DCPI 2530/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2530 OF 2009

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BETWEEN

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| HO LAI SAN TERESA | Plaintiff |
| And |  |
| OREA DENTAL CENTRE LIMITED | 1st Defendant |
| WONG KA LI | 2nd Defendant |
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Coram : Before Master K. Lo in Chambers (Open to public)

Date of Hearing : 9 March 2010

Date of Handing Down Decision : 4 June 2010

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D E C I S I O N

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1. This is a medical negligence claim where both issues on liability and quantum are in dispute.
2. Parties agree that a joint medical report on both liability and quantum be prepared by their respective maxillofacial experts.
3. Plaintiff insisted on using Professor Cheung Lim Kwong (“Professor Cheung”) as their expert. Professor Cheung had treated the Plaintiff previously after the alleged medical negligence incident. Defendant objected on the use by Plaintiff of such an expert on the ground that Professor Cheung could not be an independent expert in this case.
4. It is not disputed that the overriding duty of an expert is to assist the court on matters relevant to his expertise and that as Mr. Justice Lam in case of *Chinachem Charitable Foundation Ltd. and Chan Chun Chuen and others* HCAP 8/2007 put it, “he has an overriding duty to the court to act independently without any fear of compromising his client’s position and/or regard to the exigencies of litigation”.
5. It is said that the Hong Kong Civil Procedure O38/37B/1 states that the code of conduct for expert witnesses (Appendix D to Practice Direction 18.1) has been introduced as part of the Civil Justice Reform as extra measure aimed at countering the perceived lack of independence and impartiality of expert witnesses.
6. It is said further that the strict adherence by the expert to the duty of independence is important for the proper administration of justice.
7. Mr. Justice Lam further pointed out that sometimes the line between professional divergence in opinion and biased partisan debate may not be easy to draw. But the court is vigilant in ensuring that the intergrity of the legal process could not be tainted by evidence of any expert who put a party’s interest above his professional duty to the court.
8. This Court has also been referred to the case of *Jung Science Information Technology Co. Ltd. and ZTE Corporation* HCCT 14/2008 where Deputy High Court Judge Lisa Wong S.C. in the dealing with an application for an order that the Presiding Arbitrator be replaced as there are justifiable doubts as to his impartiality or independence and that he has misconducted himself in the arbitration proceedings applied the test of whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Presiding Arbitrator was biased. By analogy, in the appointment of an expert, the same test should be applied.
9. Professor Cheung was one of the treating doctors of the Plaintiff after the accident.
10. It is conceded by Counsel for the Plaintiff that if leave is granted for Professor Cheung to be an expert in the case, he would both be a witness as to fact and an expert witness.
11. Without any disrespect to Professor Cheung, it matters not whether he would in fact be biased towards his client, the fact remains that for an objective fair minded and informed observer, he would consider there would be real possibility of biased and that the evidence of Professor Cheung would not be seen to be independent and his overriding duty to the court would possibly be blemished.
12. Further, in Hong Kong there are no shortage of readily available and competent oral and maxillofacial surgeon who can assist the court in cases like the present one.
13. Counsel for the Plaintiff submitted that the time has not yet come when Professor Cheung was alleged to be negligent in treating the Plaintiff and as such, there is no conflict of interest between Professor Cheung to the Plaintiff and to the Court. This I cannot agree.
14. Why should the Court accept Professor Cheung as an expert, putting the independence of the expert at risk, possibly also to have to have another joint report prepared if such situation should arise?
15. An expert is there to assist the Court, not to create difficulty for the Court. It is therefore totally undesirable and unacceptable that Professor Cheung be appointed as an expert in this case.
16. Further, I do not think that the case of *Chan Pui Ki*, an infant suing by her mother and next friend Chu Kam Hing HCA 2006/1992 cited to me is of much assistance to the Plaintiff’s case here as that case only concerns assessment of damages. The issue on appointment of an expert is not an issue in that case.
17. I do not accept Professor Cheung be appointed as an expert for the Plaintiff in this case. This Court could not see in practice how a natural person when testifying in Court as an expert for the Court can maintain/can be seen his neutrality when he is at the same time also a factual witness for the Plaintiff.
18. I also make an order nisi that costs of and incidental to this directions application be to the Defendant.
19. After considering the statement of costs of the Defendant, I make summary assessment of the costs at $7,101.

(K. Lo)

Master of the District Court

Mr. Lo Po Wing instructed by Messrs. L.C.P. for the Plaintiff.

Mr. Lee Kung Sang of Messrs. Johnnie Yam, Jacky Lee & Co. for the Defendants.