# DCPI 1054/2019

[2022] HKDC 247

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1054 OF 2019

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BETWEEN

MAK MEI LING（麥美玲） Plaintiff

and

DR. POON NAI YUN（潘乃炘） Defendant

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

Date of Hearing: 22 December 2021

Date of Decision: 18 March 2022

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DECISION

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*INTRODUCTION*

1. This is a decision in relation to an application made by the defendant to ask the Court to expunge 2 purported expert reports filed by the plaintiff in the context of a medical negligence case.
2. In the defendant’s summons filed on 3 November 2021 (“the Summons”), the defendant requests the supplemental report by Dr Chu Cho Shun Frederick (“Dr Chu”), specialist in prosthodontics dated 4 November 2020 (“Dr Chu’s Supplemental Report”) and the report by Dr Chiu Siu Ning (“Dr Chiu”), specialist in psychiatry dated 12 December 2020 (“Dr Chiu’s Psychiatric Report” and collectively with Dr Chu’s Supplemental Report will be referred to as “the Reports”) filed by the plaintiff’s solicitors be expunged from the case, on the basis that they do not comply with Order 18 rule 12(1C) of the Rules of the District Court (“RDC”).
3. The defendant also requests his costs of reviewing and considering Dr Chu’s Supplemental Report and Dr Chiu’s Psychiatric Report and the costs of the application, including but not limited to the costs of the defendant’s solicitors’ letter to the plaintiff’s solicitors dated 15 October 2021, to be paid by the plaintiff to the defendant, to be taxed if not agreed.

*BACKGROUND*

1. The crux of the plaintiff’s claim is that the defendant had, in his capacity as a dentist, allegedly failed to provide active periodontal treatment from 18 June 2008 to 22 March 2016 for her as his patient. Her alleged injuries are set out in §§6 and 9 of the statement of claim (“SoC”). They include “serious personal injuries and pain to her tooth 27”, “advance periodontal bone loss” and “depression and panic”.
2. Specifically, §9 of the SoC states that “[f]ull particulars of the Plaintiff’s loss and damages are set out in the Statement of Damages”.
3. §6 of the statement of damages (“SoD”) contains the following list of psychiatric problems allegedly suffered by the plaintiff which supposedly was caused by the defendant’s treatment:

“(a) Poor mood associated with pain especially in rainy days;

1. Low self esteem;
2. Insomnia;
3. Loss of energy, lack of motivation for activities;
4. Loss of interest in activities, e.g. socializing with friends;
5. Fatigue;
6. Impaired concentration and memory;
7. Retardation;
8. Agitation;
9. Ideas of worthlessness;
10. Nightmares;
11. Anxiety;
12. Sense of foreshortened future regarding career, life span;
13. Irritability;
14. Impaired appetite;
15. Inability to return to full time or part time employment;
16. Current and future stringent financial status; and
17. Depressed mood.”

*DISCUSSION*

1. *Legal principles*
2. The following legal principles are cited by the defendant in support of his argument.
3. Under Order 18 Rule 12(1A) of the RDC, a plaintiff in an action for personal injuries is required to serve a medical report with his SoC and SoD.
4. Under Order 18 Rule 12(1C) of the RDC, “medical report means a report *substantiating* *all the personal injuries alleged* in the statement of claim which the plaintiff proposes to adduce in evidence as part of his case at the trial.” [emphasis added]
5. Specifically, “[w]hat is required is a report which substantiates all the injuries with sufficient particularity that one is not left in any doubt what is and what is not attributed to the accident or other event.”: See *Hong Kong Civil Procedure 2021* 18/12/52, *Nur v John Wyeth and Brother Ltd* [1994] PIQR P72, per Rose LJ, and *AB v John Wyeth & Brother Ltd (No 1)*, [1991] 5 WLUK 75, per Kennedy J.

*II. Factual background to the present dispute*

*(a) “Voluntary disclosure” of the Reports and Court Order of 24 December 2020*

1. By way of background, on 16 and 17 December 2020, the plaintiff’s solicitors provided to the defendant the Reports by way of “voluntary disclosure”, without having obtained leave to do so.
2. On 24 December 2020, the parties attended a hearing before me during which I had clearly pointed out to the plaintiff’s solicitor (who represented the plaintiff at the hearing) that such “voluntary disclosure”, purportedly based on the RDC, does not exist: See §44 of my Reasons for Decision dated 25 January 2021.
3. By an Order dated 24 December 2020, I ordered the plaintiff to file and serve “medical reports within the meaning of Order 18, rule 12(1C) of the Rules of the District Court and the expert medical reports as to liability and causation on or before 7 January 2021”.
4. Of course, when I ordered the plaintiff to file and serve the expert medical reports as to liability and causation, I had in mind the requirement specified under §66(5) of PD 18.1, which was something I made abundantly clear to the parties at the hearing on 24 December 2020.
5. On 28 December 2020, the plaintiff filed and served the Reports, purportedly in compliance with the Order.

