## DCPI 1665/2011

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 1665 OF 2011

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BETWEEN

LEE CHUI YING 1st Plaintiff

(Discontinued)

CHEUNG MAN KOK 2nd Plaintiff

and

CHAN YEE LING ELAINE（陳綺玲） Defendant

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Before : Deputy District Judge Winnie Tsui in Chambers (Open to Public)

Date of Hearing : 7 October 2015

Date of Decision : 16 November 2015

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DECISION

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*Introduction*

1. This is the defendant’s appeal against Master J Chow’s decision refusing leave to adduce expert evidence of a psychiatrist.

*Factual background*

1. The action arose out of a scuffle which took place in the office of a law firm on 30 July 2011 (“the Incident”). The second plaintiff and the defendant were both practising solicitors – the former the principal partner of the firm and the defendant its associate at that time. (The first plaintiff, an employee of the firm, had earlier discontinued her claim against the defendant.)
2. According to the defendant, shortly prior to the Incident, she served notice to terminate her contract with the firm. On the day of the Incident, the defendant was in the office. While she was in a conference room with the second plaintiff, there was some pulling and tugging at a recycled bag carried on the defendant’s shoulder as the second plaintiff was trying to seize the bag which the latter alleged contained documents belonging to the firm. Both the second plaintiff and the defendant claim that they were hurt during the scuffle.
3. The writ was issued in August 2011.
4. The second plaintiff claims that as a result of the Incident, she suffered injuries and seeks damages in the sum of $100,000.
5. The defendant counterclaims that as a result of the Incident, she sustained injuries to her neck and shoulders, scratches to her right arm and a fractured tooth. Further, shortly afterwards, she showed signs of “insomnia, nightmares, headache, unstable mood and [had] frequent flashback experience”. She experienced “feelings of helplessness, hopelessness and lack of confidence”.
6. In her revised statement of damages dated 5 November 2013, it was pleaded that she still suffered from a number of psychiatric symptoms, including persistent depressed mood, loss of energy, lack of motivation, fatigue, loss of interest in activities, avoiding friends, loss of trust in other people, insomnia and related sleeping problems, impairment of concentration and memory, feeling detached from friends, severe nausea after taking medication, loss of confidence and flashbacks and nightmares of the Incident, avoidance of repeating the thoughts or conversations about the Incident.
7. The defendant counterclaims damages of around $1.3 million but states that she will waive any damages awarded in excess of the District Court’s monetary jurisdiction of $1 million.

*Psychiatric evidence presently available*

1. In respect of her alleged psychiatric illness, the defendant has been receiving treatment since October 2011, ie, shortly after the Incident. In these proceedings, she has made disclosure of a number of reports and medical notes compiled by her treating doctors recording the diagnosis and treatments to date.
   1. Starting from August 2011, she attended the Violet Peel General Out-Patient Clinic for her shoulder and neck injuries. In the consultation notes, it was recorded that she was suggested to seek help from a clinical psychologist or psychiatrist in respect of her psychiatric symptoms.
   2. From October 2011 to March 2012, the defendant consulted a psychiatrist, Dr Jenny Tsang. In her report made in February 2015, Dr Tsang stated that back in 2012 the defendant was suffering from active symptoms of depression and that her depression was caused by the Incident. At that time, Dr Tsang recommended a treatment plan of psychotherapy from a clinical psychologist, giving details of the number of sessions required and the hourly fee.
   3. From April 2012 to December 2013, the defendant consulted a psychologist, Dr Rhoda Yuen. In her report made in January 2014, Dr Yuen stated her diagnosis to be post-traumatic stress disorder as a result of the Incident and that “[t]he long term symptoms and disturbance created much distress and impairment in her occupational, emotional and social functioning”. Dr Yuen recommended a treatment programme of “cognitive-behavioral therapy and mindfulness practices for relaxation”, also giving details of the number of sessions required and the fee.
   4. From April to June 2012, the defendant received psychotherapy treatment provided by St John’s counselling services.
   5. From March 2014 to September 2014, the defendant consulted another psychiatrist, Dr Li Derek Seung Yau. The diagnosis was post-traumatic stress disorder and depressive disorder. Dr Li reported that the defendant “could also manage some legal work although not as competent as before”.

