DCPI 510/2006

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 510 OF 2006

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BETWEEN:

WAN SAI PING (尹細并) 1st Plaintiff

(Widow of LO CHUNG HING,

deceased)

The estate of LO CHUNG HING, 2nd Plaintiff

deceased

and

HONG KONG BAPTIST HOSPITAL Defendant

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Coram : HH Judge Lok in Chambers

Date of hearing: 5 February 2007

Date of handing down of Decision: 28 February 2007

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DECISION

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1. This is an application by the Defendant to strike out the Statement of Claim on the ground that it discloses no reasonable cause of action, it may prejudice, embarrass or delay the fair trial of the action or the claim is frivolous or vexatious.
2. This action is another litigation arising out of the outbreak of Severe Acute Respiratory Syndrome (“SARS”) in Hong Kong in 2003. The deceased was a patient admitted to the Defendant’s hospital (“the Hospital”) at the time of the outbreak. Unfortunately, the deceased was later found to have contracted the SARS virus and died as a result, the Plaintiffs therefore bring the present action against the Defendant to claim for damages.
3. I have heard a similar application by the Defendant in another case involving a different patient (see *Mak Ka Chun v. Hong Kong Baptist Hospital,* unreported, DCPI 1810/2005, decision of HH Judge Lok on 15 September 2006). However, as the formulations of the claims are not the same in these two actions, different considerations apply.
4. The Plaintiffs’ claim in the present case is formulated in the following manner. According to the Plaintiffs, there were suspected SARS infections on the 8th Floor of the Hospital some time in March 2003. However, the Defendant did not reveal these probable infection cases to the public, and so the deceased was admitted as a patient to the Hospital in the period from 20 to 26 April 2003 without knowing the risk of getting infected with the virus. During the time of his hospitalization, the deceased stayed on the 9th floor of the Hospital, on which there was an outbreak of SARS at the same time. It is the therefore the Plaintiffs’ contention that the deceased contracted the virus during his stay in the Hospital.
5. As to the causes of action relied on by the Plaintiffs, it is pleaded in paragraph 12 of the Statement of Claim as follows:

*“12. The infection of SARS by the deceased in the Hospital was caused by the negligence and/or breach of common duty of care under [the Occupiers Liability Ordinance] on the part of the Defendant, its employees, servants or agents. In the premises, the negligent of failure to inform the deceased and/or his relatives of the outbreak of SARS in the Hospital caused and/or contributed to the death of the deceased.*

*Particulars of breach of common duties of care of the Defendant*

1. *The deceased was a lawful visitor of, or patient admitted in, the Hospital and the Defendant being the occupier within the definition of [Occupiers Liability Ordinance] had breached the common duty of care towards the Plaintiff:-*

*(i) Failing to take any or any adequate precaution to ensure that the Plaintiff would not be infected of SARS whilst visiting or staying in the Hospital;*

* 1. *Failing to provide any or any adequate information to its patient and/or member of the public in respect of the danger of being infected of SARS whilst visiting or staying in the Hospital;*
  2. *Failing to erect any or any adequate warning signs to notify its patient or member of the public in respect of the outbreak of SARS in the Hospital;*
  3. *Lack of any or any adequate management structure so as to ensure an effective chain with frequent and meaningful interchanges to take control during the outbreak of SARS in the Hospital;*
  4. *Lack of any or any adequate communications system between the management and the Hospital staffs including doctors, nurse and administrative staffs in the frontline so as to ensuring them to take adequate measurement or precaution to avoid the risk of infection of SARS in the Hospital;*
  5. *Failing to institute or enforce any or any adequate isolation system at the first detention of suspected SARS in the Hospital;*
  6. *In all the circumstances of the case to ensure that the deceased would be reasonably safe in using the Hospital; and*
  7. *In all the circumstances the Defendant exposed the deceased to an unnecessary risk of infection.”*

1. The Defendant’s grounds for challenging the Statement of Claim can be summarized as follows:

(i) the Plaintiffs have not pleaded how the deceased had contracted the SARS virus, nor how the alleged breach of the common duty of care pleaded under paragraph 12 had caused the deceased’s contraction of such virus. As there is no nexus between the particulars pleaded and the actual contraction of the virus by the deceased, the Plaintiffs’ Statement of Claim discloses no reasonable cause of action;

