中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

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Mr Yau Kin-chung
Asst Dir of Adm 3
Chief Secretary for Administration's Office
5/F, East Wing
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28 September 2007

Dear Mr Yau,

Civil Justice (Miscellaneous Amendments) Bill 2007

Pre-action discovery provisions in existing sections 41 and 42 of the High Court Ordinance (Cap. 4) give a right to potential personal injuries ("PI") claimants through pre-action discovery of relevant documents to ascertain whether they have a valid claim. The likelihood of their claims and hence the possibility of early settlement often depend on the outcome of pre-action discovery.

PI litigation largely involves employees' claims in respect of industrial accidents, medical or other types of professional negligence and traffic accidents. Because of the relatively wide scope of discovery ("relevant" documents) available under existing sections 41 and 42 of Cap. 4, parties and non-parties to potential PI claims often readily respond to potential claimants' requests for such discovery without the unnecessary expense of a court order.

With regard to Part 6 of the Bill (Discovery), the Administration confirms that all applications including PI actions for pre-action disclosure will have to satisfy the new and "somewhat stricter" test of "direct relevance" (at p. 5, para. 11 of Administration's Paper No. CJRB6/2007). The Administration further states–

> "Nevertheless, it may be relevant to note that the concept of 'directly relevant' is already set out (although not defined) in the existing Practice Direction 18.1 on the procedures of the PI list. Paragraph 7 of the Practice Direction 18.1 states –
>
> [7. Compliance with ***Order 25 Rule 8***]
>
> "... In considering whether to make any order for ***specific discovery or disclosure***, the court will have regard to ... ... whether the documents and

matters sought to be discovered or disclosed are *strictly and directly relevant* to the issues between the parties." (my emphasis added)

Order 25 rule 8(1) of the Rules of the High Court provides for automatic directions in PI actions where the directions provided in that rule shall take effect automatically when the pleadings in any action which the rule applies are deemed to be closed. Paragraph 7 of the Practice Direction 18.1 refers to specific discovery which, again, is a mechanism where action has already been commenced. The practice and procedure of pre-action discovery are, however, provided in Order 24 rule 7A.

Under the existing law, it seems that different considerations to the scope of disclosure are given at different stages of PI litigation or potential PI litigation.

Questions

(a) The test of "directly relevant", as proposed in the Final Report, should not extend to "background documents" or possible "train of enquiry" documents (ref: para. 486 of the Final Report, at p. 251-252). Does Part 6 of the Bill intend to restrict potential PI claimants' right of access to "training of enquiry" documents without which they do not know whether they have a valid claim?

(b) Given that potential PI claimants' right to pre-action discovery under Part 6 of the Bill will be substantively affected and the fact that such proposal was not included in the Final Report nor the Consultation Paper, has the Administration sought the views of the parties likely to be affected (e.g. patients' rights groups, employees' organisations, the insurance industry, the Director of Legal Aid and the Labour Department, etc)?

I would be pleased if you could let me have your reply in bilingual form on or before 3 October 2007.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

cc. LA
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