*(b) The plaintiff’s 2nd affirmation*

1. The contents of the Reports were referred to in the 2nd affirmation of the plaintiff (“P’s 2nd Aff”), which incidentally does not state her place of residence, contrary to Order 41 rule 1 (4) of the RDC and contains various arguments/submissions, contrary to Order 41 rule 5 of the RDC.
2. I find the above breaches of the RDC are sufficient to render P’s 2nd Aff defective. However, for the sake of completeness, I shall continue with the discussion here and proceed to make my findings below.

*(c) The Reports*

1. In the affidavit of the defendant’s solicitor, Christopher Guy Howse filed on behalf of the defendant (“D’s Aff”), it highlights the issues regarding the Reports. As stated in D’s Aff, the defendant’s solicitors explained these issues to the plaintiff’s solicitors in their letter dated 15 October 2021 and proposed that the matter be resolved by way of a consent summons: See §§ 9 -11 of D’s Aff.
2. Unfortunately, no response was received by the defendant to the letter dated 15 October 2021, leading to the issue of the Summons.

*Findings on the specific issues in dispute*

*(i) Dr Chu’s November 2020 report*

1. Dr Chu’s Supplemental Report stated, *inter alia*, that “a patient’s imaging records (X-rays, CT scans) have to be placed in correct left and right orientation” and “(i)t is clearly unprofessional for (the defendant) to submit the two radiographs (tooth 21 – dated 26 September, 2013 and tooth 27 – dated November, 2013) in wrong orientation.”

1. The defendant submits that Dr Chu’s Supplemental Report should be expunged because:-
2. It does not relate to the dental treatment provided by the defendant to the plaintiff. It only criticises the manner in which the defendant provided X-rays to the plaintiff’s solicitors under the cover of the defendant’s 2 letters to the plaintiff’s solicitors dated 8 February and 15 July 2019;
3. Accordingly, it does not comply with the requirement in Order 18 Rule 12(1C) that the report *“[substantiates] all the personal injuries alleged in the statement of claim which the plaintiff proposes to adduce in evidence as part of his case* at the trial.” (emphasis added);
4. Dr Chu’s Supplemental Report therefore does not satisfy the Order of this Court dated 24 December 2020, which required the plaintiff to file “medical reports within the meaning of Order 18, rule 12(1C) of the Rules of District Court, and the expert medical reports as to liability and causation”.
5. Under P’s 2nd Aff, she made the following points :-
6. Under §13, she claims that “[she] only knew upon discovery after filing the Statement of Claim that the Defendant was negligent in failing to keep the radiographs in the correct left and right orientation at all material times, i.e. after the said radiographs were taken by Dr. Chu and during the period of which Dr. Chu was providing the dental treatment to me”;
7. Under §14, she claims that “[she] will amend the Statement of Claim in light of the opinion by Dr. Chu...”; and
8. Under §17, she says that “it is beyond comprehension as to why the Defendant’s solicitors have any basis to suggest [that Dr Chu’s Supplemental Report] only [criticises the manner in which we have provided the X-rays to the Plaintiff’s solicitors]”.
9. In P’s 2nd Aff, the plaintiff exhibited Dr Chu’s letter written to her solicitors dated 16 November 2021, which states that “(C)ontrary to the Para 10(a) of the Affidavit of Christopher Guy Howse dated 3 November, 2021, my November 2020 Report is not to criticize the manner in which Defendant firm provided the radiographs to the Plaintiff’s solicitors, but it is an opinion that the radiographic records was (sic) kept by Defendant in a negligent manner. It would be a disaster if a diagnosis or operation was carried out on such radiographs, i.e. wrongly oriented for the left and right sides.”
10. §§ 4 and 5 of the section entitled “Expert opinions” on page 3 of Dr Chu’s Supplemental Report states as follows:-

“4. It is clearly unprofessional for Dr. Poon to submit the two radiographs (tooth 21 - dated 26 September, 2013 and tooth 27 - dated November, 2013) in wrong orientation to the Claimant’s lawyers on 8 February, 2019”; and

“5. It took more than 18 months, i.e. until 4 September, 2020, for Dr. Poon to submit the two radiographs in correct orientation. This delay is unacceptable.”

