DCPI1810/2005

# IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1810 OF 2005

BETWEEN

MAK KA CHUN Plaintiff

and

HONG KONG BAPTIST HOSPITAL Defendant

Coram: H H Judge Lok in Chambers (Open to public)

Date of Hearing: 15 September 2006

Date of Decision: 15 September 2006

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DECISION

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1. This is an application by the 1st Defendant to strike out the Amended 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 Plaintiff was a patient who was admitted to a multi-bed ward of the 1st Defendant hospital (“the Hospital”) at the time of the outbreak, and the 2nd Defendant was a doctor treating a patient staying next to the Plaintiff in the multi-bed ward and was later found to have contracted the SARS virus. After the discharge from the Hospital, the Plaintiff was found to have contracted the SARS virus and, as a result, the Plaintiff claims for damages against both Defendants for failing to take adequate precautions in preventing the Plaintiff from contracting the SARS virus.
3. According to the expert report of Dr Michael Whitby produced by the Plaintiff, it is not known how the Plaintiff had contracted the deadly virus. However, the Plaintiff is relying on the following facts in establishing the causal link between the Defendants’ negligence and the contraction of the virus by the Plaintiff:

(1) the Plaintiff was referred for admission to the Hospital for a MRI scan and he was not suffering from SARS prior to his admission to the Hospital on 23 April 2003;

(2) the Plaintiff was the only person in his residential estate to have contracted the SARS virus during the outbreak, and none of the Plaintiff’s family, friends or colleagues had contracted the SARS virus;

(3) A patient identified as I2 (“Patient I2”) was admitted to the same multi-bed ward of the Hospital in the early morning on 23 April 2003, and his bed was just next to that of the Plaintiff;

(4) the Plaintiff was discharged on 24 April 2003, but during the time of his hospitalisation, he was cared for by a nurse who was later found to have contracted the SARS virus;

(5) after the discharge from the Hospital, the Plaintiff started to suffer from fever and diarrhoea and he was subsequently found to have contracted SARS.

1. So far as I understand, even the Plaintiff does not know how he had actually contracted the virus. It is the Plaintiff’s contention that he had, more probably than not, contracted the SARS virus while he received in-patient treatment in the Hospital on 23 and 24 April 2003. Had the 1st Defendant properly implemented the infection control measures as pleaded in paragraph 24 of the Amended Statement of Claim, and had the 2nd Defendant fully discharged his duty as pleaded in paragraph 26 of the Amended Statement of Claim, the Plaintiff says that he would not have contracted the SARS virus while he was under hospitalisation.
2. In this striking-out application, the 1st Defendant argues that the Amended Statement of Claim discloses no reasonable cause of action. The Plaintiff has not pleaded how he had contracted the SARS virus, nor how the alleged negligence under paragraph 24 of the Amended Statement of Claim had resulted in the contraction of the virus by the Plaintiff. In such case, the argument follows, there is simply no nexus between the particulars pleaded and the actual contraction of the virus by the Plaintiff. Further, with the lack of such information, the 1st Defendant does not know what case it has to meet, and such defect in the pleading will prejudice, embarrass or delay the fair trial of the action.
3. It is trite law that the court would only exercise its summary power to strike out a pleading in a plain and obvious case. In my judgment, although the exact route of transmission of the SARS virus to the Plaintiff is not known, which is quite easy to understand, it is, at least at this stage, not fatal to the Plaintiff’s case. In the trial, the question of causation can be proved by direct evidence or by way of inference to be drawn from other circumstantial evidence. In the present case, the Plaintiff has pleaded all the necessary facts in support of his case that he had contracted the SARS virus while he received in-patient treatment at the Hospital, and had the 1st and the 2nd Defendants taken the necessary precautions as pleaded in the Amended Statement of Claim, the Plaintiff would not have contracted the virus. Obviously, whether the Plaintiff is able to establish his claim on causation is a question of fact which has to be decided at the trial with the benefit of listening to the expert and other factual evidence. Hence, the Plaintiff’s case is at least arguable and the Amended Statement of Claim should not be struck out at this stage.
4. However, I agree with the 1st Defendant that the particulars of negligence pleaded in paragraph 24 of the Amended Statement of Claim are so vague that it would cause difficulty and embarrassment to the 1st Defendant in the preparation of the defence. In the said paragraph, the Plaintiff makes general allegations that the 1st Defendant had failed to adopt the necessary infection control measures, had placed too much reliance on the case definition criteria of the World Health Organisation in dealing with patients, and had failed to provide adequate facilities, protective equipment and training to its medical staff. However, it is not known in what way the taking of these measures would actually have prevented the Plaintiff from contracting the virus. It is not sure whether it is the Plaintiff’s case that the 1st Defendant should not have allowed any outbreak of SARS in the Hospital, or the 1st Defendant should have reduced the risk of the Plaintiff’s exposure to the virus.
5. In the hearing today, I have asked Mr Jones, counsel for the Plaintiff, as to the exact formulation of the Plaintiff’s claim. In reply, Mr Jones submits that the Plaintiff is going to rely on the following particulars of negligence:

(1) had the 1st Defendant followed the strict guidelines promulgated by the Hospital Authority at the time of the SARS outbreak, and had the staffs of the 1st Defendant made proper inquiry of Patient I2 at the time of his admission, then Patient I2 should not have been admitted to the multi-bed ward and, as a result, the Plaintiff would not have contracted SARS;

(2) as supported by the expert evidence of Dr Whitby, the test result of Patient I2 should have been made available 24 hours after the admission of that patient, but in the present case, the actual test result was only available on 25 April 2003 which was one day late. Had the report been made available within 24 hours, the 1st Defendant would have isolated Patient I2 immediately, thereby greatly reducing the risk of the Plaintiff in contracting SARS;

(3) even if the 1st Defendant was not negligent in admitting Patient I2 to the multi-bed ward, had the 1st Defendant taken proper infection control measures and provided the staffs with adequate facilities, protective equipment and training, it would have greatly reduced the risk of the Plaintiff in contracting SARS.

1. The Plaintiff’s formulation of the case catches me and the 1st Defendant’s counsel by surprise. According to the expert report of Dr Whitby, it seems that the Plaintiff accepts that the initial placement of the Patient I2 in the multi-bed ward was the correct decision. However, the Plaintiff now claims that it was not a correct one. Obviously, what happened during the admission of Patient I2 now becomes a relevant issue, and the 1st Defendant has to defend the arrangement of placing Patient I2 in the multi-bed ward. This is the problem with the vague allegations contained in the Plaintiff’s existing pleading. Without knowing the exact formulation of the Plaintiff’s claim and how the alleged negligence led to the contraction of the virus by the Plaintiff, it is very difficult for the 1st Defendant to properly prepare the defence.
2. The second ground mentioned in paragraph 8(2) above is contained in Dr Whitby’s report but, in my view, the Plaintiff cannot formulate its case by reference to the expert report, and the exact formulation of the Plaintiff’s case should be contained in the Statement of Claim itself. Although there is such a defect in the pleading, such defect can be cured by proper amendments. I therefore refuse to strike out the Amended Statement of Claim and grant leave to the Plaintiff to further amend the pleading.
3. There is one more observation I would like to make about the pleading. In order for the Plaintiff to succeed, the Plaintiff must be able to prove that he contracted the virus at the Hospital. Although the exact route of transmission is not known, the Plaintiff would have contracted the virus either from Patient I2, from the nurse who cared for him and later found to have contracted SARS, or from the general environment in the multi-bed ward. Apparently, it is the Plaintiff’s case that whatever was the route of transmission, the Defendant should be liable in negligence. However, the particulars of negligence for each route of transmission would be different, and it is the duty of the Plaintiff to formulate his case clearly by reference to different routes of transmission so as to avoid any further confusion in the future.
4. Mr Jones submits that as it is very difficult for the Plaintiff to obtain all the material facts before discovery, and the existing pleading is the best one that the Plaintiff can supply at this stage. Obviously, I have great sympathy with the Plaintiff about the difficulty that he is facing, as the outbreak of SARS was quite a novel event. However, it is trite law that the Statement of Claim must contain a clear formulation of the plaintiff’s claim, and it must supply sufficient particulars to enable the defendant to know what sort of case he has to meet. Knowing the proper issues of the case by reference to the pleadings, the parties can then proceed to discovery, and not the other way round. As I mentioned above, without knowing that it is one of the Plaintiff’s allegations that Patient I2 should not have been admitted to the multi-bed ward, we would not have known that the documents and the evidence about the admission of that patient would be so relevant in the present case.
5. The 1st Defendant also tries to strike out the claim on the ground that it is frivolous and vexatious. However, with proper amendments in the Amended Statement of Claim, I cannot say that the Plaintiff’s claim is hopeless at this stage. I therefore refuse to strike out the claim on such ground. In the written submission, the 1st Defendant also argues that the doctrine of *res ipsa loquitur* and breach of occupier’s liability are not applicable in the present case. At this stage, I only have to say that the Plaintiff’s allegations in this regard are not wholly unarguable, and the same should be dealt with by the judge during the trial of this action.
6. Finally, I would like to express my gratitude to both counsel for the assistance they have rendered to this court, and I now listen to the parties’ submission on the proper wording of the order and on the question of costs.

(David Lok)

District Judge

Representation:

Dr Douglas Jones, instructed by the Legal Aid Department, for the Plaintiff

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