# DCPI 1054/2019

[2021] HKDC 77

**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: 24 December 2020

Date of Decision: 24 December 2020

Date of handing down Reasons for Decision: 25 January 2021

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REASONS FOR DECISION

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*INTRODUCTION*

1. This is a case management matter in relation to the filing of medical reports and/or expert medical reports in the context of a medical negligence case.
2. On 29 October 2020, the defendant issued a summons to, *inter alia*, request the plaintiff to file and serve the medical reports within the meaning of Order 18, rule 12(1C) of the Rules of the District Court (“the RDC”) (“the Medical Reports”) and expert medical reports as to liability and causation[[1]](#footnote-1) (“the Expert Medical Reports”) and for specific discovery (“the Summons”).
3. In the Summons, the defendant sought an “unless order” for the plaintiff to file and serve the Medical Reports and the Expert Medical Reports and for corresponding extensions of time to be granted to the defendant for the filing of the Defence and Mediation Response.
4. At the end of the hearing on 24 December 2020, I found in favour of the defendant and made the following order:-

“1. The plaintiff do 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;

2. The plaintiff shall provide specific discovery of the documents requested in the letter from the defendant’s solicitors dated 14 December 2020 (“Letter”) on or before 31 March 2021 by:

(a) serving a second supplemental list of documents in regard to the class or classes of documents which are in her possession, custody or power; and/or

(b) in regard to documents which are not now nor have at any time been in her possession, custody or power, she shall file and serve an affidavit which states whether she has now, or have at any time had in her possession, custody or power any or each of that class or classes of documents specified in the Letter, and if any of the documents has or have been, but is or are not now in her possession, custody or power, stating when she have parted with the same, what has become of the same, and the steps she has taken to locate the documents;

3. Unless the plaintiff complies with paragraphs 1 and 2 within the prescribed periods, her claim shall be struck out;

4. The defendant’s deadline to file and serve his defence shall be extended until 28 days after the plaintiff complies with paragraph 2 of the Order;

5. The defendant’s deadline to file and serve his mediation response shall be extended until 42 days after the plaintiff complies with paragraph 2 of the Order;

6. The deadlines for the plaintiff to file her reply and for parties to file and serve lists of documents and witness statements on facts as set out in the Order of Master Matthew Leung dated 21 September 2020 shall be extended accordingly;

7. The Checklist Review hearing of 2 March 2021 to be vacated and adjourned to 11 June 2021 at 9:30 a.m. in Court no.8 before His Honour Judge Andrew Li (with 1 hour reserved); and

8. Costs of and occasioned by the Summons be to the defendant, to be summarily assessed.”

1. I said I would give the reasons for my decision in due course. Here are the reasons.

*BACKGROUND*

*The plaintiff’s claim*

1. In the statement of claim (“the SoC”), the plaintiff claims that the defendant had allegedly failed to provide active periodontal treatment from 18 June 2008 to 22 March 2016 to her: (See §§6 and 9 of the SoC). The alleged injuries include “serious personal injuries and pain to her tooth 27”; “advance periodontal bone loss” and “depression and panic”.
2. §6 of the statement of damages (“the SoD”) contains the following list of psychiatric issues allegedly suffered by the plaintiff which was supposed to have been 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, eg 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."

*History of the plaintiff’s claim and the Summons*

1. The plaintiff first issued a writ and general indorsement of claim on 21 March 2019 for alleged negligent dental treatments given by the defendant to her on 22 March 2016.
2. There had been no less than 6-7 *ex parte* applications by letter or summons on the part of the plaintiff to postpone the service of the writ and the adjournment of the checklist review hearing based on the reason that her claim was “pending investigation and seeking expert report on liability”.
3. The writ was eventually served on the defendant on 27 August 2020 after directions were given by Master Matthew Leung (“Master Leung”) on 26 August 2020.
4. The acknowledgment of service was filed by the defendant on 31 August 2020.
5. On 21 September 2020, Master Leung gave case management directions, including, *inter alia*, directions regarding filing and serving “the Statement of Claim, Statement of Damages and 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 5 October 2020” (“Master Leung’s Order”).
6. On 5 October 2020, the plaintiff filed and served the SoC and the SoD. She also filed and served the report of Dr Wong Sing Yan Philip, a periodontist[[2]](#footnote-2) dated 28 April 2017 (“Dr Wong’s Report”) at the same time.
7. On 22 October 2020, the defendant wrote to the plaintiff and reminded her that Dr Wong’s Report does not comply with Order 18, rule 12(1A) of the RDC or Master Leung’s Order.
8. On 27 October 2020, the plaintiff wrote to the defendant and disclosed the report of Dr Chu Cho Shun Frederick, a prosthodontist dated 27 August 2020 (“Dr Chu’s Report”), allegedly by way of “voluntary disclosure”.
9. On 28 October 2020, the defendant wrote to the plaintiff and enquired why Dr Chu’s Report was not provided to them earlier and asked for the extension of the deadline to file the defence as a result.
10. The plaintiff did not reply.
11. On 29 October 2020, the defendant issued the Summons.
12. The Summons was originally fixed to be heard before me on 19 November 2020.
13. On 3 November 2020, the plaintiff filed and served Dr Chu’s Report without leave of the Court or notice to the defendant.
14. On 4 November 2020, the defendant wrote to the plaintiff to enquire why Dr Chu’s Report was not filed and served earlier and enclosed a draft consent summons to vacate the hearing fixed in respect of the Summons.

1. Also on 4 November 2020, which was more than 19 months after the issue of the writ, the plaintiff applied for legal aid.

1. On 6 November 2020, I re-fixed the hearing of the Summons to 24 December 2020 in view of the plaintiff’s application for legal aid and the automatic stay of proceedings which would last until 16 December 2020.
2. On 2 December 2020, the defendant received notification that the plaintiff’s application for legal aid was refused.
3. On 14 December 2020, just 2 days before the automatic stay expired, the plaintiff applied for legal aid again. This time the automatic stay was supposed to last until 25 January 2021. That would have frustrated the adjourned hearing fixed on 24 December 2020. That stay was lifted by me under Section 15(4) of the Legal Aid Ordinance, Cap 91 and I ordered the adjourned hearing fixed on 24 December 2020 to proceed as scheduled.
4. On the same day, the defendant wrote to the plaintiff to ask for various specific discovery. The plaintiff replied and agreed to provide the same on or before 1 March 2021.
5. On 16 December 2020, the plaintiff wrote to the defendant enclosing Dr Chu’s supplemental report dated 4 November 2020 (“Dr Chu’s Supplemental Report”) again by way of “voluntary disclosure”.
6. On 17 December 2020, the plaintiff wrote to the defendant to enclose the report of Dr Chiu Siu Ning, psychiatrist dated 12 December 2020 (“Dr Chiu’s Psychiatric Report”).

*DISCUSSION*

1. In the aforestated circumstances, the plaintiff had only filed and served Dr Wong’s Report with the SoC. She had failed to file and serve Dr Chu’s Report, Dr Chu’s Supplemental Report and Dr Chiu’s Psychiatric Report with the SoC. She tried to serve those reports by way of “voluntary disclosure” which is not something recognised under the RDC or PD.
2. What is significant to note in this case is that Dr Wong’s Report does not deal with the complaints, including the psychiatric condition, alleged by the plaintiff in the SoC and the SoD nor the liability or causation issue of the case. The plaintiff has therefore not complied with Order 18, rule 12(1A) of the RDC or §§53 and 66(5) of PD 18.1 as of the date of hearing of the Summons.
3. The plaintiff also has not complied with Master Leung’s Order which required her to file and serve the Medical Reports and the Expert Medical Reports on or before 5 October 2020.

*Medical reports required to be filed and served with the SoC and the SoD*

1. Under Order 18, rule 12(1A) of the RDC, a plaintiff in a personal injury action is required to serve a medical report with his statement of claim and statement of damages.
2. 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.”
3. Under §53 of PD 18.1, a medical report(s) within the meaning of Order 18, rule 12(1C) of the RDC shall be “filed and served *at the same time* as the statement of claim” [emphasis added].
4. §65(1) of PD 18.1 requires service of a medical report within the meaning of Order 18, rule 12(1C) of the RDC and at least one medical report “must describe the Plaintiff’s condition at a time preferably *no earlier than 4 months* prior to its service thereof;” [emphasis added].
5. §66(5) of PD 18.1 requires that, in all medical negligence cases, a copy of the expert medical report relied upon as to liability and causation will have to be served at the same time of serving the writ and statement of claim.
6. The above requirements for a plaintiff to file and serve his medical report(s) at the same time of filing his statement of claim in a personal injury case (and in a medical negligence case the additional requirement of a report on liability and causation) are mandatory and not optional. They are there for good reasons, namely, to enable the defendant or his insurers to know the nature and extent of the plaintiff’s complaints/injuries and to understand the basis of his claim. They will help to achieve the underlying objectives of the Civil Justice Reform as stated under Order 1A, rule 1 of the RDC.
7. In a medical negligence case, the additional requirement of filing and serving a report on liability and causation will also help to prevent any vexatious or baseless claim against a medical professional whose reputation needs to be protected.
8. Thus, it is crucial for a plaintiff to serve the above medical reports at the time of serving his writ and/or statement of claim, not at a later date or at a date at the convenience of the plaintiff or chosen by his lawyers.

