# DCPI 2780/2012

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

# PERSONAL INJURIES ACTION No. 2780 OF 2012

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BETWEEN

TSE LAI KWAN Plaintiff

and

SECRETARY FOR JUSTICE

(FOR AND ON BEHALF OF

DEPARTMENT OF HEALTH) Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Before: His Honour Judge Kent Yee in Chambers (open to public)

Date of Hearing: 10 February 2014

Date of Decision: 14 February 2014

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DECISION

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*Introduction*

1. Each of the parties has an application before me. First, the defendant took out a summons dated 22 August 2013 to strike out certain parts of the statement of claim and the Amended Writ both filed herein on 9 August 2013 (“**the Striking Out Summons**”). A week later, the plaintiff by summons dated 29 August 2013 (“**the Disapplication Summons**”) applies for disapplication of section 27 of the Limitation Ordinance (“**LO**”) pursuant to section 30 of the LO.

2. The plaintiff brought this action for damages for personal injuries sustained when she worked for the Department of Health (“**the Department**”) as a general worker at Hospital Authority Building situated at 147B Argyle Street, Kowloon (“**the Building**”). She alleges three separate accidents in which she was injured and they took place on 15, 20 and 22 January 2010 respectively. The present dispute is centred on the last accident (“**the 3rd Accident**”). The defendant now seeks to strike out all those matters relating to the 3rd Accident from the statement of claim and the Amended Writ on the main ground that the 3-year limitation period expired when the plaintiff’s claim relating to the 3rd Accident was introduced by way of amendment to the Writ herein without leave on 9 August 2013.

3. For the purpose of these two applications, I need only set out the following background facts.

4. The plaintiff is presently a 64-year-old lady. From December 2001 to August 2010, the plaintiff was employed by the Department. In the morning of 15 January 2010, she met with an accident (“**the 1st Accident**”) when she was descending from a plastic 2-step round stepstool after cleaning the top of a cabinet above her height inside the Building. As a result, she injured her lower back, left leg and left hip.

5. After taking a rest at home for 2 days over the weekend, on 20 January 2010, the plaintiff returned to her work but was injured in another accident at the Building in the morning (“**the 2nd Accident**”). When she was transporting a bench with a cart for the purpose of waxing the floor with her colleague Ah Ying, she injured her lower back, left hip and left leg again. She felt the injuries sustained in the 1st Accident were aggravated by the 2nd Accident.

6. On 22 January 2010, despite her injuries, which necessitated her need of a limping gait, the plaintiff resumed work in the morning and she was asked to replace an empty distilled water bottle with one filled with 18.9 litres of water by putting the latter onto a water dispenser. After doing the heavy job, the plaintiff again found her existing injuries seriously aggravated. As a result, she was admitted to Queen Elizabeth Hospital (“**QEH**”) for treatment and was discharged on the same day.

7. By a letter dated 29 March 2010 (“**the Enquiry Letter**”), the Department made enquires with the plaintiff in respect of her report of the 1st Accident. In particular the plaintiff was asked why she only reported her injuries to her supervisor on 1 February 2010 and the plaintiff was requested to give the names of her co-workers to whom she had mentioned about the accident.

8. On 16 April 2010, the plaintiff replied to the Department by a letter in her handwriting (“**the Reply Letter**”). Among other matters, the plaintiff explained that on 22 January 2010, after changing a bottle of water, when she wanted to carry another bottle, she could hardly walk and felt acute pain[[1]](#footnote-1). Consequently, Mr Cheng (her supervisor) and other people helped her call an ambulance to send her to QEH. Clearly she referred to the 3rd Accident.

9. In the present action, the plaintiff relies on all the three accidents and claims against the defendant acting on behalf of the Department in negligence, breach of employment contract (both express and implied terms) and breach of statutory duties. In passing, I note that out of these three simple accidents, the plaintiff managed to come up with altogether 61 particulars of such negligence and breaches in the statement of claim. This is a classic example of prolix drafting and the pleading is clearly overburdened as a result.

10. On 24 December 2012, Messrs B. Mak & Co. on behalf of the plaintiff issued a pre-action letter to the defendant (“**the Letter**”). In the Letter, there was no mention about the 3rd Accident at all.

11. On 28 December 2012, the plaintiff issued the Writ herein with an Indorsement of Claim. Again, the plaintiff based her claim on the 1st and 2nd Accidents only and there was no mention about the 3rd Accident in the Indorsement of Claim.

