# DCPI 2212/2020

[2023] HKDC 953

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2212 OF 2020

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BETWEEN

RIAZ MOHD, Deceased 1st Plaintiff

NAZAKAT, on behalf of himself and other

Defendants of RIAZ MOHD, deceased 2nd Plaintiff

and

YEE HOP CLEANING COMPANY Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to Public)

Date of Hearing: 18 April 2023

Date of Decision: 7 July 2023

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DECISION

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*INTRODUCTION*

1. This is a decision regarding the costs of a personal injuries (“PI”) claim arising out of an alleged work related accident happened to the 1st plaintiff on 3 June 2015 (“the Accident”). The issues arose as a result of two case management conference (“CMC”) hearings held before me on 17 January 2023 and 18 April 2023 respectively.

*BACKGROUND*

1. The plaintiffs issued the writ of summons (“the Writ”) which contained the general endorsement of Claim (“the Endorsement”) prepared by the plaintiffs’ solicitors, Messrs Mohnani & Associates (“MA”) in this case on 13 July 2020.
2. The following has been pleaded under the Endorsement:-

“The 2nd Plaintiff’s claim is for damages, (together with interest thereon and costs), for personal injury, loss and damage sustained to the 1st Plaintiff arising out of the negligence and/or and/or breach of common duty of care and/or breach of statutory duties on the part of the Defendant, their servants and/or agents at G/F., Mei Yue House, Shek Kip Mei Estate, Shek Kip Mei, Kowloon, Hong Kong on 3rd June 2015 at about 11:00 p.m. On that day the 1st Plaintiff was performing his duties as a cleaner. The 1st Plaintiff was cleaning the floor when he suddenly slipped and fell. At the time the 1st Plaintiff was employed by the Defendant company. All the cleaning liquids and material were provided by the Defendant. As a result of the slip and fall, the 1st Plaintiff suffered from a stroke which resulted in severe neurological impairment. The 1st Plaintiff subsequently passed away on 26th December 2016.”

1. Pursuant to §99 of Practice Direction (“PD”) 18.1, MA issued a check list review (“CLR”) notice (“CLR Notice”) on 13 July 2020 with a returnable date before a PI Master on 23 December 2020.
2. A notice to insurer (“Notice to Insurer”) was filed by the plaintiffs on the same day, ie on 13 July 2020.
3. The Writ was not served on the defendant until almost a year later. An acknowledgement of service of the Writ with the intention to contest the proceedings has been filed on behalf of the defendant by the defendant’s solicitors, Messrs William Lee & Associates (“WLA”), on 6 July 2021.

