DCPI 112/2004

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INURIES ACTION NO. DCPI 112 OF 2004

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BETWEEN

WONG FUNG SZE and WONG MING SZE ALIGHT 1st Plaintiff

as administrators of the estate of

WONG SIU MO, the deceased

WONG FUNG SZE 2nd Plaintiff

and

HOSPITAL AUTHORITY Defendant

for and on behalf of TUEN MUN HOSPITAL

\_\_\_\_\_\_\_\_\_\_\_\_

Before: His Honour Judge To in Chambers

Date of Hearing: 11 October 2004

Date of Judgment: 11 October 2004

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D E C I S I O N

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1. This is the 2nd Plaintiff’s application for leave to appeal against my order made on 7 July 2004 refusing her application to amend the statement of claim and granting the Defendant’s application to strike out her statement of claim and to dismiss her action against the Defendant. In an application for leave to appeal, the burden is on the applicant to show that she has an arguable case with reasonable chances of success on appeal or that there are other special reasons why the matter should be considered by the Court of Appeal: *Ma Bik Yng v Ko Chuen,* HCMP 4303/1999.
2. Mr Mui advanced six grounds of appeal. The first two of these alleged that I erred in determining that a horrifying event could not have lasted for several months in the absence of a formal trial after hearing the evidence of the 2nd Plaintiff and her medical expert, Dr Lo. Mr Mui also submitted that I ignored the latest principles as laid down in *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792. My decision was reached on the basis of the law as set out by the House of Lords in *Alcock and others v Chief Constable of South Yorkshire* [1992] 1 AC 310. In coming to my decision, I have also adopted the very realistic approach of the Court of Appeal in *North Glamorgan NHS Trust v Walters* which was most favourable to the 2nd Plaintiff.
3. For the purpose of the applications then before me, I have assumed the facts were as pleaded in the statement of claim as it stands and as proposed to be amended and have taken into account the medical reports produced by the 2nd Plaintiff. That must represent the best case the plaintiff may present at trial, if the matter should proceed to trial. In a nutshell, the 2nd Plaintiff is a secondary victim. She cannot succeed without proving shock. On her pleaded case or her case as proposed to be amended, she suffered psychiatric illness as a result of a series of events which occurred over a period of two to four months, which in law could not constitute a shock within the meaning of Lord Ackner’s fifth proposition in *Alcock v Chief Constable of South Yorkshire.* Even with the more realistic and somewhat relaxed approach adopted by the Court of Appeal in *North Glamorgan NHS Trust v Walters*, I was unable to reach the conclusion that the series of events which occurred over the two to four months period could on a realistic view of those facts constitute a horrifying event and not gradual assaults on the 2nd Plaintiff’s nervous system. A protracted analysis of evidence which put at the highest could not in law constitute a shock would be a futile exercise, which no court should embark upon in a claim of this nature. This is what Order 18 rule 19 of the Rules of District Court seeks to prevent. Proceeding to trial would achieve nothing for the 2nd Plaintiff as she would be bound by her pleading. There is no merit in these grounds of appeal.
4. In his third ground of appeal, the 2nd Plaintiff alleges that I failed to appreciate the shock upon the 2nd Plaintiff who had been repeatedly advised by TMH that there was nothing wrong with the deceased when being informed of the result of the MRI and CT scan from St Teresa’s Hospital on 21 July 2001. The words “nervous shock” as pleaded by the 2nd Plaintiff were probably used in their ordinary sense. I have duly considered its technical meaning in accordance with the fifth proposition of Lord Ackner in *Alcock and others v Chief Constable of South Yorkshire*. Even taking the 2nd Plaintiff’s case as pleaded or proposed to be amended, I was not satisfied that it disclosed nervous shock in the technical sense.
5. In her fourth ground of appeal, the 2nd Plaintiff says that I have not considered her case of misrepresentation. In the verbal reasons given by me when dismissing her application, I made no mention of this particular claim. That was because no authority has been advanced to me that such misrepresentation would have the legal effect of turning a secondary victim to a primary victim so that he could succeed on a claim for psychiatric illness without proving shock. Almost all cases referred to me at the hearing involved some misrepresentation, in particular *North Glamorgan NHS Trust v Walters,* but none of those authorities have decided that misrepresentation by themselves constituted a sufficient ground of claim. If misrepresentation were a sufficient ground for claim, the control imposed by Lord Wilberforce in *McLoughlin v O’Brien* [1983] 1 AC 410 would have become otiose and the law about nervous shock would not have developed the way it did.
6. Today, Mr Mui referred me to the case of *Chesneau v Interhome* (1983) 134 NLJ 341. That was a case of recovery for inconvenience, discomfort, annoyance and disturbance in tort. It is not an authority that damages for psychiatric illness caused by misrepresentation is recoverable by a secondary victim without proving shock. It is of no assistance to the 2nd Plaintiff.
7. In her fifth ground of appeal, the 2nd Plaintiff alleges that her case is fact-sensitive and it would be wrong to strike out her claim without undergoing a minute and protracted examination of the documents and her evidence as well as that of her medical expert. Quite apart from the fact that no argument has been advanced to explain why this case is fact-sensitive, there is no suggestion that there are any factual issues which need to be resolved at trial and which might materially affect my conclusion. Mr Mui has not referred me to any document which required protracted examination. As for the need to hear evidence generally, this is a repetition of the first and second grounds of appeal which I have dismissed as unmeritorious.
8. In her sixth ground of appeal, the 2nd Plaintiff alleges that I failed to appreciate the proposed amendments. I have duly considered her proposed amendments. They are insufficient to cure the defect in her case.
9. Lastly, Mr Mui repeated his plea that I should take an incremental step to advance the frontier of liability to cover gradual assaults on the nervous system. I consider I am bound by the authorities and this is not a suitable case on which such incremental step could arguably be taken.
10. For the above reasons, I am not satisfied that the 2nd Plaintiff has shown an arguable case with reasonable chances of success on appeal. Accordingly, I refuse her application for leave to appeal to the Court of Appeal. The 2nd Plaintiff shall pay the Defendant’s costs with certificate for counsel.

Signed

( Anthony To )

Judge of the District Court

Mr. L. Mui, instructed by Messrs Lam, Lee & Lai for the 2nd Plaintiff

Mr. Paul Lam, instructed by Messrs T. S. Tong & Co. for the Defendants