12. On 9 August 2013, the plaintiff filed an Amended Writ pursuant to Order 20 Rule 1 of the Rules of the District Court. On the same day, she filed her 68-page Statement of Claim. The only amendment made to the Indorsement of Claim is the inclusion of the 3rd Accident. In the Statement of Claim, the plaintiff relies on the 3rd Accident too.

*The Applications*

13. There came the Striking Out Summons pursuant to Order 20 rule 4 and Order 18 rule 19 of the Rules of the District Court. The former rule provides:

(1) Within 14 days after the service on a party of a [writ](http://www.hklii.hk/eng/hk/legis/reg/336H/s1.html#writ) amended under [rule 1(1)](http://www.hklii.hk/eng/hk/legis/reg/336H/s1.html) or of a [pleading](http://www.hklii.hk/eng/hk/legis/reg/336H/s41a.html#pleading) amended under [rule 3(1)](http://www.hklii.hk/eng/hk/legis/reg/336H/s3.html), that party may apply to [the Court](http://www.hklii.hk/eng/hk/legis/reg/336H/s72.html#the_court) to disallow the amendment.

(2) Where [the Court](http://www.hklii.hk/eng/hk/legis/reg/336H/s72.html#the_court) hearing an application under this rule is satisfied that if an application for leave to make the amendment in question had been made under [rule 5](http://www.hklii.hk/eng/hk/legis/reg/336H/s5.html) at the date when the amendment was made under [rule 1(1)](http://www.hklii.hk/eng/hk/legis/reg/336H/s1.html) or [3](http://www.hklii.hk/eng/hk/legis/reg/336H/s3.html)(1) leave to make the amendment or part of the amendment would have been refused, it shall [order](http://www.hklii.hk/eng/hk/legis/reg/336H/s90a.html#order) the amendment or that part to be struck out.

14. Order 12 rule 20(5) provides,

(1) Subject to [Order](http://www.hklii.hk/eng/hk/legis/reg/336H/s90a.html#order) 15, rules 6, 7 and 8 and this rule, [the Court](http://www.hklii.hk/eng/hk/legis/reg/336H/s72.html#the_court) may at any stage of the proceedings allow the [plaintiff](http://www.hklii.hk/eng/hk/legis/reg/336H/s44a.html#plaintiff) to amend his [writ](http://www.hklii.hk/eng/hk/legis/reg/336H/s1.html#writ), or any party to amend his [pleadings](http://www.hklii.hk/eng/hk/legis/reg/336H/s41a.html#pleading), on such terms as to [costs](http://www.hklii.hk/eng/hk/legis/reg/336H/s62.html#costs) or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to [the Court](http://www.hklii.hk/eng/hk/legis/reg/336H/s72.html#the_court) for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any [relevant](http://www.hklii.hk/eng/hk/legis/reg/336H/s24.html#relevant) period of limitation current at the date of issue of the [writ](http://www.hklii.hk/eng/hk/legis/reg/336H/s1.html#writ) has expired, [the Court](http://www.hklii.hk/eng/hk/legis/reg/336H/s72.html#the_court) may nevertheless grant such leave in the circumstances mentioned in those paragraphs if it thinks it just to do so.

(3) …

(4) …

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been [claimed](http://www.hklii.hk/eng/hk/legis/reg/336H/s22.html#claim) in the action by the party applying for leave to make the amendment.

15. The gravamen of the defendant’s complaint is that while the Writ was amended on 9 August 2013 to include the 3rd Accident taking place on 22 January 2010 without leave, the 3-year limitation period under section 27(4)(a) of the LO had already expired. Further, the 3rd Accident did not arise out of the same facts or substantially the same facts as the 1st Accident and/or the 2nd Accident. Therefore the contention of the defendant is that an application under Order 20 rule 5 would have been refused had it been made and so pursuant to Order 20 rule 4(2), the amendment to the Writ together with those parts relating to the 3rd Accident (collectively “**the Offending Parts**”) should be struck out.

16. On the other hand, the defendant contends that this Court should strike out the Offending Parts on the ground that the new claim was included only after the expiry of the limitation period and it did not arise out of the same facts or substantially the same facts as the 1st Accident and/or the 2nd Accident. Hence, the Offending Parts are in contravention of section 35 of the LO and should not be entitled to the benefit of “relation back” rule thereunder.

