## DCPI 398/2014

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 398 OF 2014

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BETWEEN

TUNG KA CHUN for himself and other members

of the family of WONG MEI KING, deceased Plaintiff

and

HOSPITAL AUTHORITY Defendant

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Before : Deputy District Judge Jason Wan

Date of Hearing : 20 November 2014

Date of Decision : 12 December 2014

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DECISION

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*The application*

1. This is an application by the defendant to strike out the statement of claim of the plaintiff on the grounds that:-
2. it discloses no reasonable cause of action against the defendant under Order 18 rule 19(1)(a) of the Rules of the District Court, Cap 336H;
3. it fails to comply with Order 18 rule 12 of the Rules of District Court and Practice Direction 18.1 to serve on the defendant a medical report with the statement of claim; and
4. the claim against the defendant is bound to fail.

*The law*

1. It is trite law that only in plain and obvious cases that the court should exercise its summary powers to strike out a pleading. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out: Para 18/18/4, *Hong Kong Civil Procedure 2015* Vol 1.
2. In the case *CY Foundation Group LTD v Best Max Holdings Ltd,* HCA 787/2011, the learned Recorder Lisa Wong summarized the relevant principles as follows:-

“(1) First, this being an application under rule 19(1) only, no evidence is admissible under rule 19(2). The court will simply assume the facts as pleaded in the statement of claim to be proved and determine, on that basis, whether the pleading discloses a reasonable cause of action.

(2) Second, the question for the Court is whether the allegations as pleaded in the statement of claim disclose some cause of action or raises some question that ought to be tried. It is not concerned with an assessment of the strength or weakness of the case. The mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. The Court would only strike out when it is possible, and not just improbable, for the case to succeed.

(3) Third, where a pleading is defective only for want of particulars to which the other side is entitled, particulars (and not an order to strike out the pleading) should have been sought under Order 18, rule 12. The Court can properly refuse to strike out even a pleading seriously lacking in particularity if the defect is not the result of a blatant disregard of Court orders and can be remedied.

(4) Fourth, where a statement of claim does not disclose the cause of action relied upon but there is reason to believe that the case can be improved by amendment, the Court may give an opportunity to amend, even though the formulation of the amendment is not before the Court.”

*The pleaded case of the plaintiff*

1. This is a personal injuries claim of medical negligence. At the material time, the plaintiff’s wife (“the deceased’) was a patient under the care and treatment of Tuen Mun Hospital (“the Hospital”) and she died on 31 July 2014 while she was still hospitalized. About a month before her death, the deceased had undergone chemotherapy at the Hospital due to breast cancer relapse and was discharged afterward. On 20 July 2014, the deceased was admitted into the Hospital again due to stomachache.
2. It is the plaintiff’s pleaded case that on 28 July 2014, a nurse performed an unknown injection on the deceased without the acknowledgement and approval of the attending doctor. Upon enquiry, the nurse in charge admitted that the injection was mistakenly performed on the deceased and she apologized to the plaintiff. On 29 July 2014, the condition of the deceased began to deteriorate and she passed away on 31 July 2014.
3. In essence, it is the plaintiff’s case that the defendant was negligent for failing to exercise reasonable duty of care to prevent the unknown injection being mistakenly performed on the deceased. In other words, according to the plaintiff, the cause of death was the unknown injection.

*The defendant’s argument*

1. The defendant submits that the statement of claim without any medical report does not disclose a reasonable cause of action of medical negligence.
2. The defendant denies there was any unknown injection performed on the deceased. For the purpose of this application, Mr. George Sit who appears for the defendant submits, even if the court takes the plaintiff’s case to its highest, without any medical proof, the plaintiff will not be able to prove what was the unknown injection and whether the injection had anything to do with the death of the deceased. In other words, the plaintiff will not be able to prove causation, let alone negligence. Therefore this action is bound to fail.
3. The defendant also complains that the defendant does not have the capacity to commence this action as he is not the personal representative of the deceased’s estate.

*The plaintiff’s argument*

1. The plaintiff opposes the application. Mr. Kenneth Lam, solicitor for the plaintiff, submits that the plaintiff will try to locate the nurse who performed the injection and she will be called as a witness to testify for the plaintiff. With her evidence, together with the medical reports that will be disclosed by the defendant at the later stage, the plaintiff will be able to prove that injection was mistakenly performed on the deceased and such act was the cause of death.
2. Concerning the issue of capacity, Mr. Lam confirms that the plaintiff has not yet applied for probate for the deceased so he is not the personal representative of the deceased’s estate. However, he submits that application will be made by the plaintiff in due course to rectify the situation.

