#### DCPI 1148/2014

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1148 OF 2014

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| BETWEEN | LAU KWAI CHIU  KWAN CHING ELVINA  RAY TSOI  VALERIE TSOI (a minor) suing by his father and next friend RAY TSOI  MICHAEL EMILY TSOI (a minor) suing by his father and next friend RAY TSOI | 1st Plaintiff 2nd Plaintiff  3rd Plaintiff  4th Plaintiff  5th Plaintiff |
|  | and |  |
|  | WONG HOK CHEUNG | Defendant |
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Coram: Deputy District Judge L C Cheng in chambers (open to public)

Date of Hearing: 23 June 2015

Date of Handing Down decision: 29 July 2015

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DECISION

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*Background*

1. The 4th plaintiff’s claims are for damages for personal injury and loss and damage arising out of an accident happened on 13 August 2013.
2. Proceedings were commenced in May 2014. Interlocutory judgment on liability was entered on 23 June 2014, with damages to be assessed. Statement of damages was filed and served in October 2014.
3. According to the pleaded case of the 4th plaintiff, she suffered from adjustment disorder with anxiety and claimed for PSLA, loss of earning capacity, special damages, future medical expenses, interest and costs.
4. The 4th plaintiff intended to adduce a report by Dr Fung Wai Choy Richard dated 1 October 2014 (“Dr Fung’s report”) in support of her case whereas the defendant objected. It ended up that a summons was issued before master applying for leave to adduce Dr Fung’s report and for various directions for expert evidence. On 23 April 2015, the master dismissed the summons. The 4th plaintiff appealed against the master’s decision. Now, I am dealing with this appeal.

*The appeal*

1. I shall treat this appeal as an actual rehearing of the application (see *Hong Kong Civil Procedure,* 2015, Vol 1, paragraph 58/1/2).
2. At the beginning of this appeal, Mr Lau, counsel for the 4th plaintiff, told me that paragraphs 8 and 9 of Dr Fung’s report would be redacted. He submitted that Dr Fung’s report would certainly be a medical report after redaction and could be adduced as evidence and as the ground for adducing expert psychiatric evidence.
3. Ms Chan, solicitor for the defendant, submitted that no matter paragraphs 8 and 9 were redacted or not, Dr Fung’s report was an expert report and should not be adduced. She further submitted that even if Dr Fung’s report could be adduced after redaction, no further expert evidence would be required.

*Medical report and expert report*

1. A medical report by a treating doctor is different from an independent expert report. A psychiatrist offered psychiatric treatment to a plaintiff usually provides documentary testimony regarding the psychiatric treatment provided, and as is usual for a treating doctor in rendering a treatment medical report.
2. Independent psychiatric examiners with forensic expertise do not have doctor-patient relationship with a plaintiff.  They usually gathered relevant data from treatment medical records and conducted forensic examination for the purpose of rendering expert testimony that requires objectivity regardless of the plaintiff’s wishes.  The formulation of such psychiatric expert opinion requires analysis of the data gathered and testing by alternative hypothesis. Therefore, it is not normally expected for the psychiatrist clinician to seek corroboration of a patient’s information or complaint to the same extent as will a forensic examiner.  On the other hand, a clinician’s treatment medical report is primarily based on the subjective symptoms reported to him by the patient (or other family members) and not on his independent forensic investigation.
3. Bharwaney J in *Hung Sau Fung v Lai Ping Wai* [2012] 1 HKLRD 1, said at p28 as follows:-

“A report of a treating doctor is always admissible to prove the fact that the injured person was receiving treatment, the nature of that treatment, and the opinion and diagnosis of the treating doctor which was communicated to the injured person.  These are all matters of fact.  Whilst the diagnosis reached and the treatment plan recommended by the treating doctor is the product of his expertise, his diagnosis and treatment plan and their communication to the injured person is a matter of fact.  However, the opinions expressed by the treating doctor in his report are not admissible as expert evidence unless leave to admit it for that purpose has been obtained from court.  That principle is easy to state but sometimes difficult to apply.  It is often a difficult and time consuming exercise to redact parts of a treating doctor’s report containing his expert opinion, which is admissible only with the leave of court, from those parts of the same report setting out his diagnosis and the opinions he has expressed to his patient, which are always admissible as matters of fact.”

*Dr Fung’s report*

1. Mr Lau submitted that at all material times, Dr Fung’s report was not intended to be filed as expert psychiatric evidence. Rather, it only serves as the indicia of psychological component of the injuries suffered by the 4th plaintiff, justifying why expert opinion is needed for the assessment of the quantum of damages.
2. Before I embark on a further discussion as to the nature of Dr Fung’s report, I shall make it clear that among the various correspondences disclosed in this appeal, some of them were marked as “without prejudice”. I addressed this observation to Mr Lau and Ms Chan. Both of them confirmed that all “without prejudice” matters had been deleted from those correspondences and they had no objection for me to read those edited correspondences. I am therefore satisfied that I can read those edited correspondences. In fact, I did not find any “without prejudice” matters left undeleted.
3. After going through all the correspondences, I accept that the primary purpose of Dr Fung’s report was intended to be served as a medical report, rather than an expert psychiatric report.
4. By letter dated 21 October 2014, Winnie Leung & Co, solicitor for the defendant, acknowledged receipt of Dr Fung’s report together with the statement of damages and queried whether the plaintiffs treat the same as psychiatric treatment or expert report.
5. Holman Fenwick Willan, solicitor for the 4th plaintiff (as well as all other plaintiffs), replied through a fax dated 21 October 2014 and stated clearly that:

“Dr. Fung Wai Choy Richard is not the 4th and 5th Plaintiff’s expert. The reports prepared by Dr. Fung are the 4th and 5th Plaintiff’s medical reports.”

1. By another fax dated 4 November 2014, Holman Fenwick Willan stated that :

“reports of Dr. Fung …… are admissible and should be adduced as medical reports”

1. In both faxes, Holman Fenwick Willan also suggested the defendant to appoint psychiatric expert to examine the 4th plaintiff.
2. From the correspondences, the stance of the 4th plaintiff was unequivocal. Dr Fung’s report was merely intended to be adduced as a medical report.
3. More important, the context of Dr Fung’s report could be regarded as a medical report after redaction.
4. In Dr Fung’s report, it started with the heading “Medical report of [the 4th plaintiff]”. In paragraph 1, it stated that the 4th plaintiff attended for “psychiatric assessment” on 27 September 2014. It further stated that the 4th plaintiff was “diagnosed with Adjustment Disorder With Anxiety”. In subsequent paragraphs, it mentioned the personal background, the road traffic accident and the psychiatric condition of the 4th plaintiff after the accident.
5. Ms Chan commented that Dr Fung’s report served no assistance to the court in any event. She doubted if Dr Fung simply received information from the 4th plaintiff’s mother, who, according to Dr Fung’s report, acted as an informant. However, paragraph 7 of Dr Fung’s report clearly stated “mental state examination on 27th September 2014”. From reading Dr Fung’s report, I accept that Dr Fung had examined the 4th plaintiff on 27 September 2014.
6. Ms Chan further commented that the 4th plaintiff did not attend any psychological or psychiatric treatment prior to saw Dr Fung. By the time when the 4th plaintiff saw Dr Fung on 27 September 2014, it was already 13 months after the accident. Ms Chan said that Dr Fung did not treat the 4th plaintiff and therefore Dr Fung’s report failed as a treating doctor report.
7. I do not agree with Ms Chan’s submission. Dr Fung did not prescribe any medicine nor suggest any further treatment apparently because he found that the 4th plaintiff has been recovered. It is a medical finding arrived at after medical examination. The “injury” allegedly sustained by the 4th plaintiff was not a physical injury, like a fracture or a wound, requiring immediate treatment. It related to the mental condition.
8. I think that is a matter for the trial Judge to determine what weight, if any, could be attached to Dr Fung’s report. It might well open to challenge if Dr Fung’s report is reliable. But it is a matter for trial.
9. I agree that paragraphs 8 and 9 of Dr Fung’s report were expert opinion for the 4th plaintiff’s case. But Mr Lau confirmed that those paragraphs would be redacted.
10. In fact, Dr Fung’s report was very short. It had only 4 pages. At page 4, Dr Fung stated that he is a specialist in psychiatry and listed out his qualification. Unlike the usual expert psychiatric report, Dr Fung did not contain any declaration as to his understanding of the duty as an expert to court.
11. In appropriate circumstance, after redacted the opinion expressed by the treating doctor in his report, those report become admissible (see *Lau Mei Wa v Li King Yin and anor,* HCPI 527/2011 (unreported, 13 July 2012)).
12. I therefore find that judging from the context of Dr Fung’s report, after redaction, it is a treating doctor report.
13. In the circumstance, I agree that after redacted paragraphs 8 and 9, Dr Fung’s report is a medical report and could be adduced as evidence. In order to do justice and to ensure fairness, I give leave for the 4th plaintiff to adduce Dr Fung’s report after redaction.
14. Ms Chan submitted that even if I allowed Dr Fung’s report to be adduced as evidence, she objected any order to the effect to excuse Dr Fung from being testified in court. She preferred to reserve the right to call Dr Fung. I agree.
15. I order that the 4th plaintiff do have leave to adduce Dr Fung’s report (after redacted paragraphs 8 and 9) without any order for calling Dr Fung or not.

*Psychiatric expert report*

1. The legal principles on expert medical evidence had been succinctly and clearly stated by Bharwaney J in *Fung Chun Man v Hospital Authority & anor* HCPI 1113/2006 (unreported, 24 June 2011). In short, 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, 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 weighted 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.
2. Each case must be decided upon its own facts. Bharwaney J in *Tang Tak Ping v Kai Shing Construction Co* [2012] 1 HKLRD 1093, 1103 said:

“11. The court’s discretion, whether or not to grant leave to a party to adduce expert psychiatric evidence, is to be exercised within the ambit of the court’s management powers. 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, that its cost is proportionate to the importance of the issue in question and the amount involved, and that it is adduced in the most effective and economic way consistent with the objectives of the Civil Justice Reform.  In *Leung Kang Wai v. Dussmann Service Hong King Ltd.* (HCMP 2098/2011, 29 December 2011), the Court of Appeal refused to grant leave to appeal against the master’s exercise of discretion in what was essentially a case management decision in a case where the causal link between the alleged tort and the psychiatric illness complained of was tenuous, the cost of obtaining such evidence was disproportionate, and the grant of leave to adduce such evidence would be contrary to the need to ensure cost efficient and speedy resolution of the personal injury litigation in that District Court case.

12. In other cases, such as the recent case of *Maxwell v. Keliston Marine (Far East) Ltd. & Anor* (HCPI 945 of 2003, 20 January 2012) and this one, where the treating doctor simply makes a bald assertion that the depression or other psychiatric condition was caused by the alleged tort, the court may require the assistance of a forensic assessment by an expert psychiatrist before it can be satisfied that a causal link between the tort and the psychiatric illness has been established.  Even so, the court should not grant leave, if the cost of obtaining such evidence was disproportionate and the grant of leave to adduce such evidence would be contrary to the need to ensure cost efficient and speedy resolution of the action.”

1. In the present case, taking all the circumstance in consideration, I decide that psychiatric expert evidence is likely to be of real assistance to the determination of the case of the 4th plaintiff. Dr Fung’s report stated that :-

“On examination, [the 4th plaintiff] was diagnosed with Adjustment Disorder With Anxiety” (paragraph 1)

1. That was Dr Fung’s finding. Mr Lau submitted that Dr Fung’s report served as the ground for calling psychiatric expert evidence.
2. I have decided that after redaction, Dr Fung’s report would be adduced as evidence. The main crux of the 4th plaintiff’s claim was whether or not she, as a resulted of the accident, suffered from any adjustment disorder with anxiety. The question of causation between the accident and the adjustment disorder of the 4th plaintiff, if any, is essentially a question of fact for the trial judge to determine, assisted by the evidence of the medical experts and the evidence of the 4th plaintiff and her mother. Ms Chan submitted that the causation between the accident and the psychiatric illness would not be challenged and therefore Dr Fung’s report would be sufficient for assessment of damages. I do not agree. In this case, the first question is whether or not the 4th plaintiff suffered from any illness. Causation between the illness and the accident is another question. I think that an independent expert psychiatric opinion is necessary.
3. There is no evidence to suggest that the cost of obtaining an expert psychiatric report is disproportionate. This case is still at an early stage. The primary aim of the court’s case management powers is to secure the just resolution of the dispute. After taking all circumstance into account, I order that an expert psychiatric report to be adduced. A single joint expert would be preferable but in case both parties cannot come to an agreement, both parties can appoint their respective psychiatric expert. In light of Dr Fung’s diagnosis of the 4th plaintiff, I do not consider him an appropriate psychiatrist to prepare an expert report in this case.
4. I understand that the scheduled CLR hearing was vacated pending this decision. Parties should therefore write to the PI master seeking further directions as soon as possible and in any event within the time limit set below.

*Conclusion*

1. In the circumstance, appeal is allowed in that the order of master dated 23 April 2015 be set aside with the following orders:
2. The 4th plaintiff do have leave to adduce Dr Fung’s report after redacted paragraphs 8 and 9.
3. The 4th plaintiff and the defendant do appoint their respective psychiatric expert or a single joint psychiatric expert.
4. The medical examination by the psychiatric expert(s) or the single joint psychiatric expert be taken place within 2 months after the order to be made herein.
5. The 4th plaintiff do lodge the psychiatric expert report with court within 14 days after the issue of the same.
6. The 4th plaintiff and the defendant do jointly report to the PI master in writing to seek for consequential direction within 28 days after the issue of the psychiatric expert report.

*Costs*

1. Generally, costs follows event. However, this appeal was successful on the basis upon redaction of paragraphs 8 and 9 of Dr Fung’s report. At the beginning, Dr Fung’s report was served to the defendant without redaction. It is true that the skeleton submission by the 4th plaintiff’s solicitor for the hearing before master did state that certain part of Dr Fung’s report could be redacted. Still, it was not clear as to which particular part should be so redacted. Mr Lau fairly conceded that at no time prior to the hearing of this appeal had the defendant and the court were informed that paragraphs 8 and 9 of Dr Fung’s report would be redacted. That stance was not even clear in Mr Lau’s written submission for this appeal. Mr Lau agreed that had a bearing on costs.
2. On one hand, it was not until the hearing of this appeal that Mr Lau told me that paragraphs 8 and 9 of Dr Fung’s report would be redacted. On the other hand, at the end of the day, the 4th plaintiff is the ultimate winner in this appeal. But taking all the circumstance into account, including particularly that it was only during the appeal hearing that Mr Lau made it clear that paragraphs 8 and 9 would be redacted, I do not think that the 4th plaintiff should be entitled to any costs. Although I am satisfied that counsel certificate should be granted in this appeal hearing, I decide that on *nisi* basis, there be no order as to costs for and occasioned by both the hearings before master and for this appeal. The cost order shall become absolute in the absence of application within 14 days to vary.

L C Cheng

Deputy District Judge

Mr Lawrence Lau, instructed by Holman Fenwick Willan for the 4th plaintiff

Miss Chan Wai Ling, of Winnie Leung & Co for the defendant