DCPI2277/09

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION DCPI 2277 of 2009**

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BETWEEN

MAN YUN FEI ANGELA Plaintiff

And

TONG CHI MING 1st Defendant

CHAN WAI MAN, RAYMOND 2nd Defendant

HONG KONG TRAMWAYS LIMITED 3rd Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Coram: Master J Chow (Open to Public)

Date of Hearing: 20th July 2011

Date of Handing Down Decision: 10th August 2011

DECISION

Introduction

1. The Plaintiff seeks leave to adduce psychiatric expert evidence at trial. The 1st – 3rd Defendants resist on the grounds that it is not relevant, unnecessary and without probative value.
2. I directed the Plaintiff’s solicitors to submit a psychiatric expert report at the Plaintiff’s own risks of costs. The Plaintiff submitted both Dr. Chow Lok Yee’s psychiatric expert report and his supplementary report dated 26th May 2011 and 18th July 2011 respectively (“Dr. Chow’s 1st and 2nd Reports).

Background

1. The Plaintiff was injured in a traffic accident on 19th November 2006 while traveling as a passenger on board the upper deck of a tram driven by the 2nd Defendant (“the Plaintiff’s Tram”). The accident happened when the following tram, which was driven by the 1st Defendant, rammed into the rear of the Plaintiff’s Tram (“the 1st Accident”). Immediately after the accident, the Plaintiff was sent to the A&E Department of Pamela Youde Nethersole Eastern Hospital, she was found to suffer from tenderness over neck and lower back and was subsequently admitted to the Orthopaedic ward of the same hospital (“PYNEH”).
2. The 3rd Defendant was the employer of both the 1st and 2nd Defendants.
3. Despite only minor injuries sustained, both parties appointed Dr. Fu Wai Kee as their single joint orthopaedic expert to examine the Plaintiff. Dr. Fu prepared an expert report dated 28th September 2010 and a supplementary note dated 8th December 2011. The parties agreed to adduce them without calling Dr. Fu to testify. Dr. Fu noted the Plaintiff with psychiatric symptoms, he recommended her to be assessed by a psychiatric expert, the 1st - 3rd Defendants disagreed.
4. It is not in dispute that the Plaintiff encountered another traffic accident on 12th October 2010 while she was on board a rehabilitation vehicle (“the 2nd Accident”). It was sometime after the examination with Dr. Fu and that was why Dr. Fu did not include the assessment of the 2nd Accident. The Plaintiff’s claim herein concerns the 1st Accident only.

The Plaintiff’s Past Medical History

1. The Plaintiff is known to be a psychiatric patient, medical reports from various doctors of treatment and care were submitted.
2. In a medical report written by Dr. Yan Wing Shan of Tuen Mun Hospital, Department of Medicine & Geriatrics dated 17th June 2011, Dr Yan stated the Plaintiff was seen by psychiatrists who considered her to have suffered from “schizoaffective disorder to be in partial remission but there was no PTSD[[1]](#footnote-1) or acute psychiatric problem.”
3. In another medical report written by Dr. Nadasa Liu, a clinical psychologist of the Pamela Youde Nethersole Eastern Hospital dated 27th April 2010, Dr. Liu said she has treated the Plaintiff upon referral from the orthopaedic ward of the same hospital. Apart from the physical injuries complained, Dr. Liu confirmed the Plaintiff was known to psychiatrist for her schizoaffective disorder with delusional features. Dr. Liu said,

“Ms Man [the Plaintiff] denied that she had mental psychological problems. She was mainly concerned about her physical rehabilitation and financial difficulties. She considered social welfare service as more relevant and needed that psychological service.”

“Ms Man had adjustment disorder with anxious mood secondary to the traffic accident. She also had history of schizoaffective disorder but she showed no insight and refused medication.”

“Ms Man was offered supportive counseling, She was followed up once in out patient clinic. She thought she had physical and social issues rather than psychological problems. She did not regard herself as having need for active clinical psychology service….. she was last seen on 26.11.2007. No further follow was arranged in our clinic.”

1. Having said that, there are instances that the Plaintiff refused psychiatric treatments[[2]](#footnote-2).

Dr. Fu’s Recommendation for a Psychiatric or Psychological Assessment

1. Dr. Fu opined, for the minor injuries, the prognosis was good. The Plaintiff does not need further orthopaedic treatments, she is able to return to work and need to take some rests occasionally[[3]](#footnote-3).
2. Dr. Fu further clarified in his supplementary note that

“The kind of minor soft tissue injury, some residual pain is not uncommon but severity should not be as marked as that of Ms. Man. It is well known that for patients suffered from depressive disorders, patients’ perception and tolerance of pain will be distorted. As a result they will have abnormal reaction to their pain. As for Ms Man, I believe she probably has some mild residual pain as a result of the minor soft tissue injury, however, the severe symptoms should be mainly the result of psychiatric problem.”

