## DCPI 189 /2004

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 189 OF 2004

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##### BETWEEN

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| CHAN CHUNG SAU | Plaintiff |
| And |  |
| HOSPITAL AUTHORITY  For and on behalf of United Christian Hospital | Defendant |

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Coram: Deputy District Judge S. T. Poon in Chambers

Date of Hearing: 4th May 2006

Date of Handing Down Judgment: 8th May 2006

D E C I S I O N

1. This is an application by the Defendant (“D”) to strike out the Plaintiff’s (“P”) claim under Order 18 Rule 19 of the Rules of the District Court.
2. The Plaintiff suffered personal injuries as a result of a traffic accident happened on 12th January 2001. He was admitted to the United Christian Hospital (“UCH”) and received treatment there. Amongst other injuries he suffered, he has a fracture in his right wrist at the scaphoid bone which eventually developed into non-union of the fracture and degenerative changes following non-union.
3. The fracture was not detected by the UCH when P was treated there in January 2001. On 7th November 2001 x-rays were taken by the UCH which revealed fracture of the scaphoid bone with mal-union and onset of degenerative changes. P then went to a private medical clinic and x-rays ordered there revealed fracture of the right carpal bones. P sues D for medical negligence.
4. Before P took out the present action against D, he sued the driver (“MDJ”) of the vehicle involved in the traffic accident for negligence. Judgment was entered against MDJ by consent in November 2004 with damages to be assessed.
5. The Writ of the present action was issued on 11th March 2004 and served to D on 4th September 2004. The assessment of damages for the action against MDJ was heard before Deputy High Court Judge Carlson and his judgment was handed down on 20th December 2004.
6. In the Statement of Damages of P in the present action, P claimed against D for damages for Pain, Suffering and Loss of Amenities (“PSLA”) and expenses for medical treatments from September 2004 onwards.
7. Similar damages were claimed in P’s action against MDJ.
8. Mr. Sakhrani, counsel for D, submitted that P had elected to sue MDJ only in that action and allowed the damages to be assessed on the basis that MDJ was to bear 100% liabilities of P’s injuries and P is now seeking double recovery.
9. Mr. Sakhrani submitted also that the remedies of P against MDJ and D are alternative to or inconsistent with each other that P could only elect to pursue against either one of them. If P elected to preserve his rights to claim against D for damages attributable to D’s negligence, P should have asked the learned Deputy Judge to leave this part out when assessing the damages.
10. Miss Kung, counsel for P, submitted that the remedies were cumulative rather than alternative or inconsistent. She said also that the learned Deputy Judge did not have the benefit of Dr. Y. Y. Kwok’s report when he assessed the damages.

**Discussion**

1. The present action was taken out prior to the entering of judgment and assessment of damages of P’s action against MDJ. P did not see fit to joint D as a party to the action and ask for apportionment of liabilities. Nor did P ask the learned Judge to disregard the injuries of P’s wrist resulting from the negligence of D when assessing the damages.
2. In assessing the award for PSLA, the learned Deputy Judge has this to say in his judgment in paragraph 22:-

“The wrist is effectively fully functional save when pushed to extremes. I assess this on the basis that there will never be a full recovery and that he may have to have a further operation (although this would appear to be highly unlikely) if the pain gets worse. At present the pain is manageable….I assess this head of damages at $300,000.”

As to the expenses for future medical treatment, the Learned Deputy Judge said in paragraph 27 of his judgment that:-

“I have also considered the claim for $150,000 for future wrist surgery but in view of the Plaintiff’s evidence, I have decided that it is more likely than not that he will not undergo this surgery which is an entirely reasonable approach by him. In those circumstances there will be no further award in respect of this claim.”

The learned Deputy Judge also provided a thorough analysis of P’s injuries on his wrist under paragraph 8 of his judgment.

1. It is crystal clear that the Learned Deputy Judge had taken into account P’s injuries on his wrist, which is the subject matter of the present claim, when making his assessment of damages against MDJ who was the one to bear all liabilities under the action against him.
2. It is not in dispute that the damages awarded against MDJ have been satisfied fully.
3. To allow P to claim against D is to allow P to have a second bite of the cherry. The damages suffered by P as a result of the traffic accident and also as a result of the alleged medical negligence had been assessed and determined fully before Deputy Judge Carlson. The issue had even been determined again at the Court of Appeal. It is an abuse of Court’s process to seek to have the same issue determined again at the District Court.
4. Further, as all the damages of P were assessed and satisfied, anything to be awarded under the present action would be a double recovery of P’s loss.
5. Mr. Sakhrani referred me to a decision of the Privy Council ***Tang Wing Hong Alan*** v ***Capacious Investments Limited*** [1996] 1 HKLR 16, where Lord Nicholls of Birkenhead, at page 21C, has this to say:-

“In the interests of fairness and finality a Plaintiff is required to bring forward his whole case against a Defendant in one action…the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together…a Plaintiff cannot recover in the aggregate from one or more Defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the Plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a Plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recover.”

1. In my view, should P have joined D in the action against MDJ, in view of the basis upon which Deputy Judge Carlson had arrived at his assessment of damages, P would not have been awarded anything more than the sum awarded by the Learned Judge.
2. Having received the full amount of damages from MDJ, P has literally recouped the whole of his loss, and any further proceedings against D in respect of the same damages would lack a subject matter.
3. Miss Kung submitted in her written submission that there is a change of circumstances by virtue of Dr. Kwok’s report and the fact that P had made an appointment for surgery on his wrist. She said without Dr. Kwok’s report, P’s claim against D was just a bare allegation without evidential basis.
4. On this point one should bare in mind that during the period between P took out the present action and the hearing on assessment of damages for the action against MDJ, P had done nothing to gather evidence to prove his case against D, there is nothing before me even to suggest that P gave instruction to Dr. Kwok to comment on probable medical negligence. P cannot explain why he did not apply for an adjournment before Deputy Judge Carlson to wait for Dr. Kwok’s report. The suggestion that P did not proceed against D because of lack of evidence simply cannot stand.
5. As regard the appointment for surgery, the fact that P has in the end refused the operation speaks for itself. The situation is nothing different from what it was before Deputy Judge Carlson.
6. Even if there is a change of circumstances, as damages had already been assessed and no provisional damages was claimed under Section 56A of the High Court Ordinance, Cap.4, the damages cannot be assessed again. *McGregor on Damages, 17th edition, at 35-040*.

**Conclusion**

1. In the circumstances, P’s present action against D is an abuse of court’s process and liable to be struck out.
2. Accordingly, I order that P’s statement of claim be struck out and P’s action against D be dismissed.
3. I see no reason why costs should not follow the event. I make a cost order nisi that costs of this action, including this application, be to P to be taxed if not agreed, with certificate for counsel. This order nisi shall become absolute 14 days after the handing down of this decision.

(S. T. Poon)

Deputy District Judge

Miss. Athena C. Y. Kung instructed by Messrs Lam, Lee & Lai for the Plaintiff.

Mr. Ashok K. Sakhrani instructed by Messrs Deacons, Graham & James for the Defendant.