# DCPI 1133/2016

[2018] HKDC 742

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1133 OF 2016

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BETWEEN

WONG YIN CHAU Plaintiff

and

HONG KONG ACADEMY OF MEDICINE 1st Defendant

SUN HANG SHING CONSTRUCTION &

DECORATION COMPANY LIMITED 2nd Defendant

MAXIM’S CATERERS LIMITED 3rd Defendant

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

Dates of Hearing: 15 May 2018

Date of Decision: 27 June 2018

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DECISION

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*INTRODUCTION*

1. This is the plaintiff’s appeals against Master SH Lee’s (“the Master”) Order made on 17 April 2018:
2. in refusing to grant leave to allow the plaintiff to file and serve further witness statements, *inter alia*, covering §§64-74 and §80 of the 2nd supplemental witness statement of the plaintiff (“P’s 2nd Supp WS) and witness statement of Li Yat Ching (“Li’s WS”); and
3. in refusing to grant leave to the plaintiff to adduce expert psychiatric report.
4. The plaintiff also sought leave to issue another summons on 10 May 2018 seeking leave to file and serve a re-revised statement of damages (“Re-RSD”) to be heard before me on the same day as the above appeals (“the Re-RSD Summons”). I granted leave to the plaintiff to issue the summons to be heard on the same day as the appeal hearing on 15 May 2018.

*BACKGROUND*

1. This is supposed to be a straightforward personal injury action arising out of a rather simple accident on 6 November 2013. The plaintiff was employed by the 3rd defendant to work as a waitress at the restaurant run by the 1st defendant at the academy. She was hit by a hard object which fell from the ceiling when she was entering the VIP room of the restaurant. The object allegedly had hit her on her right hand and right arm.
2. The plaintiff has been on legal aid since June 2014. In the present proceedings, the writ of summons was issued on 1 June 2016 with the statement of claim filed on 21 June 2016. The defence was filed on 19 July 2016 with a reply filed by the plaintiff on 4 August 2016.
3. Interlocutory judgment has been entered by consent on 15 August 2016, leaving damages to be assessed.
4. The parties have made discovery as early as in October 2016.
5. The plaintiff’s main witness statement (consisted of 43 pages) dated 13 December 2016 was served pursuant to the Order of Master Rita So on 7 November 2016 (“P’s Main WS”).
6. The revised statement of damages (“RSD”) was filed on 9 March 2017. The plaintiff’s supplemental witness statement (consisted of 41 pages) was filed and served on the same day (“P’s Supp WS”).
7. The 1st and 2nd defendant’s answer to the RSD was filed by the defendants on 22 March 2017 (“the Answer”).
8. The notice of assignment of counsel was issued on 23 March 2017.
9. A notice of re-assignment of solicitors assigning the current solicitor to act on behalf of the plaintiff was issued on 12 May 2017.
10. On 31 May 2017, by an Order of the Master, the originally checklist review hearing scheduled for 1 June 2017 was vacated and re-fixed to 28 December 2017. This included a direction for leave to set down for assessment of damages.
11. On 18 January 2018, the plaintiff issued a summons (“the Witness Statement Summons”) seeking leave to adduce P’s 2nd Supp WS and 4 other additional witness statements. On the same day, the plaintiff issed another summons seeking leave to adduce expert psychiatric and/or anaesthesiologist evidence (“the Expert Evidence Summons”)[[1]](#footnote-1).
12. The hearing of those summonses was adjourned to 16 April 2018 for substantive arguments and was heard before the Master on 16 & 17 April 2018.
13. Due to the plaintiff’s last minute applications, the checklist review hearing was further adjourned to 24 July 2018 for management directions or leave to set down.
14. After hearing submissions from the parties, the Master made the following Order on 17 April 2018 in relation to the Witness Statement Summons:

“1. Leave be given to the Plaintiff to file and serve paragraph 1-6, 38-52, 54-63, 77-79, 82(n) & (o), 85 (limited to last 3 entries in 2017), 89, 98(l), (m), (n) (q) & (r), 99(l), (m), (n), (q), & (r) of 2nd Supplemental Witness Statement of the Plaintiff dated 2nd December 2017 annexed to Plaintiff’s summons out of time within 21 days from today;

2. Leave be given to the Plaintiff to file and serve paragraphs 1-12, 16-21 & attachment 1 of Witness Statement of 李一清 dated 23rd October 2017 annexed to the Plaintiff’s Summons out of time within 21 days from today;