*The plaintiff’s repeated failures in serving the medical reports*

1. It is clear that at the time of issuing the writ in March 2019, the plaintiff did not have *any* medical evidence to support her claim. The only report she had was Dr Wong’s Report which was dated 28 April 2017. But that report only recorded the treatments given to her by Dr Wong as her treating dentist between August and October 2016. It did not address the alleged negligent treatments provided by the defendant.
2. While the Court would be prepared to give some indulgence for a plaintiff and his legal advisers to investigate into his case and to seek medical expert evidence in a medical negligence case, such indulgence must be within reason and should not cause any inordinate delays in the claim itself.
3. In this case, the Court had given the plaintiff more than 18 months to put her house in order. The PI Masters had given multiple extensions to the plaintiff to allow her to find an expert and to serve the writ. Yet despite Master Leung’s Order, the plaintiff still failed to file the Medical Reports and the Expert Medical Reports before the deadline. After the defendant issued the Summons, she then applied for legal aid twice, obviously with the intention to frustrate the hearings fixed for the Summons.
4. As said, the only medical report filed with the SoC on 5 October 2020 was that of Dr Wong’s Report. It did not provide any causative link between the treatments and her alleged injuries. It also did not provide any opinion on her alleged psychiatric condition suffered as a result of the alleged negligent treatments. It also did not comment on the treatments given by the defendant to the plaintiff. This is perhaps not surprising given the fact that Dr Wong was her treating dentist and not her medical expert. Hence, I find the defendant was right to point out to the plaintiff that Dr Wong’s Report did not comply with Master Leung’s Order.
5. Order 18, rule 12(1A) of the RDC and §§65(1) and 66(5) of PD 18.1 require the Medical Reports and Expert Medical Reports to be filed and served at the same time as serving the statement of claim and the statement of damages. They do not recognise such novel concept as “voluntary disclosure” stated by the plaintiff’s solicitors in their correspondence after the event. The plaintiff cannot choose to serve such reports at any time she likes as in the case she did with Dr Chu’s Report, Dr Chu’s Supplemental Report and Dr Chiu’s Psychiatric Report. The plaintiff has to nail her colours to the mast at the time of serving her SoC and SoD as the defendant, particularity in a medical negligence case like the present case, is entitled to know what allegations are being made against him and the precise basis of those allegations.
6. I therefore do not accept the explanations given by Mr Tam, who represented the plaintiff at the hearing, that the delay in filing and serving of the Medical Reports was due to his client’s difficulties in finding an expert. She should have found her expert before she issued the writ or at the latest by the time she served the SoC and the SoD.

1. In this case, the plaintiff was given 18 months since the issue of the writ to find an expert. Yet Mr Tam was not able to tell the Court when did they first start to locate an expert on liability and causation in order to support the plaintiff’s claim. At the hearing, Mr Tam admitted that they had contacted Dr Chu to obtain an expert report in July 2020 only. I note that this was 16 months after the writ had been issued.
2. I also do not accept the delay of filing and serving the Medical Reports and Expert Medical Reports in this case was caused by the defendant in disclosing 2 radiograph records with wrong orientation initially as Mr Tam has argued at the hearing.
3. Given the fact that the 2 radiographs were provided by the defendant under their cover letter dated 15 July 2019, it took the plaintiff more than a year to request the radiographs in the right orientation to be provided to them on 25 August 2020.
4. It is clear that once Dr Chu was found and agreed to act as an expert for the plaintiff, it took him no time at all to point out to the plaintiff’s solicitors that the 2 radiographs were in the wrong orientation. This was quickly put right by the defendant within a couple of weeks. Thus, this could not be the cause of the delay.
5. In the circumstances, I find the defendant had acted properly by issuing the Summons to force the plaintiff to comply with Master Leung’s Order.

*Specific discovery*

1. On a review of the plaintiff’s pleadings, the defendant noticed that a number of documents which relate to the matters in question in this case and which must either currently or previously be in the plaintiff’s possession, custody or power have not been provided.
2. Pursuant to Order 24, rules 3 and 7 of the RDC, the defendant wrote to the plaintiff to request specific discovery on 14 December 2020. Since the plaintiff had agreed to disclose those requested documents on or before 1 March 2021, this matter was not in contention at the hearing. Accordingly, I made an order according to the agreement reached by the parties on this matter.

*CONCLUSION*

1. For the above reasons, I made the Order as set out in §4 above.
2. For the costs of the Summons, having read the defendant’s statement of costs lodged on 7 January 2021 and the plaintiff’s list of objection lodged on 20 January 2021, I have summarily assessed the costs of the Summons in the sum of HK$45,000, such costs to be paid by the plaintiff to the defendant forthwith.

( Andrew SY Li )

District Judge

Mr Tam Kam Tong, of Ellen Au & Co, for the plaintiff

Miss Chung Hiu Yee, of Howse Williams, for the defendant

1. which is required under §66(5) of the Practice Direction (“PD”) 18.1 [↑](#footnote-ref-1)
2. who was her treating dentist [↑](#footnote-ref-2)