“For this kind of symptoms that have high non – organic component, the response to orthopaedic treatment such as physiotherapy [treatment] is usually poor. On the other hand, if the psychiatric component is controlled by psychiatrist or psychologist there may be quite significant improvement. That is why I will suggest her to seek psychiatrist or psychologist’s treatment.”

Dr. Chow’s 1st and 2nd Report

1. The Plaintiff submitted Dr. Chow’s 1st and 2nd Report and I have the benefit of reading them. He opined,

“Firstly, Schizoaffective Disorder (DSM code 297.70): She has been diagnosed to be suffering from Schizoaffective disorder since 1996 which was well documented in medial notes of Castle Peak Hospital. It is a pre existing psychiatric condition present before the accident….. All along she [the Plaintiff denied that she had been suffering [from] any mental illness and she had irregular adherence to prescribed drug regime…. The above accident has no adverse impact on her Schizoaffective Disorder [[4]](#footnote-4)”

“Secondly, Adjustment Disorder with Depressed Mood (DSM code: 309.0): Her mood is mildly depressed and irritable. She worries about future work capacity and finance. Her sleep is disturbed by pain. She lacks energy. She has concentration and memory problems. Adjustment Disorder is defined as the development of emotional or behavior symptoms in response to an identifiable stressor. In her case, the physical injury due to the accident has been the cause of her Adjustment Disorder. The pain and physical disabilities and the subsequent employment and financial difficulties have played significant roles as continuing stressors. In her case, the physical pain and disabilities should be very mild given the injury was mild. [[5]](#footnote-5)”

1. Dr. Chow concluded by saying “even though she suffered from a very mild physical injury, the consequence on her pre existing impaired occupational functioning was huge and significant.” Dr. Chow recommended both medication and psychological treatments. [[6]](#footnote-6)
2. The reason for preparing the 2nd Report was because the occurrence 2nd Accident was not brought to the attention of Dr. Chow at time of examining the Plaintiff. Ms Wong, solicitor for the Plaintiff, explained at the hearing that the impact of the 2nd Accident to the Plaintiff was minimal and that was why they have withheld it from Dr. Chow in the outset.
3. Dr. Chow finally revised his opinion in light of the 2nd Accident as follows:

“In her case, the physical injuries of the 1st Accident and the subsequent employment and financial difficulties are the main identifiable stressors that cause the Adjustment Disorder with Depressed Mood. The abovementioned symptoms have their onset occurred before the second accident happened. And the employment and financial difficulties have been present before the occurrence of the 2nd accident….. She has developed Adjustment Disorder with Depressed Mood mainly due to occurrence of [the] 1st Accident. Presence of Schizoaffective Disorder has significantly affected her ability to cope with the unemployment and financial difficulties occurred as a result of the 1st Accident.” [[7]](#footnote-7)

The Plaintiff’s pleaded quantum

1. The Plaintiff pleaded $700,000 under the Pain, Sufferings and Loss of Amenities in her Statement of Damages filed on 6th July 2010. Ms Wong, solicitor for the Plaintiff, did not seek directions to file the Plaintiff’s Revised Statement of Damages as at the date of the argument. She submitted, the Plaintiff will further plead damages for her psychiatric injuries in the Revised Statement of Damages and at most $638,000. [[8]](#footnote-8)

The Defendant’s Objections

1. Ms Li, solicitor for the 1st – 3rd Defendants submitted,
2. Dr. Fu’s recommendation is neutral because he said the Plaintiff should attend psychiatric or psychological treatments, as opposed to be examined by a psychiatrist or psychologist. I.e. an expert report is not relevance and not necessary.
3. The issue of pain, which is subjective, cannot be assessed by a psychiatrist. i.e. an expert report is of no assistance to the Court. The adjustment disorder as diagnosed was not a result of the pain suffered by the Plaintiff. Physical injuries, i.e. the degree of residual pain, as assessed by Dr. Fu previously was minor, what one would expect from a psychiatric expert report to comment on how the pain would affect the Plaintiff.
4. The 1st and 2nd Reports did not resolve issues in respect of the impact of psychiatric factors on the perception or tolerance of pain, they did not add much to reports from doctors of treatment and care. i.e. the expert report lacks probative value.
5. The Plaintiff refused both psychiatric and psychological treatