot of documents and it may be necessary to call medical evidence in the trial. Further, he stated that the Plaintiff might have difficulty in making effective submissions without legal representation. For the aforesaid reasons, he submitted that it is more appropriate for the Plaintiff to begin his action in this Court.
4. The Defendants’ solicitor commented on the medical reports of the Plaintiff. The Plaintiff was upon admission to A&E Dept of Ruttonjee / Tang Shiu Kin Hospital found to have mild tenderness at the left side of neck and right shin. X-ray of the cervical spine, chest and sternum were all normal. He was treated and discharged. Sick leave of 5 days was recommended that is from 9 – 15 September 2003. Medical Report of his private physician Dr. Liu Lai Hang, Julian upon medical examination on 15 September 2003 showed that on physical examination, his condition was good. “There was tenderness at the left side of his neck and pain on moving the neck. There was bruising and tenderness at the scafnoid area of his right wrist and pain maximum on adduction of his right wrist”. He was given seven further days’ sick leave. On the 22 September 2003 he was again seen by the same doctor who noted that he had improving symptoms and signs. Sick leave of one week was issued that day. The third and fourth visits to the same doctor were on 30 September 2003 and 10 October 2003 he was found to have gradual improvement. Sick leave of one week was given each time. The Defendants’ solicitor commented that there is no expert report on diagnosis or prognosis. There is no expert report on permanent incapacity arising from the above symptoms. She stated that the symptoms were minor.
5. The Defendants’ solicitor drew my attention to Chan San Clement v. Opex Limited trading as Dragon Food snacks Shop & Another DCPI wherein H.H. Judge Lok assessed damages for PSLA at $25,000 and loss of earnings at $1,100, travelling expenses at $400, and medical expenses at $550. Total damages came to $27,050. Judge Lok in that case came to the conclusion that the assessment of damages for injuries suffered in that case did not entail complicated argument. He was of the view that the case should have been brought in the Small Claims Tribunal. However he was not clear whether he could award costs in any other scale other than the District Court scale in view. He therefore made the order that there be no order as to costs.
6. The second authority Cho Ho Kuen v. Yu Kwok Wah, Chan Chun Fai and Chan Chun Keung is not strictly on this point and need not be referred to. The third authority M Beraha & Co. Ltd. v. Ng Wai Lun CACV No. 256 of 2003, is a decision of the Court of Appeal on appeal from a judgment by H.H. Judge Lok wherein he concluded that the action ought to have been instituted in the Small Claims Tribunal and awarded costs at an amount which the Plaintiff would have been awarded if the case were brought in the Small Claims Tribunal but included an amount for the costs of bringing two overseas witnesses to testify in the case. In that case the Court of Appeal, held that O 62, r3(2) combined with O 62, rule 9(4)(b), in their view, are wide enough to entitle the District Court to order costs to be not more than a specified sum, or to be assessed on a basis similar to the scale applied in the Small Claims Tribunal. The Court of Appeal affirmed the decision of H.H. Judge Lok. The Court of Appeal also held that one of the main purposes of establishing the Small Claims Tribunal and to let litigants have resort to it is to let the parties resolve their disputes where the claims are within the monetary jurisdiction of the Small Claims Tribunal without the need to incur the expenses of retaining legal services.
7. The Defendants’ Solicitor further refers to the case of Sit Ka-yee v. Lai Wai-ho, a Ruling of H.H. Judge Carlson delivered after the Judgment in Ho Wai-Leung and Wan Chi-Kuen aforesaid. In Sit Ka-yee Judge Carlson referred to an important point that where a personal injury action filed in the Small Claims Tribunal can bring forensic difficulties for an unrepresented litigant who may have to call medical or other experts, where this arises, the Small Claims Tribunal could under section 7 of the Small Claims Tribunal Ordinance transfer the action to a higher court.
8. I have to find whether it was reasonable for the Plaintiff to file this claim in the District Court. The injuries of the Plaintiff referred to aforesaid show that the symptoms were not serious. There was no in-depth expert report that describes injuries other than mild tenderness suffered in the neck and on moving the neck and on his right wrist where the pain is most on adduction of his right wrist. Dr. Liu on each of the Plaintiff’s visits to him stated that he found the Plaintiff’s condition was improving.
9. The Defendants’ solicitor submitted three authorities related to awards for PSLA to support her contention that PSLA would not have been over $35,000. The Plaintiff’s solicitor Mr. Yu had not supplied the Court with any authorities and had not done any research on the PSLA likely to be awarded in this case. Mr. Yu merely stated that he relied on his past experience.
10. I come to my conclusions as follows: -
11. P.I. cases are not like cases of liquidated claims where it is immediately apparent that a claim is within the jurisdiction of the Small Claims Tribunal, particularly where the case is in the borderline. Without legal advice it is not possible for a prospective Plaintiff to know the amount of damages likely to be awarded and hence which is the right forum for his claim. On the other hand, a Plaintiff’s solicitors before filing his client’s claim in the District Court should consider the likely amount of damages that could be claimed and have supporting authorities to support their initial view of the likely damages to be awarded on PSLA. Further they should ensure there is evidence available to support other heads of damages. In this case, on the basis of the injuries suffered by the Plaintiff PSLA was not likely to exceed $35,000 or thereabouts. Initially the Plaintiff had claimed loss of earnings at $12,500.00. However upon the application of the Defendants for supporting documents for this claim, the Plaintiff relinquished this head of claim. The Plaintiff’s solicitors should have ensured that he had the documentation to support this claim for loss of earnings and the Plaintiff was willing to adduce them.
12. It is clear that the Plaintiff had sent pre-action letters to the Defendants and the Defendants or his insurer had not sent a constructive reply thereto within one month as required by paragraph 2.3 of the Practice Directions. Although paragraph 2.3 of the same practice Directions state that, “If there is no such reply the claimant will be entitled to commence proceedings forthwith without risk as to costs”, this does not absolve the Plaintiff’s solicitor from his responsibility for advice to his client based on authorities as to the choice of the appropriate forum for the claim.
13. The Court of Appeal stated in M Beraha & Co. Ltd. v. Ng Wai Lun that “One of the main purposes of establishing the Small Claims Tribunal and let litigants have resort to it is to let the parties resolve their disputes on matters within the monetary jurisdiction of the Tribunal without incurring the expense of retaining legal services (which normally would involve a rather substantial amount) and at the same time would not have the effect of an unrepresented litigant having to fear the imbalance of power caused by a lawyer representing the other side while he himself does not have legal representation.” Since this is the purpose of the establishment of the Small Claims Tribunal a prospective Plaintiff to proceedings should not by-pass this and obtain an unfair advantage by filing a claim, which is not likely to exceed the jurisdiction of the Small Claims Tribunal, in the District Court.
14. As Judge Carlson stated in Sit Ka-yee and Lai Wai-ho referred to aforesaid, stated in response to the submission of Mr. Yu the Plaintiff’s solicitor (also the solicitor for the Plaintiff in this action), who stated “that a personal injury action which can bring forensic difficulties for an unrepresented litigant who may have to call medical experts or other technical evidence, is best dealt with in a court that permits legal representation.” Judge Carlson stated, “Some personal injury actions in the Small Claims Tribunal will present such difficulties and some will not. If they are complex, the Tribunal does have the power to transfer a case to this court or to the High Court if it considers that to be the appropriate to the particular case (see section 7 of the Small Claims Tribunal Ordinance) but that is a matter for the Tribunal to decide when a claim is brought before it.
15. In Lai Ki v. B+B Construction Company Limited & Ors. HCPI 63/2001 Seagroatt J. when deciding on whether costs should be taxed on a District Court Scale or the High Court Scale, after referring to the English decision of Glyn-Jones, J. in Hopkins v. Rees & Kirby Ltd (1959) 2 All ER 352 stated that “The acid test therefore has been, ignoring all questions of contributory negligence, has the Plaintiff a reasonable prospect of recovering a sum of money in excess of the County Court jurisdiction?” In my view, analogous to the test stated aforesaid, the acid test to be applied here is, ignoring all questions of contributory negligence, has the Plaintiff a reasonable prospect of recovering a sum of money in excess of the Small Claims Tribunal jurisdiction?
16. I am of the view that with care, the Plaintiff’s solicitor should have come to the conclusion that quantum for PSLA likely to be awarded would fall within the jurisdiction of the Small Claims Tribunal. He has not advanced any basis for the Court to come to the conclusion that the Plaintiff has a reasonable prospect of recovering a sum of money in excess of the Small Claims Tribunal jurisdiction. The Plaintiff’s solicitor did not even bother to research on authorities with comparable injuries to help him to come to the correct conclusion as to the appropriate venue for filing this claim. The Plaintiff’s solicitor advanced here the same argument referred to in paragraph (4) above that had been advanced in Sit Ka-yee and Lai Wai-ho and had been rejected by Judge Carlson. The Plaintiff’s solicitor ought to have taken greater care to ensure that his client had the supporting documents for loss of earnings before filing the claim.
17. Despite the aforesaid, I am conscious that a layperson would not know what is the appropriate forum to file his claim for personal injuries without legal advice. A Plaintiff would not know about computation of damages and the heads of damage and the appropriate quantum for each head without legal advice. Having considered the aforesaid, I find that the Plaintiff is not entitled to costs of the action from the date of the filing of the claim in the District Court except such costs as would have been appropriate for a claim to be filed in the Small Claims Tribunal. However, I am of the view that the Plaintiff is entitled to Solicitors costs for considering on his behalf the totality of his case to enable him to come to the decision as to the appropriate forum for this P.I. action and even for the drafting of a pre-action letter to the Defendants and the Defendants’ insurer to attempt to obtain a settlement. I am of the view that this would be the appropriate costs for pre-action advice related to forum and also for a pre-action letter to the Defendants and the Defendants’ insurer as follows: -

