## DCPI 2532/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2532 OF 2014

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##### BETWEEN

NG HOK HUNG（伍學紅） Plaintiff

### and

MUI LIK MAN WILFRED（梅力文） 1st Defendant

HOSPITAL AUTHORITY（醫院管理局） 2nd Defendant

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Before: Deputy District Judge Samson Hung in Chambers (Open to Public)

Date of Hearing: 24 March 2015

Date of Decision: 13 June 2016

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DECISION

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1. At the beginning of this hearing, pursuant to the joint application by plaintiff and the 1st defendant, I granted leave for the plaintiff to withdraw his entire claim against the 1st defendant, thus leaving only the 2nd defendant’s summons that needed to be dealt with at the present hearing.

*The 2nd defendant’s summons*

1. By its summons (“the Summons”) dated 30 December 2014, the 2nd defendant applied for, inter alia, an order that the Statement of Claim in respect of the claim against the 2nd defendant be struck out in whole or in part pursuant to Order 18, r 19 of Rules of the District Court, Cap 336H or under the inherent jurisdiction of the court.

*Legal principles on striking out*

3. The legal principles governing the striking out of a party’s pleadings in civil actions are well established and briefly set out below.

4. The court may at any stage of the proceedings order to be struck out any pleadings on the basis, amongst others, that it discloses no reasonable cause of action, or it is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court.

5. A proceeding is frivolous when it is incapable of reasoned argument, without foundation or cannot possibly succeed. A proceeding is vexatious when it is oppressive or lacks bona fides. The expression “frivolous or vexatious” includes proceedings which are an abuse of the process.

6. An abuse of the process of the court connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery, and will in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

7. There should be no trial on affidavit in a striking out application. Disputed facts are to be taken in favour of the party whose pleading is under attack.

8. The power to strike out should only be exercised in plain and obvious cases. A claim must be so obviously unsustainable, the pleading unarguably bad, and it must be impossible, not just improbable, for the claim to succeed before the court would strike it out. That a case may be weak and unlikely to succeed is no ground for striking it out.

*The plaintiff’s case as pleaded in the Statement of Claim*

9. According to the plaintiff’s pleaded case, on 28 May 2010, he was first seen by the 1st defendant, a doctor in private practice, regarding a swelling in the right groin. Inguinal hernia was diagnosed and the plaintiff was admitted to Evangel Hospital on 2 June 2010 for treating the right inguinal hernia by the 1st defendant (“the 1st Operation”).

10. Despite the 1st Operation, the plaintiff developed recurrent right inguinal hernia. On 4 March 2011, the plaintiff was further admitted to the Accident & Emergency Department of Tseung Kwan O Hospital (“TKOH”) which was under the management of the 2nd defendant.

11. Allegedly, the doctors in TKOH initially told the plaintiff that no emergency operation was necessary and he could wait for the laparoscopic surgery scheduled in August 2011.

12. However, on 6 March 2011, Dr Lai Ying Yeung (“Dr Lai”) of TKOH informed the plaintiff that an emergency operation must be performed. Accordingly, an emergency operation which was an open surgery was performed on 7 March 2011 to treat the recurrent hernia (“the 2nd Operation”).

13. It was alleged by the plaintiff that prior to signing the consent form for the 2nd Operation, the doctors in TKOH did not inform him of (a) the risks involved in the operation; and (b) the risks and side effects of general anaesthesia and local anaesthesia. The plaintiff further alleged that while he was given a signing form by the nurse accompanying him to the operation room he was not explained of its content.

14. Despite that the plaintiff chose to use local anaesthesia instead of general anaesthesia and did not give consent to use general anaesthesia, the anesthetist rejected his choice and performed general anesthesia for him.

15. Further, the plaintiff expressly stated that he did not consent to an operation which might involve orchidectomy and a doctor from TKOH had verbally agreed not to perform orchidectomy in the operation. However, during the 2nd Operation, right orchidectomy was carried out in addition to hernia repair.

16. Finally, the plaintiff complained about the doctors of TKOH failing to advise him that there were metal clips remaining in his abdomen prior to the 2nd Operation and/or failing to remove all the ineffective metal clips from the plaintiff’s wound during the 2nd Operation.

17. As a result, the plaintiff suffered from serious injuries to his right groin and his right testicle was removed.

18. Consequently, the plaintiff instituted the present proceedings and claimed against, inter alia, the 2nd defendant for medical negligence.