1. With greatest respect to Dr Chu and the plaintiff’s legal advisers, in my judgment, they have failed to understand the meaning of “expert medical report as to liability and causation” which is required to be filed and served at the same time as serving the SoC in a medical negligence case. I find the way the plaintiff attempts to base her medical negligence claim against her former dentist on an X-rays which were given in the wrong orientation rather absurd if not totally misconceived for the following reasons.
2. First, the defendant only received the request from the plaintiff’s solicitors to re-send the X-rays on 25 August 2020, ie more than 18 months after they had first received the X-rays under the cover of the defendant’s solicitors letter dated 8 February 2019. The requested X-rays were duly provided to the plaintiff’s solicitors approximately a week later, ie on 4 September 2020. Thus, the assertion contained in §5 of Dr Chu’s Supplemental Report that it took the defendant more than 18 months to submit the two X-Rays in the correct orientation is incorrect.
3. Second, contrary to his letter dated 16 November 2021, Dr Chu’s Supplemental Report makes no reference to the manner in which Dr Poon has “kept” the X-rays. It is clear that Dr Chu’s criticisms only relate to the fact that the defendant sent the X-rays in the “wrong orientation to the Claimant’s lawyers on 8 February, 2019” and that the defendant’s solicitors only sent them in the correct orientation 18 months later.
4. Last but not the least, the SoC does not make any reference to either the manner in which the X-rays were provided by the defendant’s solicitors to the plaintiff’s solicitors or the manner in which the defendant had allegedly “kept” his X-rays. With respect to the plaintiff’s legal advisors, I simply do not see how the manner in which the X-rays were presented, namely, in the wrong orientation could form part of the alleged negligent treatment of the plaintiff by the defendant. In my judgment, it has absolutely nothing to do with the alleged neglected dental treatments raised by the plaintiff in her SoC.
5. Mr Wong, counsel for the plaintiff, in his submission pointed out the fact that Dr Chu has in his Supplemental Report opined that “(I)t is clearly unprofessional for Dr. Poon to submit the two radiographs (tooth 21 – dated 26 September, 2013 and tooth 27 – dated November, 2013) in wrong orientation to the Claimant’s lawyers on 8 February 2019.” In a subsequent letter dated 16 November 2021, Dr Chu tried to “clarify” that his Supplemental Report was not to criticize the manner in which the defendant’s firm provided the X-rays to the plaintiff’s solicitors, but it is “an opinion that the radiographic records was (sic) kept by the Defendant in a negligent manner.”
6. With greatest respect to Dr Chu, he did not explain in the letter how this “clearly unprofessional” conduct of the defendant had somehow caused the injuries allegedly suffered by the plaintiff as stated in the SoC or SoD. In other words, there was simply no *causative link* between this what he would call “clearly unprofessional” act on the part of the defendant and the plaintiff’s alleged injuries. In my view, it simply does not fulfill the requirements under Order 18, rules 12(1C) of the RDC and §66(5) of PD 18.1, particularly on the issue of liability and causation which is required in every medical negligence case.
7. Accordingly, I do not see the relevance of the wrong orientation has anything to do with the alleged negligence on the part of the defendant *as pleaded* by the plaintiff in her SoC and SoD. Hence, I would order Dr Chu’s Supplemental Report to be expunged from the documents in this case.