*Discussion*

1. Notwithstanding the fact that I am sympathetic of the loss of the plaintiff, I find the defendant’s argument more convincing. I agree that the statement of claim fails to disclose a reasonable cause of action. These are my reasons.
2. For the purpose of this application, I am prepared to take the plaintiff’s case to its highest and assume the plaintiff will be able to prove every single piece of fact of his case. In gist, the plaintiff’s case is that a nurse performed an unknown injection on the deceased and the injection was the cause of the deceased’s death.
3. In order to prove the claim, in very simple terms, the plaintiff needs to prove the following:-
4. a nurse had performed an injection on the deceased;
5. the injection caused the death;
6. the injection was performed mistakenly;
7. the defendant was negligent for failing to supervise the nurse to prevent the mistake.
8. At the hearing, Mr. Lam for the plaintiff told me that there is no medical report being prepared for the deceased and the plaintiff is not seeking to adduce any medical report at this stage. He said the plaintiff will wait until the defendant discloses the medical report of the deceased. Therefore it is not the case where the plaintiff asks for more time to file a medical report. I need to consider the plaintiff’s case on the basis that there may not be any medical evidence adduced to prove the claim.
9. I find that it is not only improbable but impossible for the plaintiff to prove his claim without any medical report in support. The plaintiff relies heavily on the fact that prior to the deceased’s death, an unknown injection was performed on her. But the crucial question is, what was the injection? Without any medical proof, I do not see how the plaintiff can take his case any further. If the plaintiff is not able to find out what the injection was, then he will not be able to establish his case that it was a particular substance in the injection that caused the death. Without concrete medical proof, the court will never be certain whether there was any relationship between the unknown injection and the death.
10. An autopsy report may help the plaintiff if such report shows that there was anything abnormal in the death. However, I was told by Mr. Lam that there was no autopsy report. In the hearing bundle, there is a medical certificate of the cause of death signed by the attending doctor and issued by the defendant. In the certificate, “carcinoma of breast” has been put down as the cause of death. Therefore, the conclusion of the certificate actually goes against the plaintiff’s case.
11. To take the plaintiff’s case to its highest, one can only say that the unknown injection may be the cause of death. Without any medical proof, the plaintiff’s case will always stay there. Not knowing what the injection was, the plaintiff will not be able to prove that the injection should not be performed on the deceased. More importantly, the plaintiff will not be able to prove that the defendant was negligent for failing to prevent the injection to be performed on the deceased.
12. Even if the plaintiff is allowed to proceed, without any medical proof, his claim is going nowhere and is bound to fail.
13. Applying the principles set out in *CY Foundation* case, I find that the plaintiff’s case is not merely weak or unlikely to succeed. There is a crucial missing component in the claim so that it is bound to fail. It will not help if I grant leave to the plaintiff to amend the statement of claim. It has nothing to do with the drafting of the pleading. The problem is, without medical evidence, the plaintiff is not even able to plead his case clearly as to why he says the unknown injection was the cause of death. It will not help the plaintiff either if I give him more time to prepare a proper medical report. As submitted by Mr. Lam, the plaintiff has no intention to prepare any report at this stage.
14. If it is impossible for the plaintiff to prove what was the cause of death of the deceased, then of course it is also impossible for the plaintiff to prove it was the defendant’s negligence that caused the death. In the premises, this action is bound to fail.
15. Concerning the capacity of the plaintiff, I agree with the defendant that as the plaintiff is not the personal representative of the estate of the deceased, he has no capacity to commence this action. However, according to Order 15 rule 6A(4), the plaintiff may, during the period of validity for service of the writ, apply to the court for an order appointing him to represent the deceased’s estate or, if a grant of probate or administration has been made, for an order that the personal representative be made a party to the proceedings. According to Order 6 rule 8, a writ is valid for 12 months. Since the writ of this action was issued on 25 February 2014, it is still valid until 24 February 2015 and the plaintiff can make the application to the court under Order 15 rule 6A(4) to appoint him to represent the deceased’s estate.

1. In other words, though the plaintiff has no capacity to commence this action, this problem can be rectified. This ground alone is not sufficient to strike out the statement of claim.

*Conclusion*

1. In any event, base on the above analysis, I find the statement of claim fails to disclose a reasonable cause of action against the defendant. I believe it is a plain and obvious case that the statement of claim should be struck out. It follows that this action must be dismissed.

*Order*

1. I order that the plaintiff’s statement of claim filed on 9 July 2014 and served on the defendant on 1 September 2014 be struck out. This action is therefore dismissed.
2. Costs should follow the event. I make a costs order *nisi* that the plaintiff shall pay the defendant the costs of this action, including the costs of this application, to be taxed if not agreed. The costs order shall become absolute in the absence of any application to vary within 14 days of this judgment.

(Jason Wan)

Deputy District Judge

Mr. Kenneth Lam, of Kenneth Lam Solicitors, for the plaintiff

Mr. George Sit, of PC Woo & Co, for the defendant