*The 2nd defendant’s case for striking out*

19. The 2nd defendant sought to strike out the plaintiff’s claim against it on the ground that it discloses no reasonable cause of action, is frivolous or vexatious and/or is otherwise an abuse of the process of the court.

20. Mr Sakhrani, appearing for the 2nd defendant, submitted that the plaintiff’s pleaded case was confused and unsupported by his own affirmation and the medical report (“the Medical Report”) of Dr Kwok Tin Fok (“Dr Kwok”), a specialist in urology engaged by the plaintiff. In particular, Mr Sakhrani drew my attention in his skeleton argument and submission to the following matters,

(a) Since it was the opinion of Dr Kwok that local anaesthesia was not medically appropriate, the allegation that the plaintiff was offered a choice of local anaesthesia which he elected must lack bona fides.

(b) As for the need of orchidectomy, Dr Kwok opined in the Medical Report that whether orchidectomy was to be done had to be judged by the surgeon dependent on the presence of severe fibrosis and adhesions. As such, the plaintiff’s allegation that the doctors agreed not to perform orchidectomy was not capable of reasoned belief and could not properly succeed.

(c) Even the plaintiff confirmed in his affirmation that Dr Lai has mentioned to him that the cord might be adherent to the mesh and that an orchidectomy might have to be done. It was also admitted by the plaintiff that the same risk has been reiterated to him by the 2 surgeons who respectively performed or assisted in performing the 2nd operation. It was therefore inherently improbable and untrue in the circumstances for the doctors to have committed to perform the 2nd operation under local anaesthesia and without orchidectomy.

(d) The plaintiff complained, as one of the particulars of negligence against the 2nd defendant, about performing the open surgery when there was no urgent or necessary cause to perform an emergency surgery. However, it was opined by Dr Kwok that it was not incorrect to offer an earlier or emergency surgery due to persistent risk.

(e) The plaintiff alleged that right orchidectomy was performed despite his explicit refusal. However, this was contradicted by the consent form that was signed by the plaintiff with express reference to the chance of orchidectomy.

(f) The medical notes of TKOH showed that the plaintiff had been explained by the doctors regarding the possibility of orchidectomy and consent by the plaintiff was recorded. In this regard, Dr Kwok stated in the Medical Report that the medical information required for informed consent had been communicated.

(g) There was no record that the plaintiff has refused orchidectomy. According to the medical notes, the risk of orchidectomy has been explained to the plaintiff and nothing about any objection raised by the plaintiff was recorded.

(h) The plaintiff’s complaints about metal clips were inconsistent with the opinion of Dr Kwok who stated that it was not very necessary or essential to inform the patient about the presence or the numbers of metal clips inside his body. More importantly, Dr Kwok opined that it might not be to the patient’s benefit to remove those metal clips since it might create lots of dissection areas.

21. As for points (a) and (b) above, even though the plaintiff’s allegations are to the effect that the doctors have acted contrary to the established medical practice, I do not think one can realistically suggest at this stage that such claims must necessarily lack boa fides or otherwise be incapable of reasoned argument.

22. Point (c) is similar to points (a) and (b), and relates to the plaintiff’s complaint that general anaesthesia was used and orchidectomy was performed without his consent or informed consent. It is sufficient for the present purpose to point out that any failure to advise or to advise adequately does not necessarily due to ignorance by the doctors of the appropriate medical practice or the risks involved. Apart from ignorance, there can be many other reasons for inadequate or ineffective communications, if any, between the doctor and the patient. Accordingly, I do not consider the plaintiff’s allegation to be inherently improbable or untrue as suggested by the 2nd defendant.

23. As for point (d), the plaintiff by the said particulars of negligence essentially complained about performing an open surgery as opposed to laparoscopic surgery without good cause. While Dr Kwok opined that it was not incorrect to offer an earlier or emergency surgery due to persistent risk, he went on to qualify his opinion in the Medical Report by adding that since laparoscopic approach demanded a trained surgeon, an open approach was a reasonable option if a laparoscopic surgeon was not available.

24. There was no evidence before me as to the availability of laparoscopic surgeons at the material time. It however seems to me unlikely that there should be a lack of qualified laparoscopic surgeons in a public hospital like TKOH. Certainly, the question as to the availability of laparoscopic surgeons should be properly left to be decided at trial when all the relevant evidence should become available after discovery. Further, even if no qualified laparoscopic surgeons was available at the time, the doctors in TKOH might still have to refer the plaintiff to other hospitals with qualified laparoscopic surgeons if it was indeed the choice of the plaintiff to go for a laparoscopic surgery. This again should properly be a matter for the trial judge to decide. Accordingly, I do not find at this stage that the plaintiff’s allegation was without any medical basis.

25. As for points (e) to (g), while the consent form and the medical notes can be aptly regarded as the contemporaneous documents which normally attract great weight when it comes to trial. However, they are not conclusive evidence. It is still open to the plaintiff to challenge at trial that the medical notes were not accurate records and that the consent form was signed by him without any explanation as to its content.

26. As quoted by the 2nd defendant, Dr Kwok opined in the Medical Report that the medical information required for informed consent had been communicated. However, Dr Kwok also stated that since he was not present at the time when the conversations took place he did not know what precisely was said between the plaintiff and the doctors (see paragraphs 17 and 19 of the Medical Report). Therefore, it is obvious what Dr Kwok actually meant by his quoted words was that based on the medical records, the information given to the plaintiff was sufficient, but since he was not there he was not certain if those records accurately reflected what has been said. Accordingly, I do not think that the plaintiff’s case was necessarily contradicted by Dr Kwok’s quoted words.

27. As for point (h), in light of Dr Kwok’s opinion, I agree there was nothing to suggest that the failure to advise the presence of metal clips inside the plaintiff’s body and the failure to remove such clips were unacceptable medical practice or otherwise inappropriate in any way. Indeed, Dr Kwok opined that it was an usual practice not to remove the metal clips away since to do otherwise might not be of benefits to the patient because of possible complications of the procedures involved. Accordingly, I consider that this part of the plaintiff’s claim should be struck out as it was without foundation or could not possibly succeed.

*Other application by the 2nd defendant*

28. By the Summons, the 2nd defendant also asked for dismissal of the plaintiff’s action against it on the ground that the plaintiff has failed to comply with the Order (“the Unless Order”) of Master Leong of High Court dated 24 June 2014 whereby the plaintiff was required to file and serve an export report on liability and causation in support of the allegations of medical negligence against the 2nd defendant on or before 30 August 2014.

29. Notwithstanding that on 24 August 2014 the plaintiff filed and served the Medical Report by Dr Kwok, it was argued by the 2nd defendant that the plaintiff was in breach of the Unless Order since the Medical Report did not support the plaintiff’s claim against the 2nd defendant.

30. In my view, for the purpose of complying with the Unless Order, it is sufficient that the Medical Report tended to support the plaintiff’s case on liability and causation in a material respect. It is thus irrelevant that it supported not the whole but only part of the plaintiff’s case.

31. In the Medical Report, Dr Kwok gave his expert opinion on, amongst other things, various aspects of the care and treatments given to the plaintiff in TKOH and the appropriateness of the same along with the established medical practice. I am satisfied that the Medical Report is an expert report on liability and causation tending to support the plaintiff’s case against the 2nd defendant in a material respect. As such, I find that the Unless Order has been duly complied with by the plaintiff.

32. Accordingly, I decline to grant any relief for the 2nd defendant under this application.

*Conclusion*

33. For the reasons given above, I order that,

(a) paragraph 1 of the Summons concerning striking out of the plaintiff’s Statement of Claim be allowed only to the extent that sub-paragraphs (7) and (8) of the particulars of negligence of the 2nd defendant in the Statement of Claim be struck out;

(b) paragraphs 2 and 3 of the Summons concerning dismissal of the plaintiff’s action against the 2nd defendant be dismissed;

(c) there be order in terms of paragraph 4 of the Summons concerning stay of proceedings pending its resolution or until further order.

*Costs*

34. Since in accordance with my decision the plaintiff has substantially defended against the Summons, I make an order nisi that the 2nd defendant pay the plaintiff’s costs of the Summons with certificate for counsel, such costs to be taxed if not agreed. The plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations. The order nisi will become absolute after 14 days in the absence of any application to vary the same.

( Samson Hung )

Deputy District Judge

Mr Neal Clough, instructed by Kenneth Lam, assigned by the Director of Legal Aid, for the plaintiff

Mr Se-to Wai Lun, Warren of Mayer Brown JSM, for the 1st defendant

Mr Ashok Sakhrani, instructed by Kennedys, for the 2nd defendant