3. Leave be given to the Plaintiff to file and serve Witness Statement of Lee Siu Keung dated 25th October 2017 annexed to the Plaintiff’s Summons out of time within 21 days from today;

4. Leave be given to the Plaintiff to file and serve Witness Statement of Ng Kwok Lai dated 25th October 2017 annexed to the Plaintiff’s Summons out of time within 21 days from today;

5. Leave be given to the Plaintiff to file and serve Witness Statement of Ng Kwok Fai dated 25th October 2017 annexed to the Plaintiff’s Summons out of time within 21 days from today;

6. The costs of the hearing of the Summons before Master S.H. Lee on 16th and 17th April 2018 be paid by the 1st and 2nd Defendants to the Plaintiff in any event, to be taxed if not agreed;

7. Subject to Paragraph 6 above, the costs of and incidental to the Plaintiff’s Summons be paid by the Plaintiff to the 1st and 2nd Defendants in any event, to be taxed if not agreed.

8. The Plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations.”

1. Also on 17 April 2018, the Master made the following Order in relation to the Expert Evidence Summons:

“1. The Plaintiff’s Summons to adduce expert evidence of psychiatrist(s) and/or anaesthesiologist(s) be dismissed;

2. The costs of and incidental to the Plaintiff’s Summons be paid by the Plaintiff to the 1st and 2nd Defendants in any event, to be taxed if not agreed; and

3. The Plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.”

1. I shall first deal with the Re-RSD Summons and then the appeals of the plaintiff on the Master’s decisions on the Witness Statement Summons and Expert Evidence Summons.

*(A) The Re-RSD Summons*

1. In my judgment, the so-called Re-RSD was prepared with one thing in mind only, ie to belatedly trying to justify: (1) the contents of P’s 2nd Supp WS and Li’s WS which the Master disallowed the plaintiff to adduce; and (2) the legitimacy of calling expert psychiatric evidence which was refused by the Master.
2. As can be seen from the history of the case, the original checklist review hearing was originally fixed for 1 June 2017. That was postponed by consent. The case was then supposed to be set down for assessment back in December 2017. However, instead of setting it down for assessment, the plaintiff, no doubt under the advice of her legal advisors, suddenly changed course and decided to file the very elaborate P’s 2nd Supp WS (which consists of 40 pages) and 4 other witness statements (with lengthy attachments) on 18 December 2017 in order to boost up her claim. When the defendants’ solicitors refused to accede to the request, the plaintiff issued the Witness Statement Summons on 18 January 2018 which was subsequently heard and decided by the Master.
3. It is to be noted that the RSD was filed and served in this case pursuant to a consent summons jointly submitted by the parties which subsequently was made into the Order of Master Rita So dated 7 November 2016. In the Order, expert evidence directions were agreed to limit to one orthopaedic expert to be appointed by each party only. Nothing was mentioned about the fact that the plaintiff might require expert psychiatric evidence and hence no direction in that regard was sought or given.
4. The original RSD filed on 9 March 2017 is a lengthy piece of document. It consisted of 27 pages and was drafted by the assigned solicitor. Considering the total claim was at HK$577,201 only (that is before the deduction of the employees’ compensation received by the plaintiff at $300,000), this is a rather extravagant document which does not seem to me to be proportionate to the amount claimed at all. The RSD provides full details of the plaintiff’s injuries, treatment received, including the psychological and psychiatric treatments she had received at the Department of Clinical Psychology and Psychiatric Department at Queen Mary Hospital (“QMH”). It further included a claim for (i) future medical expenses; (ii) loss of earning capacity; and (iii) loss of future earnings, although all those 3 items stated are not quantified and stated as “to be assessed” only.
5. In my view, the changes made in the Re-RSD are substantial but not clear. It is substantial because from a 27 page RSD, it has now changed into a 34 page Re-RSD. From a claim of $570,000, it has now increased to a sum of $1.73 million (which incidentally has exceeded the current jurisdiction of the District Court). It is not clear because the changes are not highlighted or underlined as one would expect to find in what effectively are substantial amendments to the RSD. At the hearing, it took the plaintiff’s counsel a long time just to explain to the court what changes had been made in the Re-RSD when comparing it to the RSD. Even then, not all the changes had been successfully identified by the plaintiff’s counsel.

