## DCPI 569/2015

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 569 OF 2015

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BETWEEN

ERWIANA SULISTYANINGSIH Plaintiff

and

LAW WAN TUNG Defendant

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Before: Her Honour Judge Winnie Tsui in Chambers (Open to Public)

Date of Hearing: 30 August 2017

Date of Decision: 30 August 2017

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DECISION

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1. This is the defendant’s appeal against Master J Chow’s decision made on 12 May 2017 dismissing her summons dated 11 May 2017 seeking leave to adduce expert psychiatric evidence. In determining the present appeal, I have taken into account the following factors.
2. First, the plaintiff’s claim for damages in the sum of about $810,000 is mainly based on the alleged psychiatric injuries suffered by her as a result of the defendant’s wrongdoing. Therefore, expert evidence in the form of psychiatric opinion on her diagnosis, causation and the impact on her earning capacity etc is clearly relevant, necessary and of probative value.
3. If the court refuses leave to the defendant to adduce such evidence, the defendant will lose the opportunity of relying on any favourable expert opinion which she may obtain and which may have the effect of reducing the amount of damages for which she will be held liable. In other words, the court’s refusal to grant leave, as accepted by the plaintiff at today’s hearing, is likely to have an adverse impact on the court’s determination of the substantive rights and obligations of the defendant. This is clearly a significant factor that the court should take into account: Order 1A, rule 2(2) of the Rules of the District Court.
4. Secondly, on the other hand, the defendant’s application taken out on 11 May 2017 is undeniably a very late application. It was taken out only one day before the 5th checklist review hearing. By that stage, the case was all ready to be set down. In fact, after the master dismissed the defendant’s application at that checklist review hearing, she proceeded to grant leave to set the case down for assessment of damages.
5. Thirdly, not only was the application late, the defendant had had ample opportunity to take out the application before 11 May 2017. But she did not do so.
6. On 26 February 2016, at the 2nd checklist review hearing, Master R So directed that the defendant should nominate her own psychiatric expert within 42 days and if she failed to do so, she would be deemed to have elected not to adduce such evidence at the assessment hearing.
7. After her failure to nominate within the prescribed the limit, she had not at any time sought any extension of time. At that time, she was not legally represented. That remained to be the case until 6 October 2016, when a Notice to Act was filed on her behalf by Ching & Co, which firm has since represented her, including at today’s hearing.
8. In the meantime, the plaintiff had gone ahead to instruct her psychiatric expert to conduct an examination on her and a report was duly compiled in May 2016, all these steps being taken with the prior leave of the court.
9. Then followed the 3rd checklist review hearing, which took place on 26 November 2017, ie, about a month after the defendant formally engaged her solicitors, no questionnaire was filed on behalf of the defendant in advance of the hearing and no formal application was made to extend time for her to nominate her own psychiatric expert. According to the notes of the presiding master, the defendant did seek to adjourn the checklist review hearing and have some time to seek leave to adduce her psychiatric evidence.
10. Notwithstanding that, at the 4th checklist review hearing, which took place on 10 February 2017, ie, 2½ months later, no application was made by the defendant, contrary to what the solicitor had previously indicated. On that occasion, the plaintiff sought a direction that her expert report be admitted into evidence without calling the doctor to give oral testimony and be examined. The defendant sought to resist that but ultimately failed before the master. The direction was granted. The defendant lodged an appeal against that, which was dismissed on 24 March 2017.
11. Yet, it took her almost 2 months later to take out the present application.
12. There was, therefore, a delay of almost 15 months. And even if one discounts the period from February to May 2017, when the issue of cross-examination was being fought, there was still a delay of almost one year in the taking out of the defendant’s application.
13. As far as one can see, there appeared to be nothing which would have prevented the defendant from taking out the application during those 12 months. Naturally, one asks the question – why not and why waited for so long before taking out the application? On its face, the timing is not consistent with any serious intention on the defendant’s part to adduce expert evidence.
14. Fourthly, worse still, there is a complete lack of explanation as to the delay.
15. The defendant’s present application was not accompanied by any supporting affidavit. It was her own application to seek an indulgence from the court to in effect extend time for her to file expert psychiatric evidence. Yet she did not see fit to explain why she was so late in making the application.
16. It is now suggested on her behalf that when Master So’s order was made and up until 6 October 2016, she was acting in person and was in jail and therefore, first, that she did not have the benefits of any legal advice and, secondly, that she was still upset about her conviction and her ability to make arrangements was restricted and her financial ability was limited.
17. It is for the defendant to explain her difficulties and hardship, which are all factual matters, by way of affidavit evidence, not through submissions from her legal representatives. This is trite and standard. Why did the defendant fail to give her explanation under oath or affirmation, when she was legally represented, when making the present application in May?
18. Mr Ching, who is the handling solicitor, explained this morning that when the summons was filed on 11 May 2017, a return date in July was given and he was not prepared to deal with it on the following day. However, the master proceeded to deal with and eventually dismiss the summons at the checklist review hearing. Mr Ching criticised that decision to be premature. He also explained that since he had not expected the summons to be dealt with forthwith, he did not have time to file a supporting affidavit to accompany the summons. He was to file it later.
19. In my view, this is an unacceptable explanation for the absence of a supporting affidavit. When a party takes out an application, it must be taken that he has a basis to make that application and that basis is to be documented on paper.
20. In the event, there is no explanation put forward before the court now as to why there has been a delay on the defendant’s part.
21. In any event, even after the defendant retained her solicitors in October 2016, there was no active step taken on her behalf to seek leave to adduce expert psychiatric evidence. And there is no explanation for that failure to act.
22. No questionnaire was filed by the defendant at all prior to the 3rd checklist review hearing.
23. In respect of the 4th checklist review hearing, the defendant filed a questionnaire. But the questions on expert evidence, ie, Section F, had all been left blank. Mr Ching submitted this morning that all along, since his firm was engaged, they took the view that cross-examination of the plaintiff’s expert would be sufficient to advance the defendant’s case at the assessment hearing. And that was why the defendant did not apply to adduce her own expert evidence until after the appeal regarding cross-examination was dismissed. But, even leaving aside the fact that this is not deposed to by affidavit evidence and that it is inconsistent with what was said on the defendant’s behalf at the checklist review hearing on 26 November 2016, it still does not explain why after the dismissal of the appeal on 24 March 2017, it took the defendant about two months to take out the present application.
24. As regards the adducing of expert evidence, the defendant’s inaction throughout (ie, from February to October 2016 when she was unrepresented and from October 2016 to May 2017 when she was) is remarkable in that it is completely inconsistent with any serious and real intention to nominate her own expert.
25. What is also extraordinary about the timing is that it was not until the day before the 5th checklist review hearing that the defendant formally sought to seek leave (even then, without any supporting affidavit) when it would be clear to all that the case was on the verge of being set down for assessment.
26. All these matters cry out for an explanation but the defendant has not able to put forward any satisfactory reason.
27. Fifthly, there are between now and the scheduled assessment (commencing on 4 December 2017) only just over three months.
28. The court has no assurance that if leave was granted now whether the scheduled assessment date would be affected. It appears from the defendant’s submissions this morning that no expert has yet been lined up. No effort has even been made of checking the availability of any potential candidates over the next two months. I asked Mr Ching why no step was taken prior to today’s hearing to at least ascertain the availability of experts. No satisfactory explanation was given save that Mr Ching was adamant that he was sure he would be able to find an expert since there are so many psychiatrists in Hong Kong.
29. I find this totally unsatisfactory. In order to convince the court that if leave is granted, the assessment date, being a milestone date, will not have to be moved, the defendant should at least put forward a plausible timetable before the court. No serious effort was put into this on behalf of the defendant. It gives the impression of “all talk no action”. Furthermore, even assuming that the defendant’s expert can complete a report within 60 days, time should ordinarily be given for both experts to meet up if there are material differences in their opinions. A further report may be required. Time may also be needed for the filing of consequential revisions to the statement of damages and an answer and possibly supplemental witness statements. Realistically, there simply does not appear to be enough time for all these steps to be taken before 4 December 2017.
30. By way of footnote, it must however be recognised that the application was taken out in May 2017, when there was more time to deal with the above steps. But even then, no proper timetable was laid before the court at that time.