*History of proceedings*

1. The writ was issued in August 2011. The defence and counterclaim was filed in October 2011 (which was subsequently amended twice). It should be noted that while the defendant’s own case is that she has started receiving treatment for her psychiatric symptoms as early as in October 2011, she only made her application to adduce expert psychiatric evidence in February 2015, more than three years later.
2. Apart from the above timing concerning her application, two matters are also of importance in the present appeal:-
   1. At the checklist review hearing on 27 November 2013, ie, about three weeks after the filing of the revised statement of damages (which, as noted in §7 above, set out extensively her alleged psychiatric symptoms), both parties elected *not* to adduce expert evidence on liability and medical expert evidence on quantum at trial.
   2. It is common ground that when the defendant’s application to adduce expert psychiatric evidence was made in February 2015, the case was ready to be set down for trial. The only reason that it was not set down was because of the defendant’s application.
3. These matters would clearly be relevant to the determination of the present appeal.
4. I would also record that there appeared to have been some uncertainty as to whether the defendant was indeed pursuing the present appeal, right up to the last moment. At the beginning of the appeal hearing, Mr Henry Fung, counsel for the defendant, was asked to explain why he had not lodged with the court any skeleton submissions prior to the hearing. He informed the court that just two days before the hearing, he was told that the defendant would withdraw the appeal. However, at 3.30pm on the day before the hearing, he was told instead that the appeal would go ahead. As a result, he had not been able to prepare his submissions. At the hearing, he simply adopted the submissions prepared by the counsel who appeared for the defendant before Master J Chow.

*Legal principles*

1. The legal principles governing whether leave should be granted to adduce expert evidence is not in dispute.
2. As explained in Bharwaney J in *Fung Chun Man v Hospital Authority* HCPI 1113/2006, 24 June 2011, the court adopts a two-stage approach.
3. First, it should be determined whether a *prima facie* case is made out for the admission of expert evidence, this means that:-

“The expert evidence must be in a recognised discipline, reasonably required to enable the court to resolve the issues in dispute, and proportionate” (at §15)

1. If so, the court should then carry out a balancing exercise.

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

*Authorities on prima facie case for admission*

1. In determining whether the applicant has made out a *prima facie* case, the guiding criteria are necessity, relevance and probative value, as stated by Suffiad J in *Chan Kwok Ming v Hitachi Electric Service Co Ltd* HCPI 322/2002 and applied in many subsequent cases, including, more recently, by the Court of Appeal in *Leung Kang Wai v Dussmann Service Hong Kong Ltd* HCMP 2098/2011, 29 December 2011 at §§14, 21.
2. The courts have over the years formulated a number of questions in determining whether the above criteria are met.
3. In *Mann v Chetty and Patel* [2000] EWCA Civ 267, Hale LJ posed the following questions (at §17):-

“Clearly, therefore, the court has to make a judgment on at least three matters: (a) how cogent the proposed expert evidence will be; (b) how helpful it will be in resolving any of the issues in the case; and (c) how much it will cost and the relationship of that cost to the sums at stake.”

1. These remarks were made with reference to the relevant English CPR provisions. However, they are accepted to be providing guidance to the Hong Kong courts in this context: see, eg, *Fung Chun Man v Hospital Authority* at §13.
2. As to what is considered to be “helpful” expert evidence, the courts have laid down the following guidance.
3. In *Barings plc v Coopers & Lybrand (No 2)* [2001] Lloyds Report Bank 85, Evans-Lombe J commented on what kind of evidence is “not helpful” (at §45):-

“Evidence meeting this test [of recognised expertise] 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.” (emphasis added)

1. In *Wong Hoi Fung v American Assurance Co (Bermuda) Ltd* [2002] 3 HKLRD 507, Chu J, referring to the *Barings* case, said (at §12):-

“Secondly, the evidence must be relevant, in the sense that it is helpful to the court in arriving at its decision on one or more of the issues to be resolved …”

1. In *Fung Chun Man*, Bharwaney J said that the evidence ought to be “of real assistance to the determination of the issues” (at §11).
2. Accordingly, where there are factual disputes which need to be resolved at trial and expert evidence is sought to be adduced in respect of those issues, one of the prerequisites for admission is whether and, if so, how much assistance or benefit the trial judge can derive from such expert evidence in the discharge of his fact-finding duty. In some cases, the assistance or benefit is clear and obvious and there would be little doubt that such evidence ought to be admitted.
3. However, in other cases, the assistance or benefit may not be readily apparent or may be less easy to gauge or measure, then it may perhaps be instructive to ask the converse question in order to determine the level of assistance or benefit, namely – would the trial judge be prevented from making a sound assessment of the relevant facts or a fully informed decision without the expert evidence; or, would his ability to reach findings of fact be seriously affected without that evidence? If the answer is “No”, it would seem that the evidence would not be considered “helpful” for present purposes. See the approach of Bharwaney J in *Fung Chun Man* at §§39, 40 and 45. And it follows that in such a case, the expert evidence sought would not be necessary, relevant or of probative value and should not be admitted into evidence.

*Approach of courts where psychiatric evidence is sought*

1. Insofar as expert psychiatric evidence is concerned, the court’s general approach seems to be as follows.
2. First, generally speaking, where a party alleges that he has suffered from a psychiatric illness as a result of the tort complained of, the starting point is that the court will “almost invariably” require a clinical psychologist or a psychiatrist to determine whether that is the case and resolve other issues, such as causation: see *Fung Chun Man* at §§23, 24. Accordingly, this is the starting point which I should take in this appeal.
3. Secondly, a distinction ought to be made between factual psychiatric evidence coming from the treating doctors and forensic psychiatric expert evidence. In the latter type, the expert would carry out an impartial evaluation in a forensic context for the purpose of litigation. The objective is to assess the veracity of the claimant’s account of his illness or symptoms – whether they are genuine or not, or whether they have been invented or exaggerated. It has been said that this type of forensic evidence from a medical perspective would often assist the trial judge in the fact-finding exercise: see *Bai Siba Kumar v Nishimatsu Construction Co Ltd* HCPI 883/2012, 8 October 2013, *per* Deputy High Court Judge Marlene Ng, at §§63 to 65.
4. However, whether the trial judge will in fact be assisted by forensic psychiatric evidence would obviously depend on the circumstances of each case.

*Analysis*

1. Applying the above principles, I should first determine whether the defendant has made out a *prima facie* case for the admission of psychiatric evidence now sought by her. If so, the next question is whether I should exercise my discretion to grant leave after carefully balancing the potentially competing factors for and against the application, such as those set out in §17 above.

