#### DCPI 599/2015

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 599 OF 2015

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BETWEEN

LIMBU CHALIMAYA Plaintiff

and

KWOK WING GROUP LIMITED 1st Defendant

KUM SHING (K.F.) CONSUTRUCTION

COMPANY LIMITED 2nd Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 19 September 2016

Date of Decision: 19 September 2016

Date of handing down Reasons for Decision: 14 October 2016

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REASONS FOR DECISION

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1. This is an appeal against a master’s decision pursuant to Order 58 rule 1 of the Rules of the District Court (“RDC”). It was taken out by the plaintiff against a decision made by Master Rita So on 20 July 2016. On that date, the master dismissed the plaintiff’s application to adduce expert orthopaedic evidence by way of the parties arranging a joint medical examination on the plaintiff. On that occasion, the master dismissed the plaintiff’s summons and also ordered the plaintiff to pay the agreed costs at HK$2,000 to be paid forthwith to the defendant.
2. At the hearing before me on 19 September 2016, I have set aside the order of the master and allowed the plaintiff’s appeal. I also granted leave to the parties to arrange the joint medical examination within 28 days from the date of that order. I also ordered the costs of the appeal to be awarded in favour of the plaintiff, such costs to be taxed if not agreed with certificate for counsel. As for the costs of the hearing below, I ordered that there should be no order as to costs for that hearing and the HK$2,000 previously paid by the plaintiff to the defendant ordered by the master should be returned to the plaintiff within 14 days.
3. I said at the end of the hearing that I would provide my reasons for the decision in due course. These are the reasons.

*BACKGROUND*

1. The present action arose out of an industrial accident at work which happened to the plaintiff on 21 January 2014 on Kam Pok Road, Yuen Long towards the direction of Sheung Shui in the New Territories (“the Road”). In the accident, the plaintiff sustained crushed fracture injury to her right index finger. At the checklist review hearing before the master, the plaintiff’s solicitors took out a summons seeking leave to arrange a joint medical examination by orthopaedic experts.

*The accident*

1. The plaintiff is a Nepalese lady who was employed by the 1st defendant as a general worker on a construction site. On the day of the accident, road works were being carried out on the Road and one of the two lanes was closed. The Road was a two-way carriageway. The plaintiff was requested to operate a “Go/Stop” sign (“the Sign”) in order to direct the traffic from both directions using the remaining lane.
2. Allegedly, in the course of her employment, strong wind had caused the Sign to topple over onto the ground. Hence, the upper part of the Sign became loosened from the bottom part. As there were traffic still coming from both directions, the plaintiff had tried to put back the Sign to the upright position as soon as she could in order to continue with directing the traffic. In the process of doing so, the upper part of the Sign dropped and hit her right index finger. As a result, her right index finger was crushed between the metal bar of the upper part of the Sign and the metal stand (“the Accident”).

*Injuries and treatments*

1. After the Accident, the plaintiff was sent to the Accident and Emergency Department (“A&E”) of Pok Oi Hospital (“POH”) for treatment. Physical examination revealed small superficial laceration on the dorsal surface of finger, just lateral to nail plate. X-ray revealed facture over the distal digit of the right index finger. The diagnosis made by the doctor at the A&E was “*acute traumatic fracture of distal digit of right index finger*”. Dressing of the wound was done and the plaintiff was granted sick leave for 15 days initially. She was advised to attend the A&E’s follow-up clinic, which she did.
2. At present, the medical evidence on the plaintiff’s injuries mainly has come from the few consultation summary of the A&E follow-up clinic at POH. I note that they are all made in note form and under standard format, obviously following a certain computer programme used by all the doctors in public hospitals.
3. The notes from the “Consultation Summary” of the various dates reveal the following picture:-
4. On 14 February 2014, the plaintiff’s fracture was stated to be “*with complete separation*”;
5. the X-ray taken on the next consultation on 14 March 2014 showed that no callus had been formed yet. She was given 40 days of sick leave on that occasion; and
6. on 22 April 2014, the X-ray showed that the healing was still not complete. The plaintiff was still reported to be suffering from pain at that time. It is to be noted that no referral to the orthopaedic specialist at the public hospital was made and hence the plaintiff was only seen by the doctors at the A&E follow-up clinic at POH.
7. The plaintiff was given occupational therapy treatment from 1 April 2014 to 30 May 2014 on 4 separate occasions. The progress notes from the occupational therapist were submitted to the medical officer at the A&E for advice. The medical officer replied was recorded as “*excellent recovery, no FU (follow up)*”. The plaintiff’s case was closed after the last consultation at the A&E on 27 May 2014. On that occasion, the plaintiff was given sick leave up to 30 June 2014, ie. 35 days.
8. It was obvious that the plaintiff had not fully recovered from her injuries by the time of the last consultation at POH because, on 2 July 2014, she had, at her own expense, attended a private orthopaedic specialist by the name of Dr David Ip for the right index finger pain. As recorded in his notes, Dr Ip questioned why no orthopaedic referral was made and no splint was applied for her finger injury while the plaintiff was being treated at the POH. Dr Ip’s own findings on the plaintiff’s injuries included “*Pain, numb, stiffness of DIPJ*”. X-ray was taken and it was revealed that the fracture was only partially united.
9. The plaintiff consulted Dr David Ip on a few further occasions during which she was treated with physiotherapy and analgesics. She was given sick leave by Dr Ip until 26 October 2014.