*Ruling on the Re-RSD Summons*

1. I would refuse the plaintiff’s application for leave to file and serve the Re-RSD for the following reasons.
2. First, in my view, judging from the timing and contents, the Re-RSD Summons was issued for an ultimate motive, namely, trying to justify the filing of P’s 2nd Supp WS and other witness statements and the introduction of expert psychiatric evidence. In my judgment, the application for filing of the Re-RSD should be made after the disposal of the appeals of the 2 summonses when the plaintiff would know by then whether the court would allow the remaining contents of the witness statements to be included or introduction of expert psychiatric evidence. It was not fair to ask both the court and the defendants to study such a lengthy document in the eve of the appeal hearing. In my view, the plaintiff was trying to “put the cart before the horse” and have the order of filing her update claims and evidence reversed. If the court allows the filing of the Re-RSD, it will almost inevitably follow that the court should give leave for the plaintiff to file P’s 2nd Supp WS and other witness statements and to adduce the psychiatric expert evidence. This is not right and such practice should not be encouraged.
3. Second, the plaintiff had had plenty of opportunities to put her full claim in the RSD but had failed to do so. The RSD was filed in March 2017. The plaintiff knew about the basis of her claim for future medical expenses, future loss of earning and loss of earning capacity and yet no particulars were provided by her at that stage. If the plaintiff’s intention was to merely update her claim in the Re-RSD, then in my view the proper time to seek leave is after the appeals to the 2 summonses have been heard and before she applies to set down the case for assessment. It certainly should not be sought right before the hearing of the appeals on the summonses.
4. Third, in my judgment, the document should not be done in a completely “revised” format so that nobody (including the plaintiff’s counsel) knew exactly what changes had been made to the RSD. In my view, it should have been made by way of amendments with all the changes highlighted by underlining them in red so that any reader of the document could easily able to identify what are the new or additional claims or changes the plaintiff has made in the Re-RSD. Just like making amendments to any pleadings, the party who wishes to make changes to them should be responsible for bearing the costs in doing that.
5. Fourth, the plaintiff is now making a claim of $1.73 million under the Re-RSD which exceeds the jurisdiction of the District Court. There is no explanation from her counsel as to why he thinks the plaintiff is entitled to do that. Nor is there any plea to say that she will be prepared to waive any recoverable damages exceeding HK$1 million. If the plaintiff has merely put the inflated figure in the Re-RSD purely as a tactic for negotiations, then it is clearly against the underlying objectives of the CJR and should not be allowed.
6. Based on the above reasons, I would dismiss the plaintiff’s Re-RSD Summons with costs to the defendant, such costs to be taxed if not agreed. The plaintiff’s own costs to be taxed in accordance with the legal aid regulations.

*(B) Witness Statement Summons*

1. I was told that the Master has refused to grant leave on those paragraphs of the witness statements under appeal on the ground of irrelevancy. I also note that the plaintiff is not appealing against some of the other paragraphs disallowed by the Master in his Order. Thus, I only need to deal with the following outstanding paragraphs in this appeal.

*(i) §80 of P’s 2nd Supp WS & §§ 13-15 of Li’s WS*

1. §80 of P’s 2nd Supp WS and §§13-15 of Li’s WS try to compare the income of the plaintiff and her co-worker Madam Li Yat Ching (李一清) between 2014 and 2017. Allegedly, they were the only 2 full-time employees employed by the 3rd defendant working at the 1st defendant’s restaurant at the time of the accident. What the plaintiff tries to do is compare the income records of the plaintiff and Li for the 3 years after the accident.
2. The plaintiff then tries to work out the loss of income between 2014 and 2017 by comparing the “reduced” working hours between her and Li after the accident. The plaintiff says that this is at least relevant to the claim of loss of earning capacity and is of substantial probative value.
3. With respect, I do not agree.
4. First, the contents of these paragraphs, with detailed calculations on the difference between the total working hours of the plaintiff and her superior Li, were made clearly with the purpose of forming the basis of a future claim for the loss of pre-trial earnings between 2014 and 2017 and not for the claim of loss of earning capacity. Thus, the submission that it is at least relevant to the loss of earning capacity claim cannot be right.
5. Second, in my view, it is artificial to compare the income of the 2 workers when there are a number of unknown factors which make the comparison at best speculative and at worst meaningless. This included: (i) we do not know what were the income difference between the plaintiff and Li prior to the accident, including whether their working hours were compatible or not; (ii) there would be obvious difference in their duties and responsibilities between Li as the manager and the plaintiff as the assistant supervisor at the time of the accident which would result in different working hours and patterns; and (iii) the difference of working hours after the accident could be due to the change of job and responsibilities of the plaintiff from that of an assistant supervisor to that of an assistant manager.
6. Third, perhaps more importantly, at the time of seeking leave for filing the P’s 2nd Supp WS, this matter has not been pleaded as part of the plaintiff’s case under the RSD. The pre-trial loss of earnings claimed under the RSD was only for the total loss of income during the sick leave period. The claim based on the difference in the working hours between the plaintiff and Li could not be found anywhere in the RSD. Thus, §80 and §§13-15 are irrelevant insofar as they purportedly try to form the basis of a pre-trial loss of earnings claim. This should not be allowed. Otherwise, it acts as an *fait accompli*.
7. Fourth, Mr Lam submits that these new proposed paragraphs are at least relevant to the issue of earning capacity. With respect, that cannot be right also. §81 (1) to (19) of P’s 2nd Supp WS has already covered the “effects” of the injuries extensively and §§49-63 provide the details of why she thinks she is entitled to damages for loss of earning capacity. As such, §80 and §§13-15 are superfluous and cannot be said to be relevant to the issue of loss of earning capacity.