*First stage – prima facie case for admission*

1. In order to answer the first question, it is important to identify the issues which will arise at trial, insofar as the defendant’s alleged psychiatric injury is concerned. Broadly, they are as follows:-
   1. Did the defendant in fact suffer from any psychiatric injury or condition?
   2. If so, what was the extent of such injury or condition?
   3. Was such injury caused by the Incident?
   4. What would be the reasonable costs of past medical treatments?
   5. What is the prognosis and what will be the costs of future treatment?
2. The resolution of the causation issue will be relevant to the incidence of liability whereas the resolution of the other issues will directly affect the quantum of a number of heads of claims, including PSLA, pre-trial and future medical expenses, pre-trial and future loss of earnings and loss of earning capacity.
3. I should pause here to note that at the hearing, Mr Fung confirmed that the expert evidence now sought is intended to substantiate the defendant’s psychiatric conditions, as presently alleged in the pleadings, and to support her present claim on quantum. The intention is not to rely on the new expert evidence to increase the quantum of her claim, since her counterclaim already exceeds the jurisdiction threshold.
4. As noted in §29 above, generally speaking, expert psychiatric evidence is required in order to assist the trial judge to determine all of the above issues in a case of this nature.
5. In my view, however, there are a number of special features in this case which may justify a departure from this generally adopted position.
6. First, there are already before the court medical reports and notes on the defendant’s condition made by two psychiatrists (namely, Dr Jenny Tsang and Dr Derek Li) and one psychologist (namely, Dr Rhoda Yuen). In these documents, the doctors set out their respective diagnosis of the defendant’s psychiatric condition. These consultations spanned over a long period of time, namely, from October 2011 to September 2014. Both Dr Tsang and Dr Yuen gave opinions on the causation issue and made recommendations on future treatment plan and gave an estimate of the costs involved. Dr Li made a comment on her working capability. See §9 above.
7. Secondly, Mr Ashok Sakhrani, counsel for the second plaintiff, confirmed at the hearing that at trial the second plaintiff would not dispute that the defendant had indeed seen those medical practitioners or that the latter had made the diagnosis as stated in their respective reports. The dispute between the parties at trial would instead focus on the veracity of the complaints of the defendant’s alleged psychiatric symptoms, as she related to her treating doctors.
8. The second plaintiff’s position is that, as confirmed by Mr Sakhrani at the hearing and subsequently in writing, if the trial judge accepts as a fact the truthfulness of those complaints, the second plaintiff would not go behind or challenge the diagnosis or the other opinions made by the doctors as regards causation or future treatment, as there would be no rebuttal evidence for her to do so. (Although it was not made clear at the hearing, I take it that Mr Sakhrani’s confirmation was made without prejudice to the plea that the alleged psychiatric injury was the result of the defendant’s own action in the Incident, or alternatively, the result of reasonable actions by the second plaintiff to protect herself during the Incident.)
9. Given the position of the second plaintiff, it would seem to me that at least insofar as the issues identified in §§33(c), (d) and (e) above and the issue of quantum generally are concerned, if the trial judge finds that the defendant’s complaints are genuine, he will have all the necessary materials to make the rulings, namely, the opinions stated in the existing medical reports. *Further* psychiatric evidence is simply unnecessary for the trial judge to make these factual findings or rulings on quantum. He does not require any further assistance from any further expert report, insofar as these questions are concerned. In my view, the present case can be distinguished from the authorities relied on by the defendant in which the existing medical reports in those cases either did not “fully address” the claimant’s psychiatric condition (as in *Fung Bun Mo v Hong Kong Airport Services Ltd* DCEC 1200/2005, 24 March 2006 at §27) or contained only a “brief account” (as in *Man Yun Fei Angela v Tong Chi Ming* DCPI 2277/2009, 10 August 2011 at §24).
10. I next turn to the issues in §§33(a) and (b) above. These require a determination of the genuineness of the defendant’s symptoms (including the impact of her psychiatric condition on her working ability). While that is ultimately a question of fact to be decided by the trial judge, as discussed in §30 above, the general approach (or starting point) of the court would seem to be one of ready admission of expert psychiatric evidence of a forensic type – see *Bai Siba Kumar*.
11. The expert can be expected to conduct examination or perform tests in order to verify or test the claimant’s symptoms or conditions. His view would assist the court to come to the necessary finding. In fact, this view was echoed by Mr Sakhrani at the hearing when he remarked that unlike physical injuries, psychiatric injuries cannot be “x-rayed” and analysed as such and the treating doctor who is to arrive at a diagnosis of a patient’s psychiatric injuries would very much rely on that patient’s own account of his symptoms. He further commented that for any *further* psychiatric evidence to be useful or meaningful, it has to be in the form of a forensic assessment of the defendant’s condition.
12. In this regard, the presently available reports of the defendant’s treating doctors may not be helpful to assist the trial judge in the fact-finding exercise since the doctors might have made their diagnosis based on the defendant’s own account of events without taking any active step to evaluate the genuineness of the defendant’s complaints in the first place.
13. That is, however, only a general position adopted by the court. I should still consider whether in the present case such forensic evidence can offer real assistance to the trial judge.
14. In this regard, the burden rests squarely on the defendant to demonstrate to the court at this (late) stage what kind of forensic psychiatric evidenceshe wishes to adduce, for instance, what examination or clinical tests can now be conducted, to assist the court to determine the veracity of the defendant’s alleged symptoms. However, the submissions of the defendant, either oral or written, are completely silent on this point. (In fact, it was Mr Sakhrani who first brought up the issue of forensic assessment at the hearing.) The defendant should also satisfy the court on the cogency of such evidence. But there is really nothing before me which sheds any light on how cogent the evidence of a new psychiatrist who is to see the defendant for the first time more than four years after the Incident will be.
15. One must also bear in mind the nature of the alleged symptoms in this case. The defendant is complaining of depressed mood, loss of energy, lack of motivation, insomnia, poor memory, poor concentration and flashbacks and nightmares of the Incident etc – see §7 above. She also complains that she cannot perform her duties as a solicitor as well as before the Incident. It does seem to me that even in the absence of any forensic psychiatric evidence, the court is in a good position to carry out the fact-finding exercise by hearing the defendant give evidence and be cross-examined at trial. This is not a case where the primary complaint relates to any impairment of cognitive function or the like.
16. Therefore I am not satisfied that the trial judge would be seriously affected in his task of resolving the factual issue as regards the issues in §33(a) and (b) by the absence of any further psychiatric evidence. Such evidence would not be reasonably required to enable the court to resolve the issues in dispute.
17. Accordingly, I conclude that the defendant has failed to make out a *prima facie* case for the admission of further psychiatric evidence.
18. It is therefore not necessary for me to proceed to carry out the balancing exercise as required under the two-stage test in *Fung Chun Man*. However, for completeness, I shall briefly set out my view on that.