17. The plaintiff accepts that the 3-year limitation period is applicable and that it already expired when the 3rd Accident was included in the Amended Writ. Thus, the Disapplication Summons pursuant to section 30 of the LO is necessary so that the Offending Parts could be allowed to stand with the disapplication of the 3-year time limit.

18. On the evidence and in the skeleton submissions filed by the parties, the major argument is whether the claim relating to the 3rd Accident arouse out of the same facts or substantially the same facts as the 1st Accident and/or the 2nd Accident. At the hearing, Mr Mak appearing for the plaintiff, accepts that the 3rd Accident was a separate event with different factual matrix. This concession substantially curtails the scope of the present debate.

19. It follows that the Offensive Parts do not satisfy Order 20 rule 5(5) and hence are liable to be struck out under Order 20 rule 4(2). Further, the “relation back” rule has no application since the Offensive Parts do not satisfy section 35(6) of the LO. Mr Mak accepts that the Offensive Parts could only be saved if this courts exercises its discretion in favour of the plaintiff under section 30 of the LO.

20. I therefore intend to proceed to consider the Disapplication Summons first given the concession of Mr Mak. In my view, if I find it equitable to disapply section 27(4) of the LO and allow the new claim to proceed, it must follow that the Striking out summons should be dismissed since the application thereunder is premised on the 3-year time limit.

21. Ms Wong, counsel for the defendant, however, has a different idea. She submits that this court should consider section 35 of the LO and Order 20 rule 5 first and the plaintiff’s claim can be allowed to proceed only if it satisfies the requirements there. She submits that the primary contention of the defendant is that if this court concludes that the Offensive Parts do not satisfy section 35 of the LO, they should be struck out and there is no need to consider section 30 of the LO.

22. In this connection, Ms Wong refers to me *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* [2012] 4 HKLRD 263 (CFI), *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* [2013] 1 HKLRD 744 (CA), *Sun Focus Investment Ltd v Tang Shing Bor* [2012] 1 HKLRD 738.

23. As rightly observed by Ms Wong, in the foregoing authorities, the courts were concerned about sections 27 and 35 only and not section 30 of the LO. There was no mention, let alone discussion, about the latter provision at all. However, it only means that no section 30 application was made before the courts. It cannot be taken to mean that section 35 should be considered in priority to section 30.

24. Properly construed, section 35 merely, among other things, provides the “relation back” rule whereby a new claim can be introduced to a pending action despite its apparent violation of the relevant limitation period. Provided that the new claim arose out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, it shall be allowed to be made to a pending action and shall be deemed to be a separate action to have been commenced on the same date as the original action. This is, in my judgment, the combined effect of sections 35(1)(b), (3), (5) and (6)(a) of the LO.

25. Going back to the present case, the Offensive Parts apparently are entitled to the “relation back” rule under section 35(1)(b) but it is subject to the restriction under section 35(3), which provides that the court shall not allow them as the applicable time limit has expired. It is worthy of note that section 30 is an express exception to section 35(3). In other words, if the relevant time limit is disapplied under section 30, the restriction under section 35(3) does not operate at all. I am hence of the view that whether I should exercise my discretion to disapply the time limit under section 30 is indeed the key issue in these applications.

*Disapplication Summons*

26. Enough said about the conceptual difficulties and technicalities, I turn to assess the merits of the Disapplication Summons. Section 30 of the LO provides this court with a wide discretion to disapply the time limits in the LO where it would be equitable to do so in all the circumstances. Section 30(3) provides that the court shall have regard to all the circumstances of the case and there six specific matters to which this court should have regard were set out.

27. I further find guidance from the decision of Master Marlene Ng in *Mok Lai Fong v Ng Po Sui* [2011] 3 HKLRD 67 where a review of the authorities relating to the exercise of the discretion under section 30 of the LO can be found. As there is no dispute about the general principles in this regard, I shall not set them out here. Suffice it to say, I am inclined to take a more flexible, generous or liberal approach as adopted in the English authorities reviewed by Master Marlene Ng[[2]](#footnote-2) and take into account all the circumstances of the case to act in respect of the equities between the parties bearing in mind the burden is on the plaintiff to justify my discretion be exercised in her favour.