*Summary of facts according to the defendant*

1. Below is a summary of facts according to the defendant.
2. The 1st and 2nd plaintiffs first came to the defendant’s attention by commencing DCMP 1787/2018 (“the MP Action”) by way of issuing an originating summons dated 5 July 2018 (“the OS”) for leave to issue a writ of summons out of time for a PI action for injuries allegedly sustained by the 1st plaintiff in the Accident. The MP Action was eventually withdrawn by the plaintiffs. By the Order of Registrar Lui on 2 June 2020, leave was granted to the plaintiffs to withdraw the OS and costs agreed at HK$4,766 was awarded in favour of the defendant (“Registrar Lui’s Order”).
3. The 2nd plaintiff, who allegedly was acting for the 1st plaintiff but had not clarified his capacity in so doing, commenced Claim No SCTC015703/20 (“the 1st Claim”) on 7 July 2020 in the Small Claims Tribunal (“SCT”). The claimants of the 1st Claim were recorded as “NAZAKAI” (ie the 2nd plaintiff) and “MOHD RIAZ” (ie the 1st plaintiff) and the defendants of the 1st Claim were stated to be “So Tim Sing Trading As Yee Hop Cleaning Company” and “So Tim Sing”. In the form of claim (“FOC”) under the 1st Claim, the grounds for the 1st Claim were unclear. However, according to the defendant’s understanding, in essence, it was related to the same alleged accident met by the 1st plaintiff on 3 June 2015 as mentioned in the Endorsement. On 3 September 2020, the 1st Claim was struck out with no order as to costs by a presiding officer of SCT.
4. On 3 September 2020, the 2nd plaintiff commenced a second Claim No SCTC022950/20 (“the 2nd Claim”) in the SCT whereby “NAZAKAT” (ie the 2nd plaintiff) was named as the claimant and “So Tim Sing” was named as the defendant. The address stated however was the address of the defendant in this case instead. In the FOC of the 2nd Claim, the grounds for the claim were again unclear. However, according to the defendant’s understanding, in essence, it was also related to the same alleged accident of the 1st plaintiff on 3 June 2015. According to the defendant’s understanding, a representative of the 2nd plaintiff agreed to withdraw their claim under the 2nd Claim against “So Tim Sing” on 29 October 2020.
5. Then the defendant did not hear from the plaintiffs again until 23 June 2021, which was almost a year after the issue of the Writ. On that occasion, MA served on WLA the Writ, the CLR Notice and the Notice to Insurer respectively filed on 13 July 2020. The Writ was generally indorsed only and was not accompanied by the plaintiffs’ statement of claim (“SOC”) or statement of damages (“SOD”). The defendant filed its acknowledgement of service on 6 July 2021.
6. No further pleadings, documents or correspondences had been received by the defendant in relation to this case until around January 2022, when MA issued two letters to the defendant inviting the defendant to consider settlement.
7. On 28 July 2022, WLA was contacted by one of the PI masters’ clerk in relation to a CLR hearing of this case which was scheduled to be heard on 29 July 2022. As the defendant had received no notice of the CLR hearing from MA, the defendant’s attendance was then excused.
8. On 3 August 2022, WLA received a letter from MA enclosing the plaintiffs’ *ex partes* summons for the 2nd plaintiff to be appointed to represent the 1st plaintiff’s estate for the purpose of these proceedings and these proceedings be carried on by the 2nd plaintiff as if he had been substituted for the estate. WLA subsequently issued a letter on 9 August 2022 to MA requesting for update and the results of the plaintiffs’ *ex parte* application under the summons but received no reply thereon.
9. On 21 October 2022, WLA were contacted by the PI Master’s clerk again in relation to the CLR hearing scheduled to be heard on 21 October 2022. Again, as the defendant had not been informed of the CLR hearing, WLA wrote a letter to the Master dated 24 October 2022 explaining the situation.
10. There had been, again, no update or correspondences from MA in relation to the said CLR hearing scheduled on 21 October 2022 until 9 December 2002 when WLA received a letter from MA enclosing only the Order dated 21 October 2022 from Master Catherine Cheng without any constructive explanation or background information. Due to the very confusing and unsatisfactory state of affairs created by MA, Master Catherine Cheng referred the case to me for a CMC. It was only then the defendant was informed of the forthcoming CMC on 17 January 2023 before me.

*Summary of facts according to the plaintiff*

1. MA lodged the plaintiff’s questionnaire pursuant to PD 18.1 on 10 January 2023 for the first CMC hearing fixed before me on 17 January 2023 (“1st CMC”).
2. However, in the questionnaire itself, MA failed to set out the background to this case. Instead, it enclosed a proposed direction to, *inter alia,* appointthe 2nd plaintiff as the deceased estate for the purpose of proceedings and that the proceedings be carried on by the 2nd plaintiff as if he had been substituted for the estate. Further case management directions like any ordinary PI case had been set out under the proposed directions.