*Second stage – balancing exercise*

1. I would not have exercised my discretion to allow the further psychiatric evidence sought for the following reasons.
2. First, this is a very late application. It was taken out almost 15 months after the filing of the revised statement of damages. The need for further psychiatric evidence would have been clear to the defendant at least by the time when that document was filed since it set out extensively her alleged symptoms.
3. Secondly, there is no justification for such lengthy delay. The defendant said that her psychiatric symptoms had only become less intense shortly before she took out the summons. To the extent that the defendant is saying that she was not capable of making a decision to seek leave to adduce expert evidence because of her medical condition, I agree with Mr Sakhrani that this allegation is unbelievable. Throughout the relevant time, ie, from November 2013 to February 2015, there were activities going on in these proceedings. The defendant filed the revised statement of damages in November 2013 and a supplemental witness statement (containing 13 pages) in October 2014. Further, she did resume working as a solicitor after the Incident (although she said she could not concentrate and worked only part-time). It is incredible for the defendant to suggest that she had been prevented by her psychiatric condition from making the application when throughout the relevant time, she managed to do so many other things.
4. Thirdly, as noted in §11(a) above, the defendant has previously elected not to adduce expert medical evidence. There is no reason why she should now be allowed to retract that election without any material change of circumstances. Not only has the defendant changed her mind then, she was also blowing hot and cold about whether to pursue the present appeal, as seen in §13 above. Such conduct is certainly not conducive to the expeditious disposal of the proceedings, which is of course one of the underlying objectives under the CJR regime.
5. Fourthly, even though no milestone date has been scheduled, when the application was taken out, the case was ready to be set down for trial. If leave is granted to adduce expert evidence, the trial would necessarily be delayed, which Mr Sakhrani estimated to be in the region of six to nine months. I accept it is a realistic estimate. It is now more than four years after the action was commenced. A further delay is clearly a significant factor against the grant of leave in the balancing exercise.

*Conclusion*

1. For the above reasons, the expert psychiatric evidence sought to be adduced by the defendant ought not to be allowed. I therefore dismiss the defendant’s appeal.
2. I further make an order *nisi* that the defendant pay the second plaintiff’s costs of the appeal, to be taxed if not agreed, with certificate for counsel.

( Winnie Tsui )

Deputy District Judge

Mr Ashok K Sakhrani, instructed by Christine M. Koo & Ip, for the 2nd plaintiff

Mr Henry Fung, instructed by Fongs, for the defendant