28. The post-expiry delay here is 6.5 months and it could not be said to be substantial. The plaintiff has primary education only and in her affirmation she explained her ignorance of the necessity of telling all the details of the accidents to her lawyer until she obtained legal advice from her counsel assigned to her by the Legal Aid Department on 6 June 2013. The amendment to the Writ was then made two months later.

29. In her affirmation, the plaintiff gave the details of the 3rd Accident and made specific mention about the involvement of her supervisor, namely, Mr Cheng. In its reply affirmation, the defendant said nothing about Mr Cheng and/or his difficulties in dealing with those allegations relating to the 3rd Accident due to the lapse of time. The burden is on the defendant to show that the evidence to be adduced is likely to be less cogent because of the delay. On this score, the defendant has failed to discharge the burden.

30. In fact, in the Reply Letter, the plaintiff already disclosed the incident on 22 January 2010 albeit not in graphic detail. She also mentioned the involvement of Mr Cheng there. Should then the defendant make enquiries with Mr Cheng upon receipt of the same in April 2010, Mr Cheng should have given the defendant a full account of his summonsing an ambulance for the plaintiff and the circumstances leading thereto on 22 January 2010.

31. I also note that all the medical evidence to be adduced by the plaintiff was obtained after the 3rd Accident. Essentially the plaintiff’s position is that the 3rd Accident aggravated the injuries sustained in the previous accidents in the same month. I cannot see how the defendant is prejudiced in their preparation of medical evidence due to the post-expiry delay. Indeed, the defendant does not allege any such prejudice.

32. Ms Wong makes cogent challenge to the evidence of the plaintiff, pointing out all the suspicious non-mentions of the 3rd Accident by the plaintiff in her previous statements and medical records, here and there. She also highlights to me the narrative of the 3rd Accident in the Reply Letter is slightly different from the account given in her affirmation. She submits that the plaintiff’s claim relating to the 3rd Accident is dubious and this court should not allow it to proceed by disapplying section 27 of the LO.

33. As pointed out in *Mok Lai Fong v Ng Po Sui,* §86*,* the plaintiff’s prospects of success and the evidence necessary to be adduced to establish those prospect are part of the circumstances that the court should take into account in considering the balance of hardship. Also I am mindful that I should not conduct a trial on affidavits on the other hand.

34. The plaintiff has already disclosed the 3rd Accident in the Reply Letter. Moreover, there must be a triggering event on 22 January 2010 necessitating her admission to QEH by an ambulance. Whilst I acknowledge the force in Ms Wong’s submissions on the strength of the plaintiff’s claim, I am not persuaded that it should even not be allowed to be adjudicated at trial to have the credibility issue resolved together with her claim concerning the 1st and 2nd Accidents.

*Conclusion and Orders*

35. Having considered the factors set out in section 30(3) of the LO and all the circumstances of the present case in the round, I am convinced that it is appropriate and equitable to exercise my discretion to disapply the time limit in respect of the 3rd Accident.

36. In the premises, I accede to the plaintiff’s application by the Disapplication Summons and dismiss the defendant’s application by the Striking out Summons. Up till 11 November 2013 (the date of the filing of the plaintiff’s affirmation), costs of the two summonses should be borne by the plaintiff, to be taxed if not agreed. Thereafter, costs of the two summonses should be borne by the defendant, to be taxed if not agreed. The plaintiff’s own costs in respect of the two summonses be taxed in accordance with the Legal Aid Regulations. These are costs orders *nisi* subject to variation upon the parties’ application(s) to be made within 14 days.

37. In light of my foregoing decision, the parties should resume these proceedings in accordance with the directions given by Master J Chow in her order dated 5 September 2013.

38. Lastly, I thank Mr Mak and Ms Wong for their helpful assistance.

(Kent Yee)

District Judge

Mr Bilan Mak, of Messrs B Mak & Co, for the plaintiff

Ms Abigail Wong, instructed by Department of Justice, for the defendant

1. The original text reads: 「22號做完清潔，換完一桶水，想返去拿多桶水就行唔到，總之越做越痛。」 [↑](#footnote-ref-1)
2. Those cases reviewed by Master Ng in *Cheung Yin Heung v Hang Lung Real Estate Agency Ltd* [2010] 3 HKLRD 67, para. 86 and *Pang Kwok Lam v Schneider Electric Asia Pacific Ltd*, unreported, HCPI 90/2010, 5.1.2011, para.108. [↑](#footnote-ref-2)