*§§64-70 of P’s 2nd Supp WS*

1. §§64-67 relate to the value of the meals provided by her employer. Mr Lam claims that they are relevant to the loss of earning capacity issue.
2. I do not agree.
3. I can see that this arguably may form part of her claims for loss of income or loss of future income. However, by definition, this cannot form part of the loss of earning capacity claim as the purpose of this is “to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market.”: See *Yu Kok Wing v Lee Tim Loi* [2011] 2 HKLRD 306 at 311I-312G.
4. §§68-70 which relate to the plaintiff’s assertions that she only has secondary school education and why, due to the alleged injuries to her hands, if she were to lose her current job, she could not even able to work in a *‘Cha Chann Teng’* (tea restaurant) or petrol station. And why she thinks she may only able to work in simple jobs as a junior clerk in an unhurried environment.
5. Despite the fact that the claim of loss of earning capacity has only been superficially pleaded in the RSD as “the plaintiff will suffer disadvantage in the labour market by reason of the disabilities resulting from the accident” and the amount “to be assessed”, I am prepared to be generous and allow the inclusion of these few paragraphs as they could be said to be related to the loss of earning capacity claim.
6. However, I do not see why this matter could not have been included earlier in the plaintiff’s Main WS and her Supp WS. Her assigned lawyers had at least 2 opportunities to put their house in order but had failed to do so. As such, I do not see why the defendants should be asked to bear the costs of the plaintiff’s “afterthought” on this issue. In my view, a party does not have the freedom to keep adding new things or materials to their claims, no matter whether they are relevant to the issues in dispute of not, and expect the other side to pay for the costs in preparing them. If they have the opportunity to do so earlier in the proceedings and failed to avail themselves to do that, they should be the party who bear the costs, much like when a party is trying to make amendments to his pleadings.

*§§71-73 of P’s 2nd Supp WS*

1. §§71-72 relate to a new claim for a part-time maid which the plaintiff says she has started to employ from February 2014 onwards. This claim did not feature in the RSD. Thus, these 2 paragraphs are not related to any of her claim made. As such, I think the Master has rightly rejected them.
2. For §73, the plaintiff is merely repeating the contents of the report of the doctor from the Psychiatric Department of Prince of Wales Hospital (“PWH”) dated 4 October 2017. I do not see why that is necessary.

*§74 of P’s 2nd Supp WS*

1. This is a new claim that she may be demoted from that of an assistant manager to a general clerk and therefore will suffer an income deduction from $17,000 per month to $11,000 per month. Mr Lam says that this is relevant to the loss of earning capacity claim. With respect, it is not. In my view, this is purely related to the issue of a possible loss of income claim which has not been pleaded in the RSD. Thus, unless and until the RSD is amended to include this claim, it should not be allowed.

*No other factor not to grant leave?*

1. The plaintiff’s counsel submits that relevancy is not the only factor to consider. He submits that there appears to be no other factor against the admission of the evidence, viz., the admission will not result in the delay of the trial of the action; it appears that it is not prejudicial to the interests of justice; nor is it scandalous or frivolous. In any event, the weight attached to the witness statement is a matter to be decided by the trial judge. Thus, the plaintiff says that if she is not able to depose all the relevant evidence at the trial, justice may be defeated. In this regard, the plaintiff relies on Order 38 rule 2A.

1. With respect, they are not the only considerations.
2. It is a timely reminder of what the underlying objectives of the CJR under Order 1A, rule 1 of the Rules of District Court (“RDC”) are:

“1. Underlying objectives (O. 1A, r. 1)

The underlying objectives of these Rules are—

1. to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
2. to ensure that a case is dealt with as expeditiously as is reasonably practicable;
3. to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
4. to ensure fairness between the parties;
5. to facilitate the settlement of disputes; and
6. to ensure that the resources of the Court are distributed fairly.”
7. Bearing in mind that this claim was originally estimated at $399,578 under the statement of damages and at $577,201 under the RSD only (both before deduction of employees’ compensation of $300,000) and that liability has not been a live issue since judgment was entered by consent in August 2016, this case could have been disposed of in a timely and cost-effective manner. Instead, the plaintiff chose to serve a 41-page long P’s Supp WS in March 2017 and then tried to introduce another 40-page long P’s 2nd Supp WS in January 2018. These are of course on top of the original 43 pages long P’s Main WS. In other words, the plaintiff is filing 3 witness statements under her own name totalling over 120 pages for a relatively simple and straightforward claim. This is on top of the 4 short witness statements she has recently introduced. In my opinion, not only some of the contents of these witness statements are repetitive, they could have been reduced to a much shorter single document.
8. In my judgment, P’s 2nd Supp WS, as well as the 4 other witness statements (which were all prepared without leave of the court), are not necessary and totally disproportionate to the injuries and the claims made in this case. By keep adding new materials and new claims to embellish her case, both the plaintiff and her lawyers are not helping to facilitate the settlement of the dispute. Moreover, by keep postponing to set down the case for assessment and creating “satellite” litigation by producing lengthy witness statements and a new Re-RSD, it totally defeats the whole idea of dealing with the case expeditiously as is reasonably practicable, thus defeating one of the important underlying objectives of the CJR.
9. What is more prevalent is that, in my judgment, most of what the plaintiff has stated in the Supp WS and 2nd Supp WS could have been mentioned at an earlier stage of the proceedings, either in the main witness statement or the RSD or both. Save and except some minor updates on the medical and special damages claims, most of the information, including her psychological and psychiatric treatments, were available or could have been made available to the plaintiff at an earlier stage. In my view, just because there was a change of the assigned solicitor or counsel does not give a free rein to a party to keep adding new witness statements and RSD at any time they like. Not only this will deprive the court’s management powers to ensure that the case will proceed to trial in an expeditious manner (if the same cannot be settled out of court), such practice will only take us back to the dark age before the CJR when parties spent a great deal of time and money in dealing with interlocutory matters rather than focusing on the real issues in dispute. Litigation is there to help parties to resolve their disputes in accordance with their substantive rights and hence achieving justice, it does not exist as a platform to create more work for lawyers.
10. For the above reasons alone, I would have disallowed most if not all the contents of the 2nd Supp WS and the witness statements of all the additional witnesses on the grounds of lateness and disproportionality alone. However, since the Master has very generously allowed them in his decision already, I shall not disturb them now. However, I certainly would agree with his costs order when he disallowed a certificate for counsel as I consider this matter could have been easily able to be dealt with by a solicitor with the appropriate experience and expertise like the assigned solicitor.

*Conclusion on Witness Statements Summons*

1. In conclusion, save from §§ 68-70 of P’s 2nd Supp WS, I agree with the Master that all the rest of the contents of the witness statements under appeal are either not relevant or related to issues currently pleaded under the RSD. Thus, they are inadmissible and therefore should not be allowed. As for §§68-70, there is no good reason in my judgment why they could not have been included in the P’s Main WS or P’s Supp WS previously filed. If the plaintiff wishes to include them now, she should be ordered to pay for the costs of it. I will therefore dismiss the plaintiff’s appeal on the Witness Statement Summons with costs in favour of the defendants. The costs of the plaintiff should be taxed in accordance with the legal aid regulations.
2. Insofar as the appeal touches on the Master’s decision of not granting a certificate for counsel for the hearing on 16 and 17 April 2018, as mentioned above, I see no reason to disturb the Master’s decision on this matter. The Master after hearing the arguments over 2 days on those 2 summonses most likely had thought that the assigned solicitor could have argued the case himself without instructing counsel. He is a better judge on this matter than me as he had heard the matter himself. I have no reason to usurp his discretion on this.

*(C) Expert Evidence Summons*

1. The plaintiff belatedly tried to seek leave to introduce expert psychiatric evidence in the case under the Expert Evidence Summons. The request was rejected by the Master. She now appeals against that decision before me.

*Legal principles in relation to calling of experts after the CJR*

1. The legal principles governing the court’s discretion to grant leave to adduce expert evidence has been succinctly summarized by Mr Justice Bharwaney in *Fung Chun Man v Hospital Authority and Another*, unrep, HCPI 1113 of 2006 (24.6.2011; Bharwaney J):-

“9. The enactment of the CJR did not result in a change to O.38, r.36 of the Rules of the High Court (“RHC”). However, after the enactment of the CJR, it is clear that the court’s discretion, whether or not to grant leave to a party to adduce expert evidence, is to be exercised within the ambit of the court’s management powers. Those powers must be exercised in the light of the underlying objectives of the CJR, including the need to ensure the cost effectiveness of the proceedings; to ensure that the case is dealt with expeditiously; to ensure reasonable proportionality having regard to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party; to ensure procedural economy in the conduct of the proceedings; and to ensure fairness between the parties.

10. The courts recognise that the primary aim of its case management powers is to secure the just resolution of the dispute in accordance with the substantive rights of the parties. However, the  substantive rights of the parties to a personal injury action do not include a legal right to call experts of their choice.

11. The expert evidence can only be adduced with leave of the court and, in deciding whether or not to grant leave, the court must ensure that such evidence is admitted only if it is likely to be of real assistance to the determination of the issues, and that it is adduced in the most effective and economic way consistent with the objectives of the CJR.

12. In this regard, I echo the observations of *Evans-Lombe J* in *Barings PLC v Coopers & Lybrand (No. 2)* [2001] Lloyds Report Bank 85:

“45. Expert evidence is admissible …… in any case where the court accepts there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court’s decision on any of the issues which it has to decide and the witness to be called satisfies the court that he has a sufficient familiarity with and knowledge of the expertise in question to  render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the court if the court takes the view that calling it will not be helpful to the court in resolving any issue in the case justly. Such evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the court is able to come to a fully informed decision without hearing such evidence.”

1. The Court of Appeal in *Mann v Messrs. Chetty & Patel (a firm)* [2000] EWCA CIV 267 proposed 3 questions that ought to be asked before deciding to allow expert evidence:-

“(a) how cogent the proposed expert evidence will be;

* 1. how helpful it will be in resolving any of the issues in the case; and
  2. how much it will cost and the relationship of that cost to the sums at stake.”

14. Chu J, as she then was, referred to *Barings PLC v Coopers & Lybrand* and concluded, in *Wong Hoi Fung v. American Assurance Co. (Bermuda) Ltd.* [2002] 3 HKLRD 507, that the expert evidence must be reasonably required to resolve the issues before the court before leave would be granted to adduce it.

15. In summary, the expert evidence must be in a recognized discipline, reasonably required to enable the court to resolve the issues in dispute, and proportionate.

16. However, even if a *prima facie* case is made out for the admission of expert evidence, in 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: to ensure cost effectiveness and economy, expedition, proportionality, and fairness between the parties. Ultimately, the court strives to do justice between the parties and, in cases where the court permits the parties to call expert evidence, the court strives to ensure a level playing field with fair access to proper experts for all parties.”

1. The same principles can be found in *Bai Siba Kumar v Nishimatsu Construction Company Limited*, unrep., HCPI 883 of 2012 (8.10.2013; Deputy High Court Judge Marlene Ng) where the learned judge has summed them up as follows:-

“37. I repeat my observations in *Ngai Ping Kwan v Choy Yat Hung*[5] citing the guidance by Bharwaney J in *Fung Chun Man v Hospital Authority & anor.*[6] In summary, expert medical evidence must be relevant, necessary and of probative value, ie it is likely to be of real assistance to the determination of the issues or, to put it in another way, it must be reasonably required to enable the court to resolve the issues in dispute. The court also has regard to other circumstances, eg potential disruption to the trial, the prejudice to the other parties, the explanation given for a late application, and these matters have to be considered and weighed in light of and against the underlying objectives. Ultimately, the court strives to do justice between the parties and to secure the just resolution of the dispute in accordance with the substantive rights of the parties.”