1. Having read the documents in this case, costs for 3.5 hours of time for a solicitor of medium standing at $2,000 per hour to take instructions, peruse medical reports, brief facts of accident, and other documentation and to research into the authorities of comparable injuries to consider the quantum of damages likely to be assessed in this case and to advise the Plaintiff.

2. Costs for drafting and sending a letter to the Defendants and Defendant’s insurer at $1,000.

3. Costs of the claim likely to be awarded in the Small Claims Tribunal at $1,000.

1. Having considered the aforesaid, I grant an order nisi for assessed costs of the action to the Plaintiff in the sum of $9,000 to be paid by the Defendants. On the basis that the Defendants had partially succeeded in the Defendants’ contention and also that one further authority, which I relied on was submitted after the lunch adjournment, I find that it is fair to grant the Defendants half the costs of this hearing with hearing time limited to 3 hours. I therefore grant an order nisi for half the costs of the hearing on 25th April 2005 to the 1st and 2nd Defendants to be taxed if not agreed with hearing time limited to 3 hours.

C. B. Chan

District Judge

Representation :

Mr. Yu Shiu Ming of Messrs. Eric Yu & Co. for the Plaintiff.

Miss Anita Chan of Messrs. Y.T. Chan & Co. for the 1st and 2nd Defendants.