*Expert evidence*

1. In the Questionnaires filed by the parties, both the plaintiff and the defendants’ solicitors had informed the court that one expert would be called by them at the trial on the issue of quantum respectively. However, the defendants later changed their mind and claimed that as the plaintiff’s injuries were trivial, hence no expert evidence was required.
2. They maintained that position at the hearing before the master and at the appeal hearing before me.

*DISCUSSION*

*The legal principles*

1. I accept the well-established principle in law that there is no entitlement on any party in a personal injury case to adduce opinion evidence from experts. Expert evidence can only be adduced or admitted as evidence at trial with the leave of the court.
2. The two-stage approach adopted by the court in determining whether expert evidence should be allowed in each case was well explained by Bharwaney J in *Fung Chun Man v Hospital Authority* (2007) unreported (HCPI 1113/2006; 24 June 2011). They are: in deciding whether or not to grant leave, the court must ensure that such evidence is admitted only (i) if it is likely to be of real assistance to the determination of the issues; and (ii) that it is adduced in the most effective and economic way consistent with the objectives of the Civil Justice Reform (“CJR”).
3. In the case of *Lee Chui Ying v Chan Yee Ling Elaine* (2015) unreported (DCPI 1665/2011; 16 November 2015), the two-stage approach as set out in *Fung Chun Man* case was summed up at §§16-17 as follows:-

“First, it should be determined *whether a prima facie case is made out for the admission of expert evidence*, this means that:- “The expert evidence must be in recognized discipline, reasonably required to enable the court to resolve the issues in dispute, and proportionate” (at §15)

If so, the court should then carry out a balancing exercise. “[I]n every case, the court must also have regard to *other relevant circumstances*, such as the potential disruption to the trial, the prejudice to the other parties, and the explanation offered by the applicant in cases where a late application is made for expert evidence to be adduced. These matters have to be considered and weighed in the light of and against the underlying objectives of the CJR ……” (at §16)” [emphasis added]

1. I agree with the defendants’ solicitors submission that, in determining whether the applicant has made out a *prima facie* case, the guiding criteria are whether such evidence is “relevant, necessary and of probative value”. In considering the issue of relevance, the expert evidence must be shown to be relevant in the sense that it is helpful to the court in arriving its decision on one or more issues to be resolved. If the court can make an informed decision on any issue in the case justly without the aid of such expert evidence, then the court may regard such expert evidence as not useful and should not be adduced (*per* Master Marlene Ng (as she then was) in *Wan Ying Sheung v Wan Yiu* Kan (2011) unreported (HCPI 288/2009; 21 March 2011).

*Whether expert evidence is required in this case?*

1. I do not accept the defendants’ contention that the plaintiff’s injuries are only trivial and that, by relying on the handwritten doctor’s comments at the A&E Department of POH which said that the plaintiff had achieved in “excellent recovery” with no follow-up treatment required, it was sufficient to say that independent expert evidence would not be required in this case.
2. Further, I do not agree that the plaintiff’s injuries were as trivial as the defendants had suggested them to be. The X-ray taken on 2 July 2014 by the doctors at the public hospital, which was about 5.5 months after the accident, revealed that the fracture had not been healed. This was reinforced by the notes made by the doctor at the A&E of POH on 14 February 2014 when he stated that the plaintiff’s fracture was “*with complete separation*”. And the X-ray taken on 14 March 2014 showed no callus was formed yet (callus being the bony healing tissue which forms around the ends of the broken bone). Hence, in my judgment, it could hardly be said that the plaintiff’s injuries were completely healed even months after the Accident. Further, there was the recommendation in the consultation summaries written by the doctors for the continuation of the mobilization and strengthening exercises. Also, the X-ray taken on 22 April 2014 showed that the healing was still not yet complete. There was no record of any further X-ray taken in the subsequent consultation on 13 May 2014. The last record shows that the remain problem of the plaintiff was the pain she was still experiencing.
3. In my judgment, the consultation summaries (which are in notes form) and the occupational therapist report (which are in standard form format) are too brief and too simple to offer any real assistance to the trial judge to determine the real issues in dispute in this case. In my view, the court will be greatly assisted by a joint orthopaedic expert report which can state the experts’ opinion on, inter alia, the following matters:-
4. the extent of the plaintiff’s injuries sustained in the Accident;
5. the appropriate period of sick leave;
6. the current condition of the plaintiff’s right index finger;
7. the prognosis of the plaintiff’s condition;
8. the extent of the injuries impacting the plaintiff’s earnings during the pre-trial period;
9. whether it was reasonable or not for the plaintiff not able to return to her pre-accident employment during the pre-trial period or any part thereof;
10. whether the plaintiff will be able to return to her pre-accident employment, if so, when; and
11. If the plaintiff is not able to return to her pre-accident job in future, what sort of job(s) she is likely able to do.
12. All the above issues have not been dealt with by any A&E doctors, let alone orthopaedic experts at the public hospital. In my view, the court will be benefited by having 2 orthopaedic experts from the parties to comment on the above matters. My view is that appointing such experts is both cost effective as well as proportionate to the claim made by the plaintiff in this case. I also see no other relevant circumstances such as the potential derailing of the trial date or pre-trial review date which will prejudice the defendants if a joint expert report is obtained at this stage.
13. Based on the above, I had allowed the plaintiff’s appeal and set aside the master’s decision and order of costs as mentioned above.

# ( Andrew SY Li )

# District Judge

Mr Kelvin Leung instructed by Messrs. How & Co, for the plaintiff

Miss Corrinne So of Messrs. Winnie Mak, Chan & Yeung, for the 1st and 2nd defendants