

LC Paper No. CB(2)1380/05-06(01)

HCMP 2878/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 2878 OF 2004

IN THE MATTER of YCK, ("the Patient")

and

IN THE MATTER of Section 7, 10A, 10B and 24 of the Mental Health Ordinance Cap. 136, Laws of Hong Kong

Before: Hon Lam J in Chambers (Not open to public)

Date of Hearing: 9 December 2005 and 3 February 2006

Date of Judgment: 9 February 2006

JUDGMENT

1. This is a sad case where a victim of a traffic accident who had become mentally incapacitated as a result thereof found a significant

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portion of his compensation money ended up in the pocket of somebody else. The matter came about as follows.

2. YCK was born in 1982. He was a delivery worker when his life was changed drastically on 6 March 2001. On that date, he had an accident whilst he was traveling as a passenger in a vehicle. He had a coma and sustained serious head injuries. He suffered from global cognitive dysfunction. Apart from cognitive functions impairment and post-traumatic epilepsy, he also had problems with hearing and vision. He also experienced personality and behavioral changes. In 2005, about 4 years after the accident, the doctors were of the opinion that he is suffering from dementia and the prognosis is poor. He cannot lead an independent life. He idles at home most of the time. He is taken care of by his mother.

3. Shortly after the accident, his mother acted as his next friend commenced a personal injuries action against the driver of the vehicle. On 11 September 2003, the action was settled on terms approved by the court. The total amount of compensation YCK should receive under the terms of settlement was \$3,500,000.00. Out of that, two sums were released to the mother, viz. \$287,001.80 for past expenses and \$871,531.54 for "accrued items". According to the counsel's opinion placed before the Master when the settlement was approved, the accrued items are made up of the following,

(a)	Pain suffering and loss of amenities	\$695,416.80
(b)	Accrued loss of earnings	\$167,728.32
(c)	Accrued loss of provident fund	\$ 8,386.42

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Counsel suggested these accrued items be released to the mother for the maintenance, care and benefit of YCK.

4. The balance of the compensation money was left in court and a monthly sum was released to the mother for the maintenance of YCK. Given the condition of YCK, the money would be his main, if not the only, source of financial support for the rest of his life. Any significant depletion of that fund might jeopardize his support some time in the future.

5. Unfortunately, after the monies were released to the mother, she paid \$861,652.00 to a Ms Cheung of a consultant company. She thought she was obliged to do so pursuant to the terms of an agreement she made with the consultant company in June 2001. She was approached by this Ms Cheung when she visited YCK in the hospital. That lady offered "consultancy services" to the family to pursue the legal claim of YCK regarding the accident. Under the written agreement dated 22 June 2001, the consultant would pay for all "professional charges". In return, the consultant would get 25% of the compensation received. It is not clear to me what professional charges the consultant would have to pay. As far as the legal costs of the solicitors acting for YCK are concerned, as in most personal injuries litigation that are settled, the costs were paid by the defendant.

6. The consultant company was not a solicitor firm and I have serious doubts about the legality of that agreement. Prima facie, it infringes the law of champerty and maintenance. In any event, as a matter of law, the mother did not have any authority to enter into that agreement on behalf of YCK who was mentally incapacitated at the material time. The agreement cannot bind YCK.

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7. The solicitor firm that conducted the personal injuries claim on behalf of the mother and YCK was not paid by the consultant company. Under the terms of the approved settlement, YCK's legal costs were paid by the defendant. The solicitor told this court that she had no idea at all about the consultancy agreement and she had always regarded Ms Cheung as a friend of the mother. After the settlement, the solicitor paid the released monies to the mother. The mother paid Ms Cheung in the absence of the solicitor.

8. The matter would not come to light but for the application by the mother for her appointment as committee for the estate of YCK under the Mental Health Ordinance. The appointment was necessary because the mother wanted to obtain the insurance proceeds of two policies held by YCK.

9. In the course of that application, this court required the mother to account for the whereabouts of the \$800,000.00 odd that was withdrawn from her bank account shortly after she got the compensation monies from the solicitor. The mother did not give the court the full picture at the beginning. There are arguments between the solicitor and the mother as to whose fault it was. In the present context, I do not consider it imperative to resolve that dispute. To do so might entail disproportionate time and costs being incurred and it may not be in the interest of YCK to pursue that inquiry. What is more important is that we now know where the monies have gone. The sum paid to the consultant company represented a substantial part of the compensation intended for the benefit of YCK. Steps should be taken to try to recover the same insofar as it is practicable to do so.

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10. It is trite law that a person who receives money on behalf of a mentally incapacitated person for the latter's maintenance and benefit holds such money as a trustee and fiduciary. As such he has an obligation to see to it that the money is used for the maintenance of the mentally incapacitated person and for that purpose only. He also has a duty to account for the use of the money. That is the position in law irrespective of how the person came to receive the money. He might receive it pursuant to a court order made under Order 80 of the Rules of the High Court. He might receive it pursuant to an order made in the context of proceedings under the Mental Health Ordinance. He might receive it without any court order. The simple point is that it is the money of the mentally incapacitated person that he is holding and he could not, without prior authorization by the court, use it for purposes other than the ordinary maintenance of the mentally incapacitated person.

11. Hence, the mother should not pay the money to the consultant without any authorization from the court. Had she made an application for court sanction, the court would have questioned the legality and propriety of that agreement.

12. I wish to stress that on the information and materials before me, the mother seems to be a victim being exploited by the consultant company at a time of distress. It is unfortunate that those advising her during the course of settlement did not foresee the undesirability of releasing a large sum to her and did not consider making application for appointment of committee at the same time. In this connection, I reiterate what I said in *Re LWO* [2005] 3 HKC 174.

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13. Solicitor and counsel acting for person under disability has a duty to consider whether reasonable measures are in place to safeguard against the misuse of monies received for the benefit of that person. Instructions from the next friend cannot override the lawyers' personal duty owed to the client, viz. the person under disability. When a lawyer detects some possible conflict of interests between a next friend and a person under disability, he should consider bringing the matter to the attention of the court and if necessary, applications should be made under Part II of the Mental Health Ordinance. Solicitors acting for persons under disability should realize that given the incapacity of their clients, they have to be more vigilant in ensuring that the interests of such clients are properly protected. That is the reason why Order 80 Rule 2(3) requires a next friend, other than the Official Solicitor, to act by a solicitor.

14. It may be easy to be wise with the benefit of hindsight. In retrospect, I have difficulty in understanding why the compensation regarding the so-called "incurred items" had to be released to the mother in 2003. Those items were to compensate YCK for losses and injuries he suffered. There is no suggestion that the mother had immediate need for the use of these monies for the maintenance of YCK. It would have been better for them to be kept in court. Had that been so, the consultant company would not have got the money that easily.

15. In the circumstances, I appointed the Official Solicitor as the committee and directed him to take steps to recoup the \$800,000.00 odd from the consultant. I make an order in terms of the draft submitted by the Official Solicitor on 6 February 2006.

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16. Pending the account of the \$42,321.00 by the solicitor, I agree with the Official Solicitors that legal costs payable to the former solicitor regarding these proceedings should be reserved. My direction of 9 May 2005 in this respect is revoked.

17. I shall release this judgment for circulation and any party who has any comment about such release must write to this court within 5 days.

(M H Lam)
Judge of the Court of First Instance
High Court

Ms B Tang of Messrs K B Chau & Co., for the Applicant
(since 6th October 2005)

Ms. W. Lo of Messrs Winnie Lo & Wong, the former Solicitor
for the Applicant (prior to 6th October 2005)

Mrs Annie Williams of Official Solicitor