DCPI 1424/2011

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1424 OF 2011

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BETWEEN

CHAN CHUN CHAU, the personal representative Plaintiff

of the estate of FA CHING CHEE, deceased

and

HOSPITAL AUTHORITY Defendant

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

Before: HH Judge Wilson Chan in Chambers

Date of Hearing: 23 June 2014

Date of Decision: 12 August 2014

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|  | D E C I S I O N |  |

INTRODUCTION

This trial involved a medical negligence claim. The plaintiff’s pleaded allegation of medical negligence against the defendant only focused on the cervical spine laminoplasty operation performed by Dr Mak Kan Hing (“**Dr Mak**”), who was working at the Orthopaedics and Traumatology Department of the Kwong Wah Hospital at the material time, on Madam Fa Ching Chee on 2 September 2008 (“**the 2nd Operation**”).

After trial, I handed down my written judgment on 5 February 2014 (“**the Judgment**”) whereby I dismissed the plaintiff’s claim against the defendant in this action with costs.

By summons dated 5 February 2014, the plaintiff applied for leave to appeal against the Judgment. The plaintiff has also filed/lodged in court the following documents in support of his application for leave to appeal: (i) an affirmation dated 22 February 2014 with five exhibits; (ii) a Chinese translation of the Judgment marked with the plaintiff (“**Mr Chan**”)’s comments; and (iii) a letter dated 9 March 2014 from Mr Chan to this court (“**the Letter**”).

The factual background of this case has been set out at paragraphs 6 to 33 of the Judgment.

Under section 63A(2) of the District Court Ordinance, Cap 336, leave to appeal should not be granted unless the intended appeal has a reasonable prospect of success, or the matter in the interests of justice ought to be heard by the appellate court.

To meet the “reasonable prospect of success” test, an applicant for leave to appeal is required to show more than just an arguable case, but an appeal that has merits and ought to be heard, although the applicant does not have to demonstrate that the appeal will probably succeed.

PROPOSED GROUNDS OF APPEAL

It appears that the plaintiff’s proposed grounds of appeal are set out in the Letter. These will be dealt with in turn.

Ground 1

At point number one of the Letter, Mr Chan complained that the defendant’s expert witness, Dr Lau Pui Yau (“**Dr Lau**”) was not an independent expert. Mr Chan alleged that Dr Lau was “related” to the defendant and therefore his expert report was not credible. Mr Chan asked the court to remove the documents prepared by Dr Lau from the court file.

I agree with Mr Woody Chang Wah Yan, solicitor acting for the defendant, that there is absolutely no evidence whatsoever to suggest that there was any bias on the part of Dr Lau.

First, by the order of Master S P Yip dated 13 June 2012, it was ordered that “*the expert evidence on liability be limited to one orthopaedic expert for each party. The expert nominated by the plaintiff is Dr David Cheng, and the expert nominated by the defendant is Dr Lau…*”. At that time, the plaintiff was legally represented by Messrs K B Chau & Co.

In fact, the plaintiff and the defendant agreed to jointly instruct Dr David Cheng and Dr Lau to compile a joint expert report on liability. As a result, the joint expert report dated 2 November 2012 was prepared.

At the time, there was never any objection raised by the plaintiff’s then solicitors regarding the suitability of Dr Lau being the defendant’s expert witness in this case.

Further, by the order of Master J Chow dated 5 April 2013, the court gave leave for both parties to call their respective expert witnesses to give evidence at trial. However, the plaintiff chose not to call his expert witness, Dr David Cheng.

Further still, Dr Lau told the court at trial that he began working at the United Christian Hospital (“**UCH**”) in 1989 and that in around 1988, Dr Mak had already left UCH to work for another hospital. Dr Lau explained to the court that when he joined UCH, Dr Mak had already left UCH. Thus, there is simply no factual basis for the plaintiff’s allegation that Dr Lau was favouring a former colleague.

Ground 2

At point number two of the Letter, Mr Chan referred to various medical treatments of Madam Fa both before and after the 2nd Operation on 2 September 2008 and asked for the leave of the court to add in new allegations relating to these medical treatments.

I do not agree that such leave should be granted. This court has stated clearly at paragraphs 2 to 5 of the Judgment that the allegations found in the Indorsement of Claim and the Statement of Claim in this action were all in relation to the 2nd Operation. As stated at paragraph 5 of the Judgment, this was emphasized in order to avoid the trial being distracted by numerous accusations made by Mr Chan in various places and in his oral testimony. Many of such accusations are unrelated to the plaintiff’s pleaded case against the defendant and are therefore irrelevant for the purpose of the trial.

Ground 3

At point number three of the Letter, Mr Chan asked the court to re‑determine the case and requested the court to summon the following persons to give evidence in court on Mr Chan’s behalf: a Dr Wu, Dr David Cheng, three lawyers present “during settlement” and counsel Mr Cheung Yiu Leung.

I agree with Mr Chang that the plaintiff’s request is wholly inappropriate.

Firstly, as mentioned in paragraph 13 above, at the Check List Review hearing on 5 April 2013, Mr Chan chose not to call his expert, Dr David Cheng, to give evidence at trial. Neither did Mr Chan seek any direction to adduce evidence from another expert witness, for example, Dr Wu. That was the plaintiff’s decision and the plaintiff should be bound by it.

Secondly, discussions between lawyers “during settlement” are clearly protected under the “without prejudice” rule so that the same should not be disclosed in court proceedings.

CONCLUSION

For the reasons set out above, I am not satisfied that the intended appeal by the plaintiff has a reasonable prospect of success. Further, there is no basis for giving leave under the second limb of section 63A(2) of the District Court Ordinance in the circumstances of the present case.

Accordingly, the plaintiff’s application for leave to appeal is dismissed.

I see no reason why costs should not follow the event. I order that the costs of the application be paid by the plaintiff to the defendant, such costs to be taxed if not agreed.

The above order as to costs is *nisi* and shall become absolute in the absence of any application within 14 days to vary the same.

Should Mr Chan require translation of this decision into the Punti or the Minnan dialect, he can contact my clerk to arrange an appointment for a court interpreter to verbally translate this decision to him at the High Court at a mutually convenient date and time.

(Wilson Chan)

District Judge

The plaintiff appeared in person

Mr Woody Chang Wah Yan, of Mayer Brown JSM, for the defendant