#### DCPI510/2006

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 510 OF 2006

BETWEEN

WAN SAI PING 1st Plaintiff

(Widow of LO CHUNG HING, deceased)

THE ESTATE OF LO CHUNG HING, 2nd Plaintiff

deceased

and

HONG KONG BAPTIST HOSPITAL Defendant

##### Before: H H Judge Lok in Chambers (Open to the public)

Date of Hearing: 28 November 2008

Date of Decision: 28 November 2008

## D E C I S I O N

1. After the Plaintiff disclosed the 2 medical expert reports as to liability, the Defendant withdrew the second application to strike out the Plaintiffs’ Statement of Claim. The parties cannot agree on the costs of the application and this is the matter that I have to decide this morning.
2. This action is about the outbreak of SARS in 2003. During the SARS crisis, the deceased was admitted to the Defendant hospital. The deceased contracted the SARS virus from the other patients or medical staffs in the Defendant hospital and died as a result. The Plaintiffs therefore brought the present action for negligence against the Defendant.

1. The Defendant made the first striking out application by summons dated 15 May 2006. In short, the attack on the pleading was then based on two fronts. Firstly, the pleading was embarrassing or defective and secondly, there was no expert medical report as to liability to prove matters such as the possible route of transmission of the SARS virus and the appropriate actions that the Defendant hospital should have taken which could have prevented the transmission of the SARS virus to the deceased. After hearing the submissions, I refused to strike out the Statement of Claim. In respect of the attack on the pleading issue, I accepted the Defendant’s argument. However, I refused to strike out the claim and granted leave to the Plaintiffs to amend the Statement of Claim. Regarding the attack on the expert report, the Plaintiffs’ counsel at that time, Mr Wong Po-wing, indicated to the court that the Plaintiffs would adduce a medical expert report on liability in due course. I therefore took the view that the Plaintiffs should be given such opportunity to adduce further evidence to substantiate their claim and so I refused to strike out the Statement of Claim.

1. The Defendant made the second striking out application on 29 October 2007. Prior to the taking out of this application, the Defendant’s solicitors wrote to the Plaintiffs’ solicitors alleging that the Amended Statement of Claim was still defective. In the said letter, the Defendant’s solicitors did not include the attack based on the lack of medical expert evidence. Neither did the Defendant’s solicitors ask the Plaintiffs’ solicitors to agree on a timetable for the filing of medical expert evidence.
2. In fact, the Plaintiffs’ solicitors had obtained an expert report as to liability from Professor Wong Tze-wai in June 2007, but they did not disclose the report to the Defendant. The second striking out application came before me for direction on 2 November 2007. In the subsequent hearing for argument before myself on 10 March 2008, the Defendant expressly relied on the lack of expert medical evidence as a ground for striking out the claim, and it was only by that time that we knew about the Plaintiffs’ expert report. After the disclosure of the 2 medical reports made by Professor Wong, the Defendant withdrew the second striking out application on 19 June 2008.
3. In the first striking out application, I have already emphasised that expert medical evidence is crucial for the Plaintiffs to establish matters such as possible route of transmission of the SARS virus and the appropriate precautions that the Defendant hospital should have taken during the outbreak of the SARS virus. Without such evidence, the Plaintiffs’ claim simply cannot succeed. However, no direction has been sought relating to the filing of expert evidence. What was more unfortunate was that the Defendant’s solicitors had not included the complaint of the lack of expert evidence as a ground in the letter sent to the Plaintiffs’ solicitors before the second striking out application.
4. Without hearing the full argument on the second striking out application, I can only proceed on the basis that the lack of expert evidence is the main attack for the second striking out application, otherwise the Defendant would not have withdrawn the summons after perusing the Plaintiffs’ expert reports.
5. As to whether the Plaintiffs should have adduced the expert report earlier which could have prevented the second striking out application, I take the view that both parties should bear some responsibility for that. Although there was no timetable for the filing of the expert reports as to liability, the Plaintiffs’ solicitors should have disclosed the report to the Defendant earlier. They have already received warning in the first striking out application that such report would be crucial to the Plaintiffs’ claim, and so the expert report should have been disclosed as soon as possible. For the Defendant’s solicitors, they were informed in the first striking out application that the Plaintiffs intended to adduce medical expert evidence, and so the Defendant should have asked for a timetable for the filing of such expert reports. Even if they took the view that it was the duty on the part of the Plaintiffs to disclose the expert report, the Defendant’s solicitors should have included such complaint as a ground for striking out in the letter before the second striking out application.
6. In my judgment, both sides should bear some responsibility for the costs wasted by the summons, and I therefore order that there be no order as to costs of the second striking out application.

# (David Lok)

# District Judge

Representation:

Mr Stephen Fong, instructed by Tai, Mak & Partners for both Plaintiffs

Ms Yeung Pui-ki, Catherine, of Messrs Johnson, Stokes & Master, for the Defendant