*Events after issue of the Writ according to the court’s record*

1. As said, the 1st CLR hearing after the Writ was issued was originally scheduled on 23 December 2020. However, due to the then public health situation and the need for social distancing because of Covid, the 1st CLR hearing was vacated and was adjourned to 23 June 2021 before Master Catherine Cheng with no order as to costs. Both MA and the defendant (who was acting in person then) were informed by the court by letter dated 21 December 2020 of the same.
2. On 21 June 2021, Master Catherine Cheng gave an order that the CLR hearing scheduled on 23 June 2021 be vacated on the ground that the plaintiffs had failed to make an application to extend the validity period of the Writ. On that occasion, MA was required by the court to file an affidavit/affirmation of service of the Writ on the defendant within the validity period or an *ex partes* application to extend the validity of the Writ, pursuant to O 6 r 8 of the Rules of the District Court (“RDC”), before the plaintiff applied in writing to the court to restore the CLR hearing date. The Master made no order as to costs on that occasion.
3. On 16 February 2022, Master Catherine Cheng made another order to schedule the adjourned CLR hearing on 29 July 2022 to be heard before her. The plaintiff was directed to make appropriate application for leave for the “carry on” order for the proceedings.
4. On 28 July 2022, WLA wrote to the court and reported to Master Catherine Cheng that the plaintiff had never served any documents in relation to the whole proceedings including the CLR hearing which was scheduled on 29 July 2022. A copy of that letter was sent by WLA to MA on the same day. WLA put on record that they had neither been informed by MA of the hearing nor the progress of the proceedings at any time prior to that.
5. On the same day, Master Catherine Cheng issued a direction to the plaintiffs to remind them that there was still an outstanding issue, ie the “carry on” application, to be dealt with by MA before the case management directions can be proceeded further. Hence, the plaintiffs’ handling solicitor was summoned to attend the hearing while the WLA was excused to attend. The master again made no order as to costs on that occasion.
6. It was only after the issue of the latest direction given by Master Catherine Cheng on 28 July 2022 that MA bothered to take out the *ex partes* summons which was something the court had requested them to do under the Order dated 16 February 2022. Further, even though it was specifically labelled as an *ex partes* summons, for some unknown reasons, MA chose to serve a copy of that on WLA.
7. On 9 August 2022, WLA wrote to MA and specifically asking MA to inform them the result of (i) the CLR hearing on 29 July 2022; and (ii) the *ex parte* summons.
8. On 24 October 2022, WLA wrote to Master Catherine Cheng again reporting that they had only been informed of the adjourned CLR hearing on 21 October 2022 during the conversations between the clerk of PI Master and one of its staff. They had neither been informed by MA the result of the hearing of the adjourned CLR hearing on 29 July 2022 nor the fact that the CLR hearing was scheduled on 21 October 2022. The only document received by them since the last hearing dated 29 July 2022 was a copy of the *ex partes* summons filed by the plaintiff on 3 August 2022.
9. Upon seeing the lack of progress and the “mess” created by MA, Master Catherine Cheng referred the matter to me by fixing a CMC before me to be heard on 17 January 2023. It has been specifically stated in that Order that interlocutory application, if any, should be taken out at least 7 days prior to the CMC and to be returnable on the same day before me. The master made no order as to costs for the hearing on 21 October 2022 which was only attended by MA. However, she ordered MA to waive their costs of the letter dated 2 August 2022 and the costs of attending the CLR on 21 October 2022.

*DISCUSSION*

*1st CMC hearing on 17 January 2023*

1. At the 1st CMC hearing on 17 January 2023 before me, Mr Mohnani of MA appeared on behalf of the plaintiffs while the defendant was represented by Mr William Lee, the principal of WLA.
2. Mr Mohnani started his submission by referring to the MP Action and the time bar issue. When questioned by the court of why he had included some “without prejudice” materials in his affirmation, he put it down to his lack of experience at the time, which was an excuse not accepted by the court. Mr Mohnani being the sole proprietor and principal of the firm should know better of not doing that.
3. Having heard Mr Mohnani’s submission, it was apparent to me that the OS taken out before Registrar Lui had been completely misconceived. Hence, it led to MA withdrawing the application before the registrar on behalf of the plaintiffs and the plaintiffs were ordered to pay costs to the defendant which was agreed at HK$4,766. However, up to the date of the hearing of the 1st CMC before me, the wasted costs had not been paid by the plaintiffs and it is unlikely that it will ever be paid by them.
4. I find the taking out of the OS was clearly a mistake made by MA rather than by the plaintiffs themselves. Mr Mohanni at the 1st CMC hearing agreed with the court that it was not the proper way to deal with such proceedings by taking out a OS under the MP Action. I further find that a lot of unnecessary costs and hearings have been wasted as a result of MA in failing to comply with the directions of the PI Master in applying for a “carry on” order.
5. In relation to the issue of the Writ in the present proceedings, Mr Mohnani submitted that it was done as a “protective writ” in order to avoid any further delay as by the time the 2nd plaintiff consulted him on the matter, the claim had already been time-barred.

1. Mr Mohanni also claims that he did not realize that his clients had filed the two separate claims in the SCT. He claims that it was done behind his back and he had only found out about this when he read the defendant’s questionnaire which mentioned about the 1st and 2nd Claims in the SCT. However, according to him, since then he has had experienced great difficulties in contacting the 2nd plaintiff whom he believed was residing in Pakistan. He only found out from the defendant’s solicitors that one of the claims at the SCT was withdrawn and the other one was dismissed by a presiding officer.
2. Under those circumstances, Mr Mohnani said he would consider applying to cease to act on behalf of plaintiffs. He asked the court to give him a few weeks to make the application to cease to act.
3. I therefore adjourned the matter to a 2nd CMC on 18 April 2023 to deal with the outstanding issues, including the costs of the action, up to the date of the application for ceasing to act.

*2nd CMC hearing on 18 April 2023*

1. At the adjourned 2nd CMC hearing before me on 18 April 2023, having read the affirmations and hearing the submissions form the parties, I accept that MA were acting under the instructions of its lay clients when they issued the Writ. I further accept the fact that the Writ was issued as a “protective writ” due to the already explained limitation period. I also accept that they might not be aware of the fact that, subsequent to the issue of the Writ in July 2020, his lay clients had issued two separate claims in the SCT on 7 July 2020 and 3 Sepember 2020 respectively.

1. Pursuant to the directions I gave at the 1st CMC, MA had applied for ceasing to act on behalf of the plaintiffs on 6 February 2023. I gave an order to allow MA to cease to act on behalf of the plaintiffs on 23 February 2023 by way of paper disposal.
2. Further, pursuant to my order given at the 1st CMC on 17 January 2023, MA was directed to file an affirmation to explain who should be responsible for the wasted costs of this action, up the date of application for ceasing to act on 6 February 2023. WLA was also directed to file and serve an affirmation on the same issue with leave to MA to make a reply, if so advised.

*MA’s explanations for the “mess” created by them*

1. In Mr Mohnani’s affirmation filed on 9 March 2023, he tried to explain to the court that at the time of issue of the Writ on 13 July 2020, he had two medical reports before him, viz. one from Caritas Medical Centre (“Caritas”) dated 27 November 2019 and one from Jinnah Hospital (“Jinnah Hospital”) in Pakistan dated 3 June 2019 (which he claims MA had only received on 4 July 2019) where the 1st plaintiff had been receiving treatment before his death.
2. However, upon reading the report form Caritas and the report from Jinnah Hospital, it is beyond any shadow of doubt that the 1st plaintiff had suffered from a “cerebraovasular accident”, ie a stroke, while at work on the date of the Accident.
3. According to the Caritas report, when the 1st plaintiff first attended the A&E of the hospital, he was found to have suffered from sudden onset of left sided body weakness. He was subsequently admitted to the ICU of Caritas under the care of the neurologists for the diagnosis of “cerebrovascular accident”. The report from Caritas also confirmed that when he was first admitted to Caritas on 3 June 2015 he was fully conscious but had slurring of speech, left sided weakness and had a health stoke scale of 20/42. The computed tomography (“CT”) of the brain showed an acute infact at the right middle cerebral artery (“MCA”) territory. His condition deteriorated and he was transferred to the Acute Stroke Unit 2 days later. He was then transferred to the neurosurgical unit of Kwong Wah Hospital (“KWH”) on 5 June 2016. Decompressive right carniectomy, right anterior temporal lobectomy and external ventricular drainage was performed on 15 June 2015. He stayed in KWH until 17 July 2015 during which when his condition had not been improved. He was transferred back to Caritas for rehabilitation. He remained bed ridden with left hemiplegia. He required constant assistance in his activities of daily living. His family finally agreed on institutional care and the 1st plaintiff was discharged on 21 March 2016 for that purpose.
4. The report from Jinnah Hospital in Pakistan gave a similar picture. The doctor at the hospital allegedly had been told that the 1st plaintiff had a “slip and fall” accident while at work in Hong Kong. The doctor stated that “(D)ue to the fall, patient also had brain hemorrhage and was unable to walk after the Incident”. He was in Pakistan for 6 months for treatment and passed away at home on 26 December 2016.
5. Judging from the above reports, in my judgment, it is extremely doubtful whether the plaintiffs have any probable cause of action against the defendant at all as the evidence seems to be quite clear that he had suffered from a stroke while at work on 3 June 2015. There is simply no credible evidence to suggest that the stroke was caused by the alleged “slip and fall”. In my judgment, it is more likely that it was the stroke which had caused him to fall rather than the other way round. Nonetheless, MA decided to issue the Writ allegedly to protect the plaintiffs’ interest.
6. After the 2nd plaintiff had successfully obtained a probate certificate on 29 December 2021 (which was provided to MA on 10 January 2022), MA wrote to the court and the defendant to report of the same and to request a CLR hearing at the earliest possible date.
7. However, MA failed to make appropriate application for a “carry on” order for the proceedings in accordance with the Order given by Mater Catherine Cheng on 16 February 2022 allegedly on the ground that they were unable to contact the 2nd plaintiff to obtain his instructions. It was only on 12 January 2023 that MA had received the 2nd plaintiff’s signed affirmation in relation to the application for leave to carry on the proceedings. The affirmation was filed on 13 January 2023.
8. Mr Mohnani submitted that the costs up until the application for ceasing to act ie 6 February 2023 should be borne by the 1st and 2nd plaintiffs due to the following reasons as set out in his affirmation:-
9. He had all along expressed to the court the difficulty they had faced in obtaining instructions from the lay client which may have caused delay in proceeding with the manner;
10. Having made investigations and enquiries all throughout, and having read the papers in the manner including two medical reports, it appears on the face of it that the plaintiff may have a probable cause of action and that he should be entitled to his day in court for just determination of his claim;
11. Furthermore, at no time had he or his firm made any payment on behalf of the plaintiffs. All disbursements including court fees and medical report fees have been paid thus far by the 2nd plaintiff;
12. Whilst there have been challenges in obtaining instructions, there has been nothing to suggest that the 2nd plaintiff is impecunious; and
13. On the face of it, it does not appear that the plaintiffs have a hopeless case and by advising the lay client about the merits of the case and the time bar issue, he had discharged my duties as his solicitors.

*WLA’s stance on costs*

1. The defendant’s stance has been set out fully in the affidavit of WLS’s assistant solicitor Mr Dickson Tse filed on 23 March 2023. Basically they refuted each and every single allegation made by MA as contained in Mr Mohnani’s affirmation. I shall not repeat the contents of the affidavit here suffice to say that had this case been properly handled by MA, they should have applied for ceasing to act much earlier and some of the hearings before Maser Catherine Cheng and certainly the two CMC hearings would not have been necessary.

*Findings of the Court*

1. First, based on the information and medical evidence available to MA at the time of issue of the Writ, I consider that there was no credible basis for the plaintiffs to make a common law claim against the defendant. Having said that, I can quite understand why, from the point of view of the plaintiffs’ solicitors, they would issue the Writ in order to “protect” his clients’ interests, given the fact that by the time of the 2nd plaintiff’s consulting him on the matter, the case had already been time-barred.
2. As the 1st plaintiff had passed away on 26 December 2016, at most the limitation period would expire 3 years from the date of death of the deceased according to s 27 of the Limitation Ordinance, Cap 283 (“the LO”). In order to displace the applicability of the limitation period, what MA should have done was to take appropriate instructions regarding the various factors which the court may take into account in evaluating whether s 27 or 28 should be displaced under s 30(3) of the LO. However, it is clear that it was not contemplated or done by them in this case.
3. In my view, had MA done that, it would be quite obvious to them that the plaintiffs had no strong basis to override the limitation period imposed under s 27 & 28 of the LO.
4. Thankfully, in this case, the case had only reached the stage of the issue of Writ and not much beyond that. Thus, the costs wasted are limited. Had the case goes further involving the plaintiffs’ solicitors drafting the statement of claim and statement of damages without good grounds of overidding the limitation period, then it may become a case where the court will ask the plaintiffs’ solicitors to show cause as to why they should not be personally held liable for the wasted costs of the entire proceedings.
5. In this case, I am prepared to give the benefit of doubt to MA and assume that they had acted upon instructions and issued the Writ with a view to protect the interests of the plaintiffs while trying to investigate into the matter. However, I would like to note that the medical reports disclosed by the plaintiffs strongly suggest that the 1st plaintiff’s condition (and his death) was caused by the stroke rather than a “slip and fall” accident at work.
6. Further, based on the rather peculiar circumstances of this case, I am prepared to give the benefit of doubt to MA and assume that the two claims made by the plaintiffs in the SCT were done without their knowledge after the MP proceedings was issued by MA. As such, I do not think MA should be responsible for the actions taken by its clients at the SCT which were done without their knowledge.
7. I noted however that a lot of unnecessary costs had been incurred due to the mistakes and inactions made by MA in, firstly, erroneously issuing the OS under the MP Action; followed by failing to inform WLA about the CLR hearings; and then the failure to take out a “carry on” order to continue with the proceedings, etc. Since the costs for the above blunders had already been dealt with by Registrar Lui and Master Catherine Cheng, I shall not re-visit them here.
8. Although Mr Mohnani admitted that the MP proceedings had been issued by mistake due to his “inexperience”, the costs of this matter had already been dealt with by Registrar Lui. The fact that the defendant is not able to recover the modest costs of HK$4,766 from the plaintiffs to date in my view is one of the vicissitudes of litigation for which I do not think the plaintiffs’ solicitors should be responsible for.
9. However, in my view, had MA been dealt with this case in a competent and efficient manner, then the two CMC hearings before me could have been avoided altogether. I therefore consider that MA should be made personally liable for those costs, including the costs of the defendant in preparing the affidavit and written submissions for the CMCs. I would therefore direct Mr Mohnani of MA to show cause within 14 days as to why his firm should not be held personally liable for the wasted costs caused by the need to hold the two CMC hearings. Such costs will be summarily assessed and to be paid on an indemnity basis and will be dealt with by way of paper disposal. I shall direct WLA to provide the court with a statement of costs for the two CMC hearings and MA to provide a list of objections, if any, after receiving MA’s submissions and if I find that they should be held responsible for those costs.

*CONCLUSION*

1. In the circumstances, I would make the following order on costs in this case:-
2. Save for the costs mentioned in (ii) below and other previous costs order made by Master Catherine Cheng in this case, the costs of the action up to the date of the order granted by the court to the plaintiffs’ solicitors to cease to act on 23 February 2023 be borne by the plaintiffs, such costs to be taxed if not agreed;
3. Subject to (iii) below, the costs of the two case management conferences held on 17 January 2023 and 18 April 2023 respectively to be borne by the plaintiffs’ solicitors personally and on an indemnity basis; and

1. The plaintiffs’ solicitors Messrs Mohnani and Associates are directed to show cause by way of filing an affirmation within 14 days as to why they should not be held personally liable for the wasted costs incurred as a result of holding the two case management conferences referred to above.

( Andrew SY Li )

District Judge

Mr Dheeraj Mohnani, of Mohnani & Associates, for the plaintiff

Mr Lee Wai Sang, of William Lee & Associates, for the defendant