1. by reason of the lack of the aforesaid particulars, the Defendant does not know what case it has to meet and the Plaintiffs’ pleading is therefore embarrassing;
2. without expert report or supporting particulars to prove the route of transmission of the SARS virus to the deceased, the Plaintiff’s claim is simply frivolous or vexatious;
3. the Plaintiffs cannot maintain a claim for breach of the common duty of care under the Occupiers Liability Ordinance, Cap. 314, as the danger of contracting the virus arose from the activities in the Hospital and not due to the state of the premises; and
4. the doctrine of *res ipsa loquitur* is not applicable in the present case.
5. Mr. Wong, counsel for the Plaintiffs, was not responsible for drafting the Statement of Claim. In the hearing, Mr. Wong clarifies that the Plaintiffs will only rely on the following two omissions to establish liability on the part of the Defendant. Firstly, the Defendant had failed to inform the public about the suspected SARS infection cases on the 8th floor of the Hospital in March 2003. It is the Plaintiffs’ contention that, had the deceased been informed about the suspected SARS infections, he would not have been admitted to the Hospital in the first place. Hence, the deceased’s contraction of the virus and his death were caused by the negligence of the Defendant. Secondly, the Plaintiffs claim that, had the Defendant provided a good isolation system in the Hospital, the deceased would not have contracted the SARS virus during his stay there.
6. In order to succeed in their claim, the Plaintiffs must be able to prove that the deceased was infected with the SARS virus during his stay at the Hospital. Although the exact route of transmission is not known at this stage, the Plaintiffs may rely on circumstantial evidence, including the outbreak of SARS on the 9th floor of the Hospital at the time of the deceased’s hospitalization, to prove that the deceased contracted the virus whilst he received in-patient treatment at the Hospital. As happened in the case of *Mak Ka Chun*, the Plaintiffs must plead all the circumstantial facts to support their case on causation, but whether the Plaintiffs are able to establish the same is a question of fact which has to be decided at the trial. Hence, although the exact route of transmission is not pleaded, it is not fatal to the Plaintiffs’ claim at this stage. The Plaintiffs, however, should amend the Statement of Claim to plead all the necessary facts that they seek to rely on in establishing that the deceased had contracted the virus during his hospitalization, including but not limited to the details regarding the outbreak of SARS on the 9th floor of the Hospital as stated in Mr. Wong’s written submissions. Provided that such particulars are given, the Plaintiffs’ claim is at least arguable and should not be struck out at this stage.
7. However, I agree with Mr. Fung, counsel for the Defendant, that the present Statement of Claim is an embarrassing pleading. Apart from the lack of the particulars mentioned in the last paragraph, there are many other reasons for me to make such conclusion. Firstly, although negligence and breach of occupiers liability are mentioned in paragraph 12 of the Statement of Claim, only particulars of the latter are supplied in the pleading, giving the impression that the Plaintiffs are relying on breach of occupiers liability as the only cause of the action. It is only in the hearing itself that the Plaintiffs confirm that they are relying on both causes of action, and so the lack of the particulars of negligence is a defect in the pleading.
8. Secondly, the Plaintiffs have not supplied any particulars as to what sort of isolation system that they say should have been provided by the Defendant. Although the Plaintiffs do not know the exact route of transmission of the virus to the deceased, the Plaintiffs must tell the Defendant the possible routes of transmission that they seek to establish at the trial. Having supplied the aforesaid, the next step is to identify the type of isolation system that the Plaintiffs say should have been provided by the Defendant, and the Plaintiffs must also establish how such isolation system could have prevented the deceased from contracting the virus. In my judgment, the Plaintiffs’ claim is far from clear from the present pleading. Is the Plaintiffs’ case that the Hospital should have isolated every patient who was having a fever at the time of their admissions? Are the Plaintiffs claiming that Patients I1, I2, F1 and 3 identified in the Report & Recommendations of the Independent Commission of Inquiry (mentioned in paragraph 13 of Mr. Wong’s written submission) were such patients which should have been isolated at the time of their admissions? No such particulars are given, and the nexus between the type of isolation system and contraction of the virus by the deceased is simply missing in the present case. Without being supplied with such information, the Defendant does not know what case it has to meet at the trial, and the Plaintiffs’ pleading is therefore an embarrassing one.
9. Thirdly, Mr. Wong confirms in the hearing that it was the suspected SARS cases in March 2003 that he says should have been disclosed by the Defendant. However, in paragraph 4 of the Statement of Claim and in his written submissions, Mr. Wong refers to the outbreak of SARS on the 9th floor of the Hospital in April 2003 in support of the claim on non-disclosure of SARS cases. The problem is that the deceased had already been hospitalized by that time, and so how could the non-disclosure of the suspected SARS cases on the 9th floor in April 2003 have prevented the contraction of SARS virus by the deceased? Further clarifications are therefore necessary.
10. No medical expert report on liability has been attached to the Statement of Claim. As there is no expert evidence to substantiate the case that the deceased had contracted the SARS virus during his hospitalization and how the alleged negligence on the part of the Defendant could have led to the death of the deceased, the Defendant also complains that the Plaintiffs’ claim is bound to fail. In my judgment, it is too early to tell whether the Plaintiffs’ claim is unarguable simply because of the lack of expert evidence on liability. The court would need to examine the full particulars of the Plaintiffs’ revised claim before making a decision in this regard. However, if the Plaintiffs’ claim is still defective after revising their claim, the Defendant is always free to make a second application for striking out which the court would only do so in a clear and obvious case.
11. Since the Plaintiffs are relying on both negligence and breach of occupiers liability as the basis of their claim, it is not necessary for me to deal with the Defendant’s argument as to whether the negligence arose from the activity in the Hospital or due to the state of the premises. Further, the doctrine of *res ipsa loquitur* is a rule of evidence dealing with the burden of proof. Although I have some reservation as to the applicability of such doctrine in the present case, I think that such issue should be left to the trial judge dealing with the evidence of the case.
12. By reason of the aforesaid, I accept that the present Statement of Claim is an embarrassing pleading. As such defect can be cured by an appropriate amendment, I will grant general leave to the Plaintiffs to amend the Statement of Claim within 21 days from the date of the handing down of this decision. Obviously, if there are still defects in the amended pleading, the Defendant will be at liberty to make a second application to strike out the Amended Statement of Claim. I also make an order *nisi* that the costs of the summons and the costs of and occasioned by the amendment of the Statement of Claim be to the Defendant, and such order

will be made absolute 14 days after the handing down of this decision.

(David Lok)

District Judge

Mr. Wong Po Wing, instructed by Messrs. Tai, Mak & Partners, for the Plaintiffs

Mr. Alfred Fung, instructed by the Messrs. Johnson, Stokes & Master, for the Defendant