*The plaintiff’s application*

1. It is most unfortunate that the plaintiff only saw fit to apply for leave to adduce expert psychiatric evidence so late in this case as there was indisputable evidence that she has been suffering from psychological/psychiatric injuries not long after the occurrence of the accident.
2. The appointment slip of the plaintiff with the PWH shows that, as far back as on 10 October 2014, the plaintiff made her first appointment with the outpatient clinic of the Department of Psychiatry at the hospital. Perhaps due to the great demand in the public health sector, her first appointment with them was fixed almost 3 years later on 28 August 2017 only. In my view, she would not have bothered with making such an appointment in October 2014 if she did not think that she was suffering from some form of genuine psychiatric illness.
3. In the report of the clinical psychologist of the Department of Clinical Psychology at QMH dated 25 July 2016, it has been recorded that the plaintiff was referred by the Department of Anesthesiology at QMH for counselling for a low mood and passive pain coping as far back as on 8 October 2015. This was less than two years after the accident. She was seen by the clinical psychologist for 5 sessions between January and June 2016.
4. During the interviews, the plaintiff reported to the clinical psychologist that she suffered onset of low mood since six months after the accident, which lasted for one year. She had experienced low and irritable mood with crying, insomnia, significant reduction of appetite and weight loss of 20 pounds, social withdrawal, and worries about the pain problems. She also expressed frustration towards the loss of potential promotion opportunity at work if she could not resume normal duties. She also worried that she might have to rely on analgesics to maintain her physical and mental functioning in the long run because her ability to concentrate was impaired by chronic pain.
5. It has also been recorded in the same report that the plaintiff’s mood had improved in the 6 months prior to the date of the report due to her increased acceptance of pain and numbness as well as adaptive adjustment of expectation on recovery. However, from April 2016 onwards, it has been recorded that the plaintiff started to encounter stresses from the compensation procedures. Her mood turned to low and she had lost motivation to move on to manage her pain. However, it was said that her job and daily functioning were largely maintained.
6. The clinical psychologist conclusion is that the plaintiff had previously suffered from adjustment disorder relating to pain and perceived loss of career prospects from the accident. However, her condition has been stabilized although she still continued to encounter stress reaction relating to her accident assessment and compensation procedures. She was recommended to continue to receive psychological treatment to facilitate her pain coping.
7. In the report of Dr Larina Yim of the Department of Psychiatry at PWH dated 4 October 2017, it has been recorded that the plaintiff first attended the outpatient clinic on 28 August 2017. On that occasion, she presented herself with depressive symptoms since 2013. Besides the physical condition, she reported to have developed sense of uselessness, insomnia and social withdrawal. Despite her pain, she still went to work regularly. Antidepressants and analgesics were prescribed. She last attended the clinic on 27 September 2017. Dr Yim confirms that the plaintiff suffered from depression which requires drug and outpatient follow-up treatments. She opines that the pain and depressive symptoms may have affected her work performance.
8. The above opinions of the clinical psychologist at QMH and the psychiatrist at PWH are supported by the opinion of Dr Stanley Wong, an assistant professor at the Department of Anaesthesiology at QMH. In his report dated 3 October 2017, Dr Wong reported that the plaintiff, besides suffering from chronic neck pain, cervicogenic headache and myosfacial pain, also suffers from the lack of sleep due to the pain she experienced. She was referred to the psychiatrist for depression and also to the clinical psychologist for pain management. It is interesting to note that Dr Wong recorded that the plaintiff had initially coped passively as demonstrated by leaning back and staying in a closed room in response to pain. She also showed fear avoidance behaviour and felt helpless in her situation. She also became socially withdrawal.
9. In my view, all the above are classic signs of psychological/psychiatric conditions which have only manifested themselves after the accident in November 2013. There is no evidence to suggest the plaintiff had suffered from any of those symptoms prior to the occurrence of the accident. Further, as 2 of these reports have been obtained only recently in October 2017, it would be difficult for the plaintiff’s assigned lawyers to decide whether to engage psychiatric expert evidence before such reports from the government hospitals become available.
10. Besides, it is important to note that the plaintiff has pleaded the above psychological/psychiatric condition in the RSD back in March 2017 based on the limited information available to her then.
11. Further, at least one of the orthopaedic experts who had jointly examined the plaintiff recommended that she should be examined by a psychiatrist.
12. As DHCJ Marlene Ng has stated in *Bai Siaba Kumar, supra*, ultimately the court strives to do justice between the parties to secure the just resolution of the dispute in accordance with the substantive rights of the parties. As such, in my judgment, it will be unfair in the circumstances of this case to deprive the plaintiff the opportunity to adduce psychiatric expert evidence to support this aspect of her claim. It is clear that she has displayed classic psychological/psychiatric symptoms since the early days of her injuries after the accident. Such condition required regular treatments at both the Department of Psychology at QMH and Department of Psychiatry at PWH. The plaintiff is still receiving treatment at the above hospitals.
13. Ms Angela Leung, the solicitor who represented the defendants at the hearing, submits that the plaintiff has failed to establish any prima facie case of the causation between the plaintiff's depression (mood problem) and the subject accident. With respect, I cannot agree with such submission. The issue of causation will be a matter of opinion to be commented on the by expert psychiatrists and not for the court to decide without the benefit of the assistance of such expert evidence at this stage.
14. Ms Leung further submits that the court can still properly assess the plaintiff's psychiatric problems on the basis of the government reports from PWH and QMH. Again, with respect, I cannot agree with this also. The reports from PWH and QMH, eventhough are helpful, do not serve the functions of that of an expert report which would assist the court to understand the plaintiff’s condition and the issue of causation in a more in-depth level.
15. Ms Leung also submits that there is no medical evidence to prove the alleged worsening of depression was caused by the subject accident. In my opinion, this is a matter which should be left to be explored by the psychiatric experts.
16. Lastly, Ms Leung submits that the plaintiff has presented herself with depression symptoms since 2013 (according to the medical report of Dr Larina Yim of Department of Psychiatry of PWH dated 4October 2017), however, the plaintiff has failed to take out any application seeking leave to adduce psychiatric report until January 2018. That is true. However, in my judgment, the plaintiff should not be punished due to the incompetence or inefficiency, if any, of her assigned lawyers. In any event, Dr Yim’s report was only available in October 2017.
17. In the aforestated circumstances, I consider that the plaintiff’s appeal on the expert evidence summons contains some merits and that psychiatric expert evidence is reasonably required to assist the court to determine one of the important issues in this case. I therefore would allow the appeal and set aside the order of the Master dated 17 April 2018 including the costs order contained therein. I shall grant leave for the plaintiff to adduce psychiatric expert evidence in this case.
18. I shall make the following management directions in regard to the adduce of psychiatric evidence:-
19. expert psychiatric evidence be limited to one psychiatric expert for each party;
20. within 14 days from today, the parties shall write to the PI master on the following:
21. state the names of the parties’ respective psychiatric expert;
22. state the deadline for conducting joint examination of the plaintiff by the parties’ respective psychiatric expert;
23. state the deadline for compiling the joint psychiatric report by the parties’ respective psychiatric expert;
24. propose directions for obtaining joint psychiatric expert report;
25. state whether it is expected that the RSD and the Answer may have to be further revised or amended;
26. if so, propose directions for leave to further revise or amend the RSD and the Answer;
27. propose all necessary and appropriate directions up to stage of setting the case down for assessment of damages, including preparing the trial bundle index; and
28. prepare a draft joint proposed case management directions no less than 14 days before the adjourned checklist review hearing scheduled on 24 July 2018 at 10:30 am in Court 14 for the court’s approval.
29. In respect of the costs of the appeal on the Expert Evidence Summons, in my view, there is no reason why the costs should not follow the event. I therefore grant a costs order nisi that the 1st and 2nd defendants do pay the plaintiff’s costs of the appeal to be taxed if not agreed and the plaintiff’s own costs to the taxed in accordance with the legal aid regulations. As to the costs below, I see no reason why 1st and 2nd defendants should not also bear those costs since they have failed to resist the appeal. However, I shall not disturb the Master’s discretion in not granting a certificate for counsel for the hearing below. The plaintiff’s own costs at the hearing below shall be subject to taxation under the legal aid regulations also. In the absence of any application to vary the costs order, it will become absolute within 14 days after the handing down of this decision. For this summons, I recognise that it involved more substantive arguments on the law and a number of authorities have been cited by the plaintiff’s counsel at the hearing. I shall grant a certificate for counsel for the appeal hearing of this particular summons only.

*CONCLUSION*

1. Based on the reasons set out above, I shall:
2. dismiss the plaintiff’s application for the introduction of the Re-RSD with costs in favour of the defendants;
3. dismiss the plaintiff’s appeal on the Witness Statement Summons of costs in favour of the defendants; and
4. allow the plaintiff’s appeal on the Expert Evidence Summons with costs in favour of the plaintiff with legal aid taxation and certificate for counsel.

( Andrew SY Li )

District Judge

Mr Simon HW Lam, instructed by Victor Yeung & Co, assigned by the Director of Legal Aid, for the plaintiff

Ms Angela Leung, of Deacons, for the 1st and 2nd defendants

1. The plaintiff had abandoned the request for the anaesthesiologist report/evidence before the Master and hence the request before the Master and at the appeal hearing was confined to one seeking for psychiatric evidence only. [↑](#footnote-ref-1)