## DCPI 2497/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2497 OF 2013

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##### BETWEEN

STRACHAN, FRANCES EVA

(also known as WAN YU WAH) Plaintiff

### and

KAREN HAU-YAN SHUM Defendant

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Before: Deputy District Judge Lui in Chambers

Date of Hearing: 25 March 2014

Date of Decision: 28 April 2014

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REASONS FOR DECISION

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1. Although the hearing was conducted in Chinese, the summonses, the supporting affirmations, the written submissions and, most importantly, the Statement of Claim (and the proposed draft amendment) in question are all in English. I therefore give my decision and reasons in English.
2. There are altogether 3 summonses before me today. First of all, the defendant took out a summons dated 23 January 2014 (“ the Striking Out Summons”) for, inter alia, the Statement of Claim dated 23 December 2013 be struck out and the claim be dismissed on the grounds that:-
   * 1. it discloses no reasonable cause of action;
   1. it is frivolous, scandalous and/or vexatious;
   2. it may prejudice, embarrass or delay the fair trial of the action; and/or
   3. it is, otherwise, an abuse of process of court.
3. Alternatively, the defendant asked for an order that unless the plaintiff files and serves a copy of an expert medical report relied upon as to causation and liability, the plaintiff claim be dismissed with costs to the defendant.
4. The plaintiff, on the other hand, filed 2 summonses for the court to deal with, namely, one dated 19 February 2014 (“the Default Judgment Summons”) for, inter alia:-
   1. judgment in default of filing a defence by the defendant;
   2. leave to continue with an High Court action HCPI 188 of 2011; and
   3. leave to sue a “Mrs. So of Flat 12/F, 90 Waterloo Road, Kowloon, Hong Kong” *(sic)* for plaintiff’s husband’s asset of over HK$ 30,000,000;

and the other one dated 24 March 2014 (“the Amendment Summons”) for leave to amend the Statement of Claim and to transfer this action from the personal injuries list to the general civil action list.

1. The background of this litigation is simple. The defendant was a doctor, who specialised in psychiatry, and the plaintiff was her patient. There is no dispute that the plaintiff attended a consultation session with the defendant for the first and only occasion on 7 January 2008. During that session, the plaintiff was provisionally diagnosed to suffer from delusional disorder but the plaintiff did not accept the defendant’s professional view. The defendant advised the plaintiff to take some medication for her to relax but the plaintiff declined to do so. Subsequently, the defendant, on or about 30 November 2010, upon request prepared a report about her diagnosis of the plaintiff for that consultation on 7 January 2008. The plaintiff was also unhappy about the contents of this report and had attempted to ask the defendant to change her opinion and to amend the report but the defendant refused to do so.
2. The plaintiff commenced a person injury claim against the defendant on 28 November 2013 in the District Court based on the cause of action of medical negligence. In short, the plaintiff alleged that the defendant’s diagnosis that the plaintiff suffered from “delusional disorder” was wrong. And according to the Writ of Summons, the plaintiff claimed that due to the wrongful diagnosis by the defendant, the plaintiff should be entitled to “emotional damage” of HK$500,000 and the costs of the consultation on 7 February 2008 and the report prepared by the defendant for a total sum of $9,200 (this sum, however, was later reduced in the Statement of Claim to $1,200 for the costs of consultation and $5,000 for the costs of the said report, namely total: $6,200). The plaintiff, in her Statement of Claim, filed on 23 December 2013, gave detailed facts which she was going to rely on in this action and this Statement of Claim is, in fact, the vary subject matter of all three summonses before me now.
3. I will first of all, deal with the defendant’s Striking Out Summons together with the plaintiff’s Amendment Summons.
4. According to the Statement of Claim, the plaintiff further claimed, in addition to the above items, several other items of damages which did not appear in the Writ of Summons, namely :-
   1. Refund of a sum of $50,000 for “loss due to withdrawing the court case in the Small Claim Tribunal due to stress where the Plaintiff has lost $ 180,000 due to cancellation of the transaction” *(sic)*; and
   2. Refund of a sum of $ 20,000 for “consultation and report fee seeing psychiatrist Mr. Tsang Fan Kwong due to the need to certifying good mental health requested by Cathay Pacific for using life time discounted staff travel benefit” in 2013 *(sic)*;
5. The plaintiff, in the Statement of Damages, further alleged that due to the wrongful diagnosis by the defendant, the plaintiff “has been discriminated by the others” and “[m]any others have been impolite to” the plaintiff. She “was insulted” and her “human right was taken away from” her in 2008.
6. I will first look at the original Statement of Claim together with the draft amendment to see whether or not the Statement of Claim and the draft amended Statement of Claim:- (1) disclosed no reasonable cause of action, (2) are frivolous, scandalous and/or vexations, (3) may prejudice, embarrass or delay a fair trial or (4) the action is, otherwise, an abuse of process.
7. It appears to me that after dealing with these two summonses, the decision for the plaintiff’s the Default Judgment Summons would be quite necessary and just be a natural consequence. And I am told today that the plaintiff abandoned 2 applications in the said summons namely,
   * 1. leave to continue with High Court action HCPI 188/2011; and
     2. leave to sue “Mrs So of Flat 12/F, 90 Waterloo Road, Kowloon, Hong Kong for the plaintiff’s husband asset of over $30,000,000” *(sic)*.
8. The issue now before me is also rather straight forward. I have to decide whether the Statement of Claim was defective and whether the draft amendment could cure the defects.
9. After reading thoroughly the original Statement of Claim, I discovered that out of more than 100 paragraphs, about 60 of them (including sub-paragraphs) are absolutely irrelevant and have nothing to do with the defendant. Only 40 paragraphs contained facts which are arguably relevant to the defendant but most of them are quite irrelevant to the diagnosis of the plaintiff.

1. The “real compliant” by the plaintiff could be seen, particularly, in 2 paragraphs of the Statement of Claim. At paragraph 5 of the Statement of Claim, the plaintiff pleaded that:-

“In the 20 mins consultation meeting on Jan 7, 2008, the Defendant informed the plaintiff that she suffered from “Delusion” and needed mental illness medication” *(sic)*

And the plaintiff continued after several sub-paragraphs under paragraph 5 and said, at paragraph 6 of the Statement of Claim, that:-

“At the end of the consultation on 7 January 2008, the Defendant knew or ought to have known that the Plaintiff disagreed with the serious mental illness diagnosis and refused to take any medication from the Defendant. Since the Defendant had failed to deliver an objective diagnosis to the Plaintiff. The Plaintiff stood up and left.” *(sic)*

1. In my view, it was not disputed that the plaintiff was not satisfied with the defendant’s diagnosis. However, after reading the entire Statement of Claim, the reason why the plaintiff was not satisfied with it, was not entirely clear. And although the plaintiff did not say so in express words, this is my understanding of the basis of the plaintiff’s complaint against the defendant, namely the defendant’s professional medical service had fallen below the standard of care and skill that should be provided by an ordinary competent professional (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). But to establish a reasonable cause of action, the plaintiff should have pleaded in her Statement of Claim on what basis that the defendant’s professional medical service had fallen below the standard. And normally, this could be easily done by filing with together the Statement of Claim (and making reference to in the Statement of Claim) an expert medical report relied upon as to causation and liability pursuant to Order 18 rule 12(1A) of the Rules of the District Court and paragraph 5 (v) of the Practice Direction 18.1. Unfortunately, throughout the entire Statement of Claim, there was no mention of such facts or opinions by any medical expert and, in breach of such Rules of the District Court and the Practice Direction 18.1, no such medical report was filed.
2. From paragraphs 8 to 13 of the Statement of Claim, the plaintiff apparently complained about the report prepared by the defendant. According to the relevant paragraphs of Statement of Claim, the plaintiff obviously was not happy with the “professional charge” of the report in the sum of HK$5,000 and she was also not happy with the contents of the report. Although the plaintiff had repeatedly requested the defendant to change her view in the report, the defendant refused to do so. I do not intent to repeat those parts of the Statement of Claim. But none of these complaints could support a reasonable cause of action against the defendant.
3. I agree with the submission of the defendant that the entire Statement of Claim contains a number of offensive and degrading allegations against the defendant that have no relevance to the claim and were made for the sole purpose of “retaliating” against the defendant for refusing to change her opinion. These allegations were obviously scandalous and vexations. I should perhaps recite one of these allegations as an example to illustrate my point. At paragraph 13-1 (19.1), the plaintiff pleaded in her Statement of Claim that:-

“Defendant thought too much and studied too much as she had a delusion thinking that the Plaintiff had a delusion as a mistaken idea which is held unshakably and cannot be corrected so Defendant disagrees changing her report.” *(sic)*

1. At paragraph 13-1 (22.1) of the Statement of Claim, the plaintiff purportedly rely on the opinion of Dr. Tsang Fan Kwong, who was also a doctor who specialised in psychiatry, to say that the defendant professional opinion was wrong. However, the plaintiff did not plead in the Statement of Claim why, and on what basis, Dr. Tsang disagreed with the defendant’s professional view of the plaintiff’s condition on the 7 January 2008. Furthermore, I have been shown evidence by the defendant that in fact, Dr. Tsang gave three opinions to the plaintiff on the 20 June 2011, 24 January 2013 and 3 December 2013 respectively on the plaintiff’s mental condition at different times for certain specific purposes. In the 20 June 2011 opinion, Dr. Tsang said that she was mentally fit to handle legal proceeding against the Hospital Authority. In the 24 January 2013 opinion, Dr. Tsang was of view that she had “no psychiatric diagnosis” and was therefore fit to travel as staff passenger as required by the airline. And in the 3 December 2013 opinion, Dr. Tsang said that she had the testamentary capacity to make a will. Dr. Tsang was never asked to give any opinion on the defendant’s diagnosis and he never expressed any opinion as to the correctness of the defendant’s diagnosis regarding the plaintiff’s mental condition on 7 January 2008 in question.
2. In my judgment, taking the entire the Statement of Claim as a whole, I am unable to see that the plaintiff has any reasonable cause of action at all. In addition to that, she made a lot of frivolous, vexatious and scandalous allegations against the defendant which are irrelevant and unnecessary. I do not see that the claim against the defendant has any reasonable prospect of success at all. I therefore accept the defendant’s argument that this Statement of Claim is liable to be struck out and I should therefore do so on the grounds that there was no reasonable cause of action and it was frivolous, vexatious and scandalous. I understand that the plaintiff also relies on the ground that the plaintiff’s action was, otherwise, an abuse of process and it seems that given my reasons above, it is therefore unnecessary for me to deal with this argument. In my judgment, this Statement of Claim ought to be struck out.
3. I will now turn to the plaintiff application to amend the Statement of Claim. The plaintiff prepared a draft amended Statement of Claim which I understand to be, in fact, a complete substitution of the original Statement of Claim. In this draft amended Statement of Claim the plaintiff said that at paragraph 6:-

“Mrs So called the Defendant informing the Defendant that the Plaintiff suffered from schizophrenia. Appointment was arranged on 7 January 2008.” *(sic)*

and at paragraph 7:-

“Based on Mrs So’s untrue slander, the Defendant informed the plaintiff to take medication for mental illness to manage imagination (hallucination) of psychosis. The plaintiff declined and terminated the 20 minutes consultation. ……”. *(sic)*

It appears to me that in this draft amended Statement of Claim, the plaintiff purported to make allegation against the defendant that her diagnosis was based on information provided by a Mrs So. The plaintiff also said that this is no longer a medical negligence and personal injury action and she applied to transfer the action from the personal injury list to the general civil action list.

1. In the prayer of this draft amended Statement of Claim, the plaintiff asked for refund of the sum of $1,200 paid for the consultation on 7 January 2008 and the sum of $5,000 for the report regarding the said consultation. The plaintiff did not explain the basis of her claim in this draft amendment. By reading the draft amendment, it would appear to me that the plaintiff is still complaining about the diagnosis of the defendant made on 7 January 2008 and the report about this diagnosis. As the plaintiff did not mention any basis in this draft amendment, I have great difficulty in understanding the cause of action. However, even putting the plaintiff’s case to the highest, the plaintiff was most likely still making the same complaint against the defendant’s professional ability and the wrong diagnosis on 7 January 2008. If that is so, the plaintiff is still required to plead sufficient facts in the draft amendment in support of that. Generally speaking, an independent medical expert opinion establishing the liability is still likely to be required. The plaintiff simply failed to identify what was wrong with the defendant’s professional opinion. In my judgment, it was not sufficient just to say that the opinion was wrong.

1. In the premises, this draft amendment is obviously not going to cure the defects which I have indentified in the original Statement of Claim which was decided to be struck out. This draft amendment also disclosed no reasonable cause of action at all and it is trait law that if the amendment cannot cure the defects indentified in the original Statement of Claim, this court should not allow the amendment. And for this reason, I will disallow the plaintiff’s application to amend the Statement of Claim.
2. In light of my decisions, namely the original Statement of Claim be struck out and the draft amendment be refused, it would therefore be unnecessary for me to deal with the application for leave to transfer this action from the personal injuries list to the general civil action list. I therefore refuse that application too.
3. Given my decisions above, this would completely disposed of the plaintiff’s action and it would therefore be unnecessary for me to consider the alternative application for unless order by the defendant, save to say that it would be utterly unfair to the defendant when more than sufficient time was given to the plaintiff to obtain an expert medical report to support her claim, this Court should still allow more time for the plaintiff to do so. I therefore make no order as to this alternative application. As the Statement of Claim is struck out and the proposed draft amendment is not allowed, the plaintiff’s Default Judgment Summons and the entire action should be dismissed.
4. I therefore make the following orders:-
5. Leave is granted to the plaintiff to withdraw paragraphs 2 and 3 of the plaintiff’s Default Judgment Summons regarding an application for leave to continue a High Court action and to sue a Mrs So;
6. The plaintiff’s Statement of Claim filed on 23 December 2013 be struck out and the plaintiff’s application to amend the Statement of Claim as per the draft attached to the Amendment Summons be dismissed;
7. The Default Judgment Summons be dismissed;
8. The plaintiff’s action be dismissed; and
9. The Checklist Review hearing scheduled on 20 May 2014 be vacated.
10. Finally, I will deal with the issue of costs. Generally speaking, costs should follow the event and I therefore make a costs order nisi that the plaintiff do pay costs of this action (including costs of all three summonses) to the defendant to be taxed, if not agreed. Unless any party applies, by summons, within 14 days, to vary the same, this order nisi shall become absolute.

( Simon Lui )

Deputy District Judge

The plaintiff appeared in person

Mr David Kan of Messrs. Howse Williams Bowers for the defendant