*Conclusion*

1. Overall speaking, there was unquestionably a long delay on the defendant’s part, coupled with a complete lack of explanation. If one takes a step back and seeks to take an overall view of how the action has progressed (or, more accurately, as far as the defendant is concerned, how it has not progressed), one sees a disturbing pattern as follows:-
2. At the early stage of the proceedings, from February 2016 onwards, there was a long period of inaction on the defendant’s part.
3. This state of inaction did not really alter even after the engagement of her solicitors in early October 2016.
4. Then, all of a sudden, when the case was quite close to being set down, there came a flurry of activities after the master’s decision on the issue of cross-examination in late February 2017. An appeal followed in March. In May, the defendant took the step (which Mr Ching described as “drastic”) to appoint her own expert.
5. All along, no satisfactory explanation is forthcoming as to why the defendant had handled the case in the way she did.
6. The above pattern can hardly be consistent with a serious or genuine attempt or intention to adduce expert evidence by the defendant. On the other hand, it is more consistent with the defendant trying to drag on the matter as long and as much as possible at a late stage in the proceedings. Here, there is simply no basis for the court to grant the indulgence now sought by the defendant.
7. The outcome would be that the solo expert report of the plaintiff would go into evidence, without cross-examination. While the defendant is still able to challenge that evidence by way of submissions, it is likely that the scope of challenge is limited as the defendant will not be able to rely on any medical evidence to either challenge or query the expert opinion obtained by the plaintiff.
8. I am fully conscious that the defendant’s substantive rights and obligations are at stake here.
9. Mr Ching submitted that it would be very unfair to the defendant and further that no prejudice, but only inconvenience, would be caused to the plaintiff if leave is granted. Mr Ching asked the court to have sympathy for the defendant so that she could have a fair assessment hearing.
10. On this submission, it must by now be clear that the “no prejudice” point is not determinative of this type of application.
11. Here, as submitted by the plaintiff, this end result is of the defendant’s own making. The court does not have any sympathy for the “injustice” that is perceived to exist by the defendant. As mentioned above, what is remarkable in this case is the complete lack of explanation by the defendant on the delay. If the defendant now asks for sympathy, she should at least put forward something to which the court’s sympathy, if any, can be directed. None has been provided. The defendant must live with the consequence flowing from how she has handled the case thus far.

*Order*

1. The defendant’s appeal is dismissed.

*[Discussion re costs]*

1. The plaintiff do have costs of the appeal, with certificate for counsel. The plaintiff’s solicitors’ having waived their right under Order 62, rule 9C(1)(b), the costs were summarily assessed in the agreed sum of $50,112.
2. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

( Winnie Tsui )

District Judge

Mr Tony Ko, instructed by Boase Cohen & Collins, assigned by the Director of Legal Aid, for the plaintiff

Ms Manna Wong, instructed by Ching & Co, for the defendant