*(ii) Dr Chiu’s Psychiatric Report*

1. The defendant submits that Dr Chiu’s Psychiatric Report should be expunged because:-
2. Dr Chiu, who first saw the plaintiff on 3 December 2020 ie almost 5 years after she last saw the defendant, does not confirm in his report that the plaintiff’s symptoms were caused by the defendant’s dental treatment. Accordingly, causation has not been established;
3. Further, Dr Chiu’s Psychiatric Report makes no reference to the 18 psychiatric issues alleged by the plaintiff in the SoD which are vague and unclear; for example, “(a) (P)oor mood associated with pain especially in rainy days”, “(h) Retardation”, or “(p) Inability to return to full time or part time employment”; and
4. Dr Chiu’s Psychiatric Report therefore does not satisfy the Order of this Court dated 24 December 2020, which required the plaintiff to file “medical reports within the meaning of Order 18, rule 12(1C) of the Rules of District Court, and the expert medical reports as to liability and causation.”
5. In P’s 2nd Aff, she has, *inter alia*, stated the following:
6. under §10, “the contents of [Dr Chiu’s Psychiatric Report] are all matters of fact and there is *no opinion* expressed by Dr. Chiu in the [Dr Chiu’s Psychiatric Report]”; and
7. under §11, “[o]n the other hand, [she is] advised and verily believes that Dr. Chiu as *a treating doctor* should not express his opinion concerning causation in the Medical Report.” [emphasis added]
8. Contrary to the plaintiff’s unequivocal position as stated above, Mr Wong for the plaintiff submits that there is a distinction between the medical report provided by a treating doctor which gives the diagnosis and treatment history on the one hand and an expert opinion report by a psychiatric expert as to the attributable causes(s) in determining whether a causal link between the tort and the psychiatric illness on the other hand. He cited the case of *Yeung Lai Ping v Secretary for Justice* [2019] 4 HKC 1, at 86 where Bharwaney J has in turn cited the case of *Pak Siu Hin Simon v JV Fitness Ltd*, HCPI 574/2014 (unreported, 4 September 2015, Deputy High Court Judge Marlene Ng (as she then was)) where the learned judge has made that distinction.
9. I have no qualm in accepting there is such a distinction between a treating doctor’s report and an expert report on liability and causation. The former can be produced by a treating doctor provided that they substantiate the injuries a plaintiff complains of in his/her claim while the latter is mandatory in a medical negligence action to show the causative link between the alleged negligent treatments by a medical practitioner and the injuries sustained by a patient. This is as clear as daylight and needs no explanation to any experienced PI practitioners. However, what I requested the plaintiff to produce at the last CMC was a “liability and causation report” as none was made available by the plaintiff when she first issued the proceedings in this case. Then his former assigned solicitor tried to introduce them belatedly through the backdoor by way of “voluntary disclosure” which I had rejected: (See my Reasons for Decision).

1. While there is no doubt in my mind that Dr Chiu as a treating doctor can produce his psychiatric report as a record of his treatments on the plaintiff on her alleged psychiatric condition, however, there seems to be a total “decoupling” of what was being alleged in the SoC/SoD and what was being reported by Dr Chiu in his report. This is perhaps not surprising as Dr Chiu only saw and “treated” the plaintiff for the first time 5 years after the alleged negligent dental treatments and on 2 separate occasions only (ie on 3 & 11 Decembe 2020). With respect to Mr Wong, Dr Chiu’s Psychiatric Report has every hallmark of that of an “expert report” rather than a treating doctor’s report. In any event, in my judgment, Dr Chiu’s Psychiatric Report is of no help in this case whether as an expert report or a treating doctor’s report.
2. Hence, I agree with the defendant’s submission that the above paragraphs cited from P’s 2nd Aff confirm that the plaintiff accepts and concedes that Dr Chiu’s Psychiatric Report does not express any expert opinion, nor does it contain any references to causation ie no causative link was established between the defendant’s dental treatments and the psychiatric symptoms from which the plaintiff is now allegedly suffering from.
3. The plaintiff’s concession is in line with the Court’s comments made during the previous Case Management Conference held on 22 October 2021, namely, that Dr Chiu’s Psychiatric Report does not contain any references to causation between the defendant’s treatment and the plaintiff’s alleged psychiatric symptoms.
4. Accordingly, I agree with the defendant that there is no basis for the Court to consider Dr Chiu’s Psychiatric Report, since it is irrelevant to its consideration of the plaintiff’s claim against the defendant in relation to his dental treatment.
5. In my judgment, Dr Chiu’s Psychiatric Report does not constitute a medical report within the meaning of Order 18 Rule 12(1C) of RDC as it does not “attribute [such injuries] to the accident” (*Hong Kong Civil Procedure 2021* 18/12/52 and *AB v John Wyeth & Brother Ltd (No 1)* [1991] 5 WLUK 75, per Kennedy J.
6. Accordingly, I am of the view that Dr Chiu’s Psychiatric Report should also be expunged insofar as it purports to stand as an expert report under the RDC and PD. I so make such an order. However, if the plaintiff wishes to include that as her “treating doctor’s report”, she may do so for that limited purpose only.

*CONCLUSION*

1. In conclusion, for the reasons stated above, I am of the view that the Reports filed by the plaintiff do not constitute medical reports within the definition set out in Order 18 Rule 12(1C) of RDC or constitutes to expert reports as to liability and causation required under §66(5) of PD 18.1.
2. Accordingly, I would grant an order in terms of the Summons and order the Reports to be expunged with costs to the defendant, including the costs of reviewing and considering Dr Chu’s Supplemental Report and Dr Chiu’s Psychiatric Report and the costs of the application, including but not limited to the costs of the defendant’s solicitors’ letter to the plaintiff’s solicitors dated 15 October 2021, such costs to be taxed if not agreed.

( Andrew SY Li )

District Judge

Mr Tim Wong, instructed by H. Y. Leung & Co. LLP for the plaintiff

Miss Chung Hiu Yee of Howse Williams for the defendant