DCPI 2514/2015

[2018] HKDC 70

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES NO 2514 OF 2015

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BETWEEN

WONG ROCKY LOK-KUN（黃樂勤） Plaintiff

and

WU KWONG SUM（胡廣森） Defendant

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Before: Her Honour Judge Winnie Tsui in Chambers (Open to Public)

Date of Hearing: 11 September 2017

Date of Decision: 24 January 2018

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DECISION

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*INTRODUCTION*

1. In this action, Mr Rocky Wong, the plaintiff, claims against Dr Wu Kwong Sum, an obstetrician, for medical negligence.
2. In 2010, Mr Wong and his wife (now divorced) were expecting a baby. The wife consulted Dr Wu for ante-natal check-ups. On 12 September of that year, she gave birth to a baby girl by low forceps delivery in Tsuen Wan Adventist Hospital. Dr Wu performed episiotomy to facilitate the delivery. Whilst at the hospital and during the follow-up consultation about ten days later, the wife complained of pain in the episiotomy wound. Dr Wu told her that it was normal.
3. Then, on 1 October 2010, the wife found an object protruding from her vagina. The object was removed. It was a surgical gauze which was stained with blood and had a very foul odour.
4. Not surprisingly, the wife commenced a personal injuries claim against Dr Wu. She claims that the doctor was negligent in leaving behind the gauze in her when he delivered the baby and she suffered from psychiatric illness as a result. The case was later settled.
5. Then, in November 2015, more than five years after the birth of the daughter, Mr Wong commenced the present action. He alleges negligence on the part of Dr Wu, which led to a train of events culminating in him suffering from mental illness. In gist, he claims that Dr Wu’s negligence caused the wife to suffer from physical pain and psychiatric disorders. This had caused her to become estranged from Mr Wong. They were divorced in 2015. Mr Wong was diagnosed with major depressive disorder in May 2015.
6. Mr Wong claims damages of just above $290,000.
7. This is the hearing of Dr Wu’s striking out application. By amended summons dated 4 July 2017, he asks for the amended statement of claim be struck out on the ground that it discloses no reasonable cause of action, pursuant to Order 18, rule 19(1)(a) of the Rules of the District Court. No affidavit is filed in support of the application as evidence is not admissible under Order 18, rule 19(2).
8. At the hearing, Mr Wong was represented by Ms Abigail Wong, counsel, and Dr Wu by Mr David Kan.

*LEGAL PRINCIPLES ON STRIKING OUT*

1. The principles governing striking out are well-known and trite.
2. It is only in plain and obvious cases that the court should exercise its summary powers to strike out any pleading. It should not decide difficult points of law at this interlocutory stage. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out: see *Hong Kong Civil Procedure 2018* at 18/19/4.
3. It is common ground that under Order 18, rule 19(1)(a), the court should look at the pleadings without resort to any extrinsic evidence and that the facts as pleaded by Mr Wong are to be taken as true for the purpose of the striking out application: see *Hong Kong Civil Procedure 2018* at 18/19/3.

*MR WONG’S PLEADED CASE*

1. It is therefore important to examine closely, and I set out below in detail, Mr Wong’s case, as disclosed by his pleadings, which include the amended statement of claim and the statement of damages.
2. Mr Wong was 28 years old when the baby was born. He worked as a ground services agent at the Hong Kong International Airport. His work title then was customer services supervisor. He married his wife in June 2010 when she was some six months pregnant.
3. Accompanied by Mr Wong, the wife was seen by Dr Wu on ten occasions from 25 March 2010 up until she gave birth. At the same time, the wife also attended ante-natal check-ups at a public hospital. Her pregnancy was uneventful.
4. Dr Wu at all times knew that Mr Wong was the husband and the father of the expected baby and that he was very concerned about his wife.
5. Mr Wong paid the hospital deposit and arranged for the wife to give birth in Adventist Hospital.
6. The baby was born on 12 September 2010. In order to facilitate delivery, Dr Wu performed episiotomy (left medial-lateral) on the wife and repaired the wound with absorbable sutures. Mr Wong was present throughout. The wife felt pain in the episiotomy wound immediately after delivery. She was given analgesics and antibiotics. In the following two days whilst still being hospitalised, she continued to feel pain in the area. Before she was discharged, Dr Wu inspected her wound and noted normal findings.
7. On 21 September 2010, Mr Wong accompanied the wife to Dr Wu’s clinic for a post-natal consultation. The wife again complained of pain at the episiotomy wound. In Mr Wong’s presence, the doctor examined the wound and told the couple that it was normal.
8. On 1 October 2010, an object was found protruding from the wife’s vagina and was removed. Mr Wong immediately took her to the A&E Department of Princess Margaret Hospital. The doctors there inspected the object and confirmed that it was compatible with a retained surgical gauze.
9. Mr Wong was furious about Dr Wu. He blamed himself for not persuading his wife to give birth at a public hospital or in Australia.
10. As a result of the incident, the relationship between the couple deteriorated. She was under serious depression since then.
11. In the statement of damages, Mr Wong sets out in detail how he has been affected by the train of events set off by the doctor’s negligent performance of the episiotomy procedure.
12. First, there was a “change in [the wife’s] behavior due to the severe episiotomy wound she suffered”.

“She became unhappy all the time and was socially withdrawn. She became quiet and they did not have much communication. [The wife] became sexually cold and uninterested. She refused the Plaintiff from all kinds of intimacy. The couple did not have any sexual intercourse ever since their daughter was born.”

1. Mr Wong was frustrated by these changes in his wife. Although he tried to be supportive to her, their relationship became more and more distant and he had no way to help. Later on, the wife refused to sleep in the same room with him.
2. The distancing led to mood change in Mr Wong in around 2012. He became negative, unhappy and prone to becoming angry. His low mood worsened gradually since 2013 as his marriage was starting to fall apart. He experienced poor sleep, loss of interest in things he used to enjoy, tiredness, lack of motivation and low energy throughout the day.
3. In early 2014, the wife was confirmed to be suffering from:-
4. major depressive disorder, single episode, in partial remission;
5. persistent depressive disorder (dysthymia);
6. female sexual interest/arousal disorder; and
7. genito-pelvic pain/penetration disorder.
8. The wife filed for divorce in 2015. Mr Wong felt helpless. He had “intense self-blame and feelings of guilt”. His concentration and attention became poor and this affected his work performance.
9. Mr Wong consulted Dr Gabriel Hung for psychiatric assessment for the first time in May 2015. Dr Hung’s diagnosis was “Major Depressive Disorder Single Episode, Mild”. He attended further assessments by Dr Hung in 2015, 2016 and early 2017. He also received therapeutic treatment by Dr Cindy Chiu, a specialist in psychiatry.
10. In March 2016, Mr Wong quit his job as customer services supervisor and took up a less stressful job as an operations trainee at HACTL at the airport. In his new job, he found it difficult at times to remember all the new information and materials.
11. On the family side, he only had limited access to his daughter. He missed her a lot.
12. It was Dr Hung’s opinion that Mr Wong’s illness is closely related to the events that happened following the birth of the daughter and that Mr Wong had been directly affected by the incident which happened to the wife.
13. The crux of Mr Wong’s case against Dr Wu is set out in paragraph 15 of the amended statement of claim. It is reproduced in full below:-

“By reason of the above, the Plaintiff is the victim of the Defendant’s negligence arising from the Incident in causing the retention of the Gauze in [the wife] on 12 September 2010 and in failing to detect the same after delivery, prior to [the wife’s] discharge from [the hospital] on 14 September 2010 and also at the consultation on 21 September 2010, *in circumstances where the Defendant knew or foresaw, or ought reasonably to have known or to have foreseen,* that any damage or injury to [the wife’s] sexual or reproductive organs which involved the retention of the Gauze at the episiotomy wound would likely result in pain and suffering to [the wife] in the circumstances in [the preceding paragraphs], and *consequential damage or injury to the sexual and marital relationship between [the wife] and the Plaintiff and/or to the mental or psychiatric well-being of the Plaintiff*.”

1. The italicised emphasis is mine and I shall return to this part of Mr Wong’s case, which is material for the disposal of the striking out application, in the discussion below.
2. The amended statement of claim goes on to set out particulars of Dr Wu’s negligence. In gist, he is said to have been negligent in leaving behind a gauze inside the wife and failing persistently to conduct a proper or adequate examination of the wife so as to detect the retention of the gauze. In short, Mr Wong complains that Dr Wu failed to provide her wife with appropriate and skillful treatment and exposing her to unnecessary risk of injury. The particulars go on for three pages. It is worth noting that all the negligent acts or omissions are alleged to have been committed or have taken place as against, or with respect to, the wife but not Mr Wong himself.
3. In summary, Mr Wong’s case against Dr Wu is that as a result of the latter’s negligence in, and following, the episiotomy, he has suffered from major depressive disorder. He claims damages under three heads totaling $291,040, which can be broken down as follows:-
4. PSLA – $220,000;
5. Medical expenses incurred – $9,600; and
6. Future medical expenses for psychological and psychiatric treatments – $61,440.

*DR WU’S SUBMISSIONS IN SUPPORT OF STRIKING OUT*

1. In his written submissions, Mr Kan treats the claim as a “secondary victim” claim. Applying the principles laid down in *Alcock v Chief Constable of South Yorkshire Police* [1982] 1 AC 310, Mr Kan first submits that the claim has failed to satisfy the test of reasonable foreseeability and the test of proximity in this context. No duty of care can arise and the pleadings therefore disclose no reasonable cause of action.
2. More specifically, on the issue of reasonable foreseeability, it is submitted that:-
3. It was not reasonably foreseeable that Mr Wong would be affected by psychiatric illness as a result of the doctor’s negligent acts (and omissions) in relation to the episiotomy because, as pleaded, there was nothing of a horrific or sufficiently horrific nature which happened from 12 September 2010 onwards that would induce psychiatric injury in a person of ordinary fortitude.
4. Mr Kan emphasises that when the gauze was discovered on 1 October 2010, it was removed without any professional help. The whole incident was not in any way life-threatening and the wife did not suffer from any significant physical injury.
5. On the issue of proximity, while Mr Kan agrees that Mr Wong had a sufficiently close relationship with the primary victim (the wife), he submits that it is debatable whether he can establish proximity to the incident in both time and space since, as pleaded, Mr Wong did not witness the discovery and removal of the surgical gauze with his own eyes. In any event, Mr Wong only pleads that he was furious with Dr Wu and he blamed himself. He does not plead that he was shocked.
6. Further, as a second ground, Mr Kan says that on the pleadings, it cannot be demonstrated that the alleged negligence was causative of the psychiatric injury. This is because, it is submitted, the injury was not induced by a sudden shocking event in this case but, as pleaded, only came about by the accumulation of more gradual assaults on the nervous systems over an extended period of time. This does not fufill one of the requisite requirements as laid down in *Alcock*.

*MR WONG’S SUBMISSIONS OPPOSING STRIKING OUT*

1. Ms Wong, appearing for Mr Wong, points out first of all that this is not a “secondary victim” or “nervous shock” case and that the plaintiff has never pleaded that he is a secondary victim. Therefore the “control mechanisms” in *Alcock* simply do not apply.
2. Ms Wong then submits that there is ample and clear authority that where circumstances call for such a duty to be recognised, a medical practitioner may owe a duty of care to non-patients. Whether a duty does exist will depend on the findings of facts and the application of the threefold test for the imposition of a duty of care. The striking out application is therefore “wholly ill-suited as a means to determine the point”. All that the plaintiff needs to demonstrate here is that his claim is arguable. Ms Wong relies on a number of authorities to make good her point.
3. First, the following passage in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 is relied upon to support the proposition that a medical doctor is not immune to claims from third parties, ie non-patients:-

“…… it is long and well-established, now elementary, that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due skill and care are not exercised, and if injury or damage can be shown to have been caused by the lack of care. Such duty does not depend on the existence of any contractual relationship between the person causing and the person suffering the damage. A doctor, an accountant and an engineer are plainly such a person.” (at 653F-G)

1. Secondly, Ms Wong places heavy emphasis on the relationship between Mr Wong and his wife – Mr Wong being her sexual and marital partner. It is submitted that, given that relationship, the harm done to the wife was harm done directly to the husband. Ms Wong cites two cases which she says are illustrations of how a non-patient, being the sexual partner of a patient who was negligently treated, could be owed a duty of care by the treating doctor as the harm to the non-patient was reasonably foreseeable. They are the House of Lords’ decision in *McFarlane v Tayside Health Board* [2000] 2 AC 59 and the decision of the Supreme Court of New South Wales in *BT v Oei* [1999] NSWSC 1082.
2. In the first case, Mr McFarlane underwent a vasectomy operation. A few months later, he was told that his sperm counts were negative and was advised that he was infertile. Acting on the advice, Mr and Mrs McFarlane ceased to take contraceptive precautions. Mrs McFarlane became pregnant and gave birth to a healthy baby girl, the couple’s fifth child. Mrs McFarlane claimed damages against the health board for pain and distress suffered from the unwanted pregnancy and birth. It was held that she was entitled to such damages. (There was also a claim made by the couple together as parents for the financial cost of rearing the child. That claim was disallowed.)
3. In the second case, the personal injuries claim was made against a general practitioner in Sydney. AT was his patient. The allegation was that the doctor negligently failed to diagnose AT’s HIV illness and to counsel him to undergo an HIV antibody test. BT, his sexual partner (and later his wife) contracted HIV from AT. BT claimed against the doctor for his negligent treatment of AT which resulted in her infection with HIV. At trial, the claim was upheld. The trial judge ruled that the doctor owed a duty of care to BT as the sexual partner of AT.
4. Relying on the success of these two “non-patient” or “sexual partner” cases, it is submitted (with some confidence) on behalf of Mr Wong that his claim, which is similar in nature, is at least arguable and should be allowed to proceed to trial.
5. Thirdly, Ms Wong cites the House of Lords’ decision in *W v Essex County Council* [2001] 2 AC 592.
6. There, W1 and W2 are the parents of W3 to W6, all young children. W1 and W2 had an agreement with the council to become foster parents. The basis of the couple’s claim against the council was that they had expressly told the council that they were not willing to accept any child who was known or suspected of being a sexual abuser. Notwithstanding that stipulation, the council placed a 15-year-old boy in their home. Unknown to W1 and W2, the boy had admitted an indecent assault on her own sister and was also being investigated for an alleged rape. Serious acts of sexual abuses against W3 to W6 were alleged to have been committed by the boy over a one-month period after he arrived at the parents’ home. It was claimed that as a result of the abuse against the children, the parents suffered psychiatric illness, including severe depression and post-traumatic stress disorder.
7. W1 and W2 claimed against the council for negligence.
8. The council applied to strike out the claim on the ground that it disclosed no reasonable cause of action. It succeeded at first stance and at the Court of Appeal. But the House of Lords overruled that and held, amongst other things, that on the facts alleged it was arguable that there was a duty of care owed to the parents and a breach of that duty by the council.
9. One of Ms Wong’s submissions on *W v Essex* is that this case is “contextually analogous to the present situation” and she urges the court to follow the approach taken by the House of Lords, as disclosed by the following passages and decline to strike out the present claim:-

“It seems to me that it cannot be said here that the claim that there was a duty of care owed to the parents and a breach of that duty by the defendants is unarguable, that it is clear and obvious that it cannot succeed. On the contrary whether it is right or wrong on the facts found at the end of the day, it is on the facts alleged plainly a claim which is arguable. In their case the parents made it clear that they were anxious not to put their children at risk by having a known sex abuser in their home. The council and the social worker knew this and also knew that the boy placed had already committed an act or acts of sex abuse. The risk was obvious and the abuse happened. Whether the nature of the council’s task is such that the court should not recognise an actionable duty of care, in other words that the claim is not justiciable, and whether there was a breach of the duty depend, in the first place, on an investigation of the full facts known to, and the factors influencing the decision of, the defendants.” (at 598F-H)

“On a strike out application it is not necessary to decide whether the parents’ claim must or should succeed if the facts they allege are proved. On the contrary, it would be wrong to express any view on that matter. The question is whether if the facts are proved they must fail. It is not enough to recognise, as I do recognise at this stage, that the parents may have difficulties in establishing their claim.

On the other hand, it seems to me impossible to say that the psychiatric injury they claim is outside the range of psychiatric injury which the law recognises. Prima facie pleaded it is more than “acute grief”.” (at 600C-D)

1. Although not a medical negligence case, part of the analogy to *W v Essex*, it is submitted, lies in the allegation that here Mr Wong subsequently blamed himself for what had happened to the wife (see paragraph 20 above), just as the parents in *W v Essex* felt that they had brought the abuser and the abused together and suffered guilt (see, eg, 599E, 600F). (Ms Wong also makes submissions on whether it is arguable that the parents were primary victims or not. But, by reason of the decision which I shall reach below, it is not necessary to recite those submissions.)

*DISCUSSION*

1. I would make a preliminary remark. My first impression of this case upon the perusal of the pleadings was that the facts are rather unusual. Having now reviewed the papers in detail, heard submissions, reserved my decision and reflected at length on arguments made by both parties, my impression of the case remains the same. And I am inclined to think that any reader of the pleadings will likely have the same thought – because the facts, as alleged, are indeed unusual.
2. Having said that, for the purpose of the striking out application, I am to take the facts as true. I shall proceed on that basis.
3. The question which I need to decide is whether Mr Wong has put forward an arguable case of negligence against Dr Wu on those assumed facts. Or, is it plain and obvious that his claim is bound to fail as a matter of law so that I should dismiss it now, rather than allowing him to proceed to trial, in the process of which no doubt much time, costs and efforts will be expended by both parties (particularly given that expert medical evidence is likely to be relevant)?

*The four elements of negligence*

1. It is proper to start the analysis by going back to the first principles on the law of negligence.
2. To establish negligence, there are four essential elements:-
3. The existence of a duty of care situation, ie one in which the law attaches liability to carelessness;
4. breach of that duty;
5. a causal connection between the defendant’s careless conduct and the damage; and
6. that the damage is not so unforeseeable as to be too remote.

See, eg, *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* (2011) 14 HKCFAR 14 at paragraph 21; *Clerk & Lindsell on Torts* (21st ed) at paragraph 8-04.

1. It is said that damage is the gist of an action in negligence. The tort is committed when the damage is sustained. “The duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly.”: see *Clerk & Lindsell* at 8-05.
2. The focus of the present discussion will be the first element. This is because the second element of breach has implicitly been assumed in parties’ submissions whereas the third element of causation should be taken as established, as it is a matter of fact. On the fourth element of remoteness, neither party has made any submission. I shall return to this element briefly below. My decision on this application is, therefore, going to turn on the issue of duty of care.

*Duty of care*

1. It is well-established that when determining whether a duty of care exists, the court will adopt a three-pronged test:-
2. Was the damage reasonably foreseeable?
3. Can the relationship between the plaintiff and the defendant be characterised as one of “proximity” or “neighbourhood”?
4. Is the situation one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the defendant for the benefit of the plaintiff?

See *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617H-618B; *Luen Hing Fat* at paragraph 27.

1. In Hong Kong, the modern starting point of how the court should approach these three requirements must be the Court of Final Appeal’s decision in *Luen Hing Fat* (see paragraphs 29 to 37).
2. It is recognised time and again by courts of the highest authority that the consideration of the three requirements involve value judgments and, in grey area cases, the outcome will have to be determined by judicial judgment. In every case, the value or judicial judgment involved is the assessment by the court of whether in a given relationship there “ought” to be liability for negligence. See *White v Jones* [1995] 2 AC 207 at 221F-G, *per* Sir Donald Nicholls V-C in the Court of Appeal; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 294. These statements were expressly acknowledged to be the proper *Caparo* approach in *Luen Hing Fat* (at paragraph 37).
3. As such, the three requirements are not susceptible of any precise definition.
4. They may be taken as convenient labels which attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope: *Caparo* at 617H-618B.
5. They are headings under which the court examines the pros and cons of imposing liability in negligence in a particular type of case: *White v Jones* at 221F-G.
6. The labels “help steer the mind through the task in hand”: *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 284, *per* Kirby J. The observation was expressly agreed by Lord Walker in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at 209E-F and acknowledged by Bokhary PJ in *Luen Hing Fat* at paragraph 37.
7. Policy considerations (of a legal rather than a political nature) are employed not only when justifying the court *not* imposing a duty of care, but also when grounding the imposition of a duty of care: *Luen Hing Fat* at paragraph 35.
8. Ultimately it is necessary to stand back and take a holistic view of foreseeability, proximity and the need to be satisfied that it would be fair, just and reasonable to impose a duty of care: *Luen Hing Fat* at paragraph 30.
9. It may be noted that when Sir Donald Nicholls V-C discussed in *White & Jones* how value judgments are involved, he referred only to the headings of “proximity” and “fairness, justice and reasonableness”. He said (at 221F), “I shall consider these two headings together, because there is no real demarcation line between them. They shade into each other. Both involve value judgments.” In this discussion, he seemed to have specifically left out the “foreseeability” heading. (And, in fact, when Lord Bridge talked about “labels” in *Caparo*, he was referring also to the concepts of proximity and fairness only.)
10. However, the other important decisions on duty of care, including *Luen Hing Fat* itself (and the authorities cited in it), appear to follow the approach that there is a “value judgment” aspect to all three headings, not just the last two. (It has been said that “these three matters overlap with each other and are really facets of the same thing”: see *Luen Hing Fat* at paragraph 30, quoting the statement made by Saville LJ in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 and endorsed by Lord Steyn.)
11. Apart from the above considerations, there is now also an established emphasis on the incremental approach. In a novel situation, the court should compare the case at hand with the distinct categories of negligence traditionally established to see whether the facts represent no more than a small extension of a situation already covered by authority, or whether the finding of a duty of care on those facts would amount to a significant extension to the law of negligence. The greater the step forward required to impose liability, the more the court will need to evaluate the consequences and be assured that it is what justice requires: *Caparo* at 618C-E; *Clerk & Lindsell* at paragraph 8-22.

*Reasonable foreseeability*

1. First of all, it is important to formulate the precise question which the court needs to address – what needed to be reasonably foreseeable and when?
2. As remarked in paragraph 55 above, damage can be said to be the gist of the action. It is not sufficient that the defendant acted carelessly. For a negligence claim to succeed, it has to be shown that the courts recognise as actionable the careless infliction of *the kind of damage* of which the plaintiff complains. When determining whether a duty of care exists, it is important to define the scope of the duty with reference to the injury or loss for which the plaintiff claims damages: *Clerk & Lindsell* at 8-05 and footnote 10.
3. The material factors to be considered under this heading are the damage done and the defendant’s knowledge at the time of the negligent act.

“The criterion of reasonable foreseeability focuses on the knowledge that someone in the defendant’s position would be expected to possess. The greater the awareness of the potential for harm, the more likely it is that this criterion will be satisfied. If the risk of harm is far-fetched, a duty will not arise.” *Clerk & Lindsell* at paragraph 8-16

1. In the present case, I would formulate the question as follows – at the time when Dr Wu performed the episiotomy and followed up on the wife in subsequent consultations, could he have reasonably foreseen that if he did so carelessly, Mr Wong, the husband, would suffer personal injury of some kind, including psychiatric illness?
2. In her oral submissions, Ms Wong agrees that it is the proper and relevant question to ask.
3. In my view, on the facts as pleaded, the answer is clearly “no”. I shall approach the question from three angles.
4. First, as a matter of first impression, the facts are unusual and the turn of events is quite extraordinary. As far as knowledge is concerned, Mr Wong’s case is that Dr Wu knew that Mr Wong was the husband and he was the father of the baby and that he was very concerned for his wife. No other knowledge on the part of Dr Wu is pleaded.
5. When one puts oneself in Dr Wu’s position with that limited knowledge, it is difficult to envisage how the doctor could have possibly foreseen that because of his negligently leaving behind a gauze inside the wife and failing to realise his mistake in subsequent consultations, the husband of his patient would suffer from psychiatric injury. The risk of such harm is simply too far-fetched.
6. One factual emphasis in Mr Wong’s case is that he subsequently blamed himself for not persuading his wife to give birth at a public hospital or in Australia and he had “intense self-blame and feelings of guilt”. Again, applying common sense, I find it difficult to come to a view that this is something which an obstetrician, in Dr Wu’s position, would have foreseen at all at the time of the childbirth and shortly afterwards.
7. Secondly, as a matter of analysis, if we go through the chain of events set in motion by the doctor’s negligent act and look at each of the developments which ultimately resulted in Mr Wong’s psychiatric illness, the answer to the question of reasonable foreseeability is equally an emphatic “no”.
8. First, Dr Wu’s negligent act is not a direct cause to the ultimate harm done to Mr Wong. While it is not necessary for a negligent act to be the direct cause, what we have here is a very indirect chain of causation. The resulting harm is several steps or levels “removed” from the original negligent act – the chronological sequence being Dr Wu’s negligence; the wife suffering from psychiatric disorders; the wife becoming completely withdrawn from Mr Wong, both emotionally and sexually; the divorce; and, finally, Mr Wong suffering from psychiatric disorders. So, at least four steps “removed”.
9. Secondly, some of the links in the chain of causation is not altogether straightforward. Nor do they come across as a natural development of events.
10. I have in mind, in particular, the link connecting the wife’s psychiatric illness to her complete isolation from the husband. In any given situation, people behave or react differently as each person is different, by personality, experiences, circumstances and otherwise. It is not possible to predict with any certainty the outcome flowing from a certain event or incident, as the possibilities are arguably infinite.
11. Many consequences may possibly flow from the wife suffering from depression and sexual disorders. The relationship between Mr Wong and his wife may be impacted in many different ways due to the wife’s illness. However, one cannot help but feel that the complete cutting off of the bond between the couple is not one which would readily come to one’s mind. Perhaps that is because that involves too drastic a change in the wife, which could not be easily anticipated.
12. The link between the divorce and Mr Wong’s own mental illness as a result is also problematic from a foreseeability point of view. While it is not impossible to predict such an outcome, I would think that it is similarly not something which can be readily expected.
13. Thirdly, looking at the chain of causative facts cumulatively, it seems far-fetched to suggest that an obstetrician in Dr Wu’s position, whose only knowledge at the time of the childbirth was (in essence) that Mr Wong cared for the wife, would or could reasonably be expected to foresee the chain of events, leading ultimately to the husband’s mental disorder.
14. Thirdly, I need to remind myself that in addressing the issue of reasonable foreseeability, the ultimate question which I am effectively seeking to answer is whether there *ought* to be liability for negligence and this involves value judgments. (Although, as noted above, *Caparo* and *White v Jones* both seem to contemplate that value judgments are relevant only (or, more relevant) to the issues of proximity and fairness, the approach taken in *Luen Hing Fat* is that they are relevant to all three requirements.) On this point, I take the view that there ought not to be liability in respect of the pleaded injury. I would make a few observations.
15. One, given my view that the resulting injury was not reasonably foreseeable, as a matter of inherent logic and common sense, it will hardly be fair, just or reasonable to impose a duty on him to avoid inflicting such injury, which he could not reasonably have foreseen at the time the negligent act was committed.
16. Two, there is no policy consideration in favour of imposing liability on the doctor in this situation. Ms Wong has pointed to none in her submissions.
17. Three, it must be stressed that the law of negligence does not impose indefinite liability on a defendant, even though he in fact acted carelessly and his careless act in fact caused harm to the plaintiff. There are limits on his liability and the court’s task is effectively to identify those limits in each case. Some of those liabilities are off limits because they are unpredictable or far-fetched, or it is felt that there should be some proportionality between the defendant’s careless act and the loss suffered as a result. Once those limits are identified, it would be wrong and unfair to subject the defendant to any liability which fall outside of those limits.
18. The following passages from *Clerk & Lindsell* contain a general but helpful discussion on this point in the context of remoteness. I would say that the observations and the reasoning there would similarly apply in the present context of duty of care.

“…… The function of a test of remoteness is to set an outer limit to the damage for which the defendant will be held responsible. The possible consequences of any human conduct are potentially endless. *The defendant’s wrongdoing may trigger a series of events stretching well beyond one’s normal expectations of possible consequences. The law does not, however, impose indefinite liability. A line must be drawn to confine the responsibility of the defendant to those consequences of his wrongdoing which it is proper for him to shoulder.* Thus, even when it is quite clear that the defendant’s wrong *caused* the damage, it may be said that the damage was too remote if it is not of the same type as would normally be anticipated in similar circumstances, *or if it occurred in an unusual way*. Remoteness of damage places on the defendant’s responsibility, *and in the context of the tort of negligence there is a significant overlap between the concepts of remoteness of damage and duty of care, which is also concerned with setting out the boundaries of liability for careless conduct*.” (at paragraph 2-136) (emphasis added)

“…… Should the defendant be held responsible where objectively he has acted carelessly, but the resulting damage is more extensive, or of a different type, or occurred in a different manner from that which could normally be anticipated? In a system of fault liability, holding a person liable for *the unpredictable or freakish consequences of his negligence* may seem unfair because of *a sense of disproportion* between the fault and the damage.” (at paragraph 2-137) (emphasis added)

1. Bearing in mind the function of the law of negligence, I am of the clear view that in the present case, Mr Wong’s injury could not reasonably be predicted, was in any event too far-fetched, took place in an unusual or extraordinary manner, and it would be disproportionate to impose liability on Dr Wu, even if in fact he had acted carelessly and such carelessness had led ultimately to the injury. In short, Dr Wu ought not to be held liable for Mr Wong’s injury.
2. In conclusion, I hold that Mr Wong fails at the first hurdle of establishing a duty of care owed to him by Dr Wu. I have come to this view not only as a matter of first impression, but I have also sought to conduct an analysis of his pleaded case in detail and consider the broader issue of whether there ought to be liability.
3. As remarked above, I would note at this juncture that given the conclusion, it is not necessary to address whether Mr Wong’s case would also fail the remoteness element. If it were necessary, I would be inclined to hold that it would, for the same reasons set out in the above discussion and on the premise that there is clearly a huge overlap between the elements of duty of care and remoteness in cases like the present one.
4. It remains for me to address the authorities relied on by Ms Wong. They are clearly relevant to the issue of duty of care and I have taken them into consideration in my analysis.
5. Ms Wong is no doubt correct to rely on the two medical negligence cases in support of the general proposition that a non-patient, being the sexual partner of a patient who was negligently treated, could be owed a duty of care by the treating doctor in respect of the injury personally suffered by the non-patient. But that is as far as those authorities can take her and the usefulness of the cases stop there.
6. This is because the facts are vastly different from the present case. The most material difference lies in the fact that, unlike Mr Wong, the claimants each had a clear-cut case of reasonable foreseeability.
7. In *McFarlane*, it was recognised that the very purpose of a vasectomy operation was to prevent the patient’s sexual partner from getting pregnant. Lord Slynn said (at 74B-D) that it was “plainly foreseeable” that if the operation did not succeed, the wife might become pregnant.
8. In *BT v Oei*, BT pleaded that she was within the class of persons who were at the risk of foreseeable injury if the general practitioner failed to advise AT to have an HIV test. At trial, the general practitioner did not seek to contend otherwise: paragraph 62.
9. These decisions are to be contrasted with, and are plainly distinguishable from, the present case as far as the issue of reasonable foreseeability is concerned.
10. Lastly, in *W v Essex*, on which Ms Wong places strong reliance, again, the foster parents had no problem with establishing reasonable foreseeability of their psychiatric illness, as the issue was conceded at first instance (see 597D-E).

*Should the claim be struck out now?*

1. Lastly, I must now turn to deal with the issue of whether it is appropriate to strike out the claim now. This issue justifiably took on significance towards the end of the hearing. Is it proper to make the decision on whether a duty of care existed in this striking out application? Or ought it to be left to the trial?
2. Ms Wong puts forward a number of arguments in favour of the latter approach.
3. First, in her written submissions, she makes the general point that it is inappropriate to strike out a claim in a case in an area of law which is in the process of developing, citing *Hong Kong Civil Procedure 2018* at 18/19/4 and *Tadjudin Sunny v Bank of America NA* [2010] 3 HKLRD 417 at paragraphs 7 and 56.
4. Second, also in her written submissions, she points out that an order to strike out should not be made where the legal viability of a cause of action is sensitive to the facts: *Yue Xiu Finance Co Ltd v Dermot Agnew* [1996] 1 HKLR 137 at 141D-E.
5. Third, in her oral submissions, she contends that the court will have to make a judgment call when considering the issue of duty of care and that such judgment call can only be appropriately made at trial.
6. Fourth, also in her oral submissions, she stresses that the purpose of a striking out application and the court’s task is merely to weed out bad and unarguable cases. Given the clear authorities of *McFarlane* and *BT v Oei* and the resembling features in Mr Wong’s case (also being a claim by a sexual and marital partner of a patient who had been negligently treated by a defendant doctor), it is at the very least arguable that Mr Wong had a potential claim in negligence and he ought to be given the opportunity to take his case to trial.
7. Notwithstanding these extensive submissions made on behalf of Mr Wong, I am of the clear view that, given the nature of the pleaded facts and the current state of the law of negligence, the claim should be struck out now. I have borne in mind that the overarching question here (as in any other striking out application) is whether it is plain and obvious that the claim is unarguable and bound to fail.
8. I shall deal with the first, third and fourth submissions together.
9. In a developing area of law, it is generally considered that an interlocutory application, whether a striking out or an Order 14A application, would be an inappropriate way to dispose of the matter. The reasons are perhaps too obvious to have to be stated. One reason is that the court is generally reluctant to make new law on assumed or hypothetical facts. In *W v Essex*, Lord Slynn commented as follows:-

“Although the power to strike out a claim which really has no chance of succeeding in law is a very valuable one to protect defendants and to prevent the court’s time being used (to the detriment of other cases waiting to be heard) in the investigation of the allegations, it has to be exercised cautiously as has so often been said. In *X* *(Minors) v Bedfordshire County Council* [1995] 2 AC 633 where the question was whether a duty of care arose in child abuse cases and in special educational needs cases Lord Browne-Wilkinson said, at pp 740-741: “Where the law is not settled but is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts.” (at 598A-C)

1. If the matter is looked at from this perspective, the area of law with which the present action is concerned cannot properly be described as “in a state of development”.
2. It is a medical negligence claim. The principles on duty of care are well-settled. The three-pronged test confirmed by, and the approach adopted in, *Luen Hing Fat* should apply.
3. The court should follow the incremental approach here – see paragraph 64 above.
4. Importantly, at the hearing, Ms Wong agrees that the present claim is *not* a novel situation contemplated in the incremental approach. It is indeed her position that the nature of Mr Wong’s claim is similar to the categories of cases, to which *McFarlane* and *BT v Oei* belong.
5. As such, we are not even concerned with any possible extension of duty of care to a novel situation. This case is all about applying well-known principles to a traditional category of medical negligence cases. We are in quite familiar territory.
6. There is also no reason why we cannot properly make a judgment call now, but have to wait until after trial.
7. The striking feature of Mr Wong’s claim is its unusual facts and the extraordinary way in which harm was ultimately inflicted on him. The material legal issues revolve round the requirement of reasonable foreseeability (and possibly the issue of remoteness).
8. It is not a case where policy considerations are engaged in any significant manner.
9. Therefore, the present case stands apart from those other cases where public policy plays or is likely to play an important or even a critical part in the deliberation over whether it is fair, just and reasonable to impose a duty of care.
10. Examples would include those cases in England where a local government authority was complained to have acted carelessly in failing to identify the special educational needs of a child under its care. In those cases, it is often recognised that the issue of whether it is just and reasonable to impose a duty of care is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the facts as proved at trial. See, eg, *W v Essex* citing (at 598D-E) the House of Lords’ decision in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 574D-E.
11. For the above reasons, I take the view that a judge in a striking out application is in as good a position as a trial judge to determine the ultimate legal issue in the present case, namely whether there ought to be liability imposed on Dr Wu for the harm done to Mr Wong. This case is really about the application of the well-known principles of negligence to the peculiar facts here. And, any value judgment which may be required to be made in resolving the claim can and should be made now.
12. I also consider Ms Wong’s argument that given the similarity of the present claim to some decided cases, it can be concluded to be at least arguable is too crude and sweeping an approach to take. The court’s task should be to examine closely and critically the pleaded facts and decide whether there is an arguable case that the elements or requirements of negligence can or may be satisfied. I have sought to go through this exercise above and come to a negative conclusion. This means that the claim is bound to fail.
13. I now turn to Ms Wong’s second submission.
14. She submits that the court should allow the claim to proceed to trial because the surrounding facts should be investigated before a ruling on liability can properly be made.
15. At the hearing, she was asked to spell out, apart from the pleaded facts, what evidence would likely emerge at trial which would be relevant to, or have an important bearing on, the question of reasonable foreseeability as formulated in paragraph 68 above. That is a material question to ask because what Dr Wu should have reasonably foreseen would be dependent on the knowledge he possessed or ought to have possessed around the time he carelessly performed the episiotomy. But his knowledge has already been set out in the pleadings.
16. Ms Wong was not really able to pinpoint any potential evidence save to stress that the factual matrix of the case should be considered (and it is always considered) at trial when determining the issue of duty of care.
17. On this issue as to whether the legal viability of a claim is sensitive to facts and therefore ought not to be conclusively determined at an interlocutory stage, there are two factors at play.
18. Sir Thomas Bingham MR discussed the point in *E (a minor) v Dorset County Council* [1995] 2 AC 633 at 693E-694B. (The case later went on to appeal to the House of Lords.) The discussion was made in the context of negligence liability on the part of local education authorities. But it is capable of being applied more generally.
19. On the one hand, it may be undesirable and potentially unfair to a plaintiff if his case is finally ruled upon before he is able, with the benefit of discovery, to refine his factual allegations. And that is more or less the point made by Ms Wong.
20. On the other hand, a striking out application, if raised, is “fought on ground of a plaintiff’s choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases.”
21. If after argument the court can be persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts, the claim is bound to fail for want of a cause of action, there is no reason why the parties should be required to prolong the proceedings before that decision is reached.
22. In the present case, the resolution of the issue of reasonable foreseeability is obviously dependent on, amongst other things, the factual issue of the knowledge of Dr Wu at the relevant time (whether actual or constructive). Naturally, this would in turn depend on what was said or discussed amongst Dr Wu, Mr Wong and the wife during the ante-natal check-ups, in the course of delivery and in subsequent consultations.
23. Accordingly, on the one hand, it may be said that the legal issue is sensitive to these facts. On the other hand, however, it is notable that nothing is pleaded in this regard save for the allegation that Dr Wu knew of the couple’s relationship and that Mr Wong was concerned for his wife. Bearing in mind that, as pleaded, Mr Wong was present at all these sessions and that the pregnancy has been described as an “uneventful” one, I think I can safely take the view that that is the best factual case which Mr Wong is able to put forward. In the circumstances, there is really not much prospect for his case to be improved or refined after discovery or the exchange of witness statements.
24. It is therefore one of those cases where within the reasonable bounds of the pleadings, no matter what actual facts emerge at the trial, I am in a position at this interlocutory stage to make the ruling as I did above that the claim is bound to fail.

*Secondary victim case?*

1. Lastly, I should complete the analysis by stating that I do not accept Mr Kan’s primary submission that this is a “secondary victim” case. It is up to Mr Wong, as plaintiff, to plead his case in the way he wishes. In his pleading, he has clearly formulated his loss as a primary victim of Dr Wu’s negligence. Therefore, it would be futile for Mr Kan to insist that the claim is bound to fail because it fails to satisfy the “control mechanisms” imposed by *Alcock*. This is because the “control mechanisms” do not apply in the first place. In any event, the *Alcock* requirements are *additional* requirements that are imposed on secondary victims on policy grounds to prevent a flood of claims: *Clerk & Lindsell* at paragraph 8-69 and footnote 329. The fundamental requirement of reasonable foreseeability of psychiatric illness remains to have to be satisfied. I have held that it is plain and obvious that it has not.

*CONCLUSION*

1. If all the facts can be proved, Mr Wong may rightly feel aggrieved by the misfortune which had happened to his ex-wife and to himself and which had been brought about by Dr Wu’s negligence in performing a straightforward surgical procedure. That said, the fact that all these had happened (if proved) does not necessarily mean that someone must be held responsible for Mr Wong’s loss. The law of negligence is often about defining the boundaries of the liability of a careless defendant. In this case, it is plain and obvious that no duty of care can be owed by Dr Wu in respect of the harm caused to Mr Wong in the form of psychiatric illness. The harm falls outside the boundaries of actionable loss. His claim is bound to fail.
2. For the above reasons, I order that the amended statement of claim be struck out on the ground that it discloses no reasonable cause of action and that the action be dismissed.
3. I make an order *nisi* that Mr Wong do pay Dr Wu’s costs of this application, including any reserved costs, and of this action, with certificate for counsel, to be taxed if not agreed, and that Mr Wong’s own costs be taxed in accordance with the Legal Aid Regulations.

( Winnie Tsui )

District Judge

Ms Abigail Wong, instructed by Fongs, assigned by the Director of Legal Aid, for the plaintiff

Mr David Kan, of Howse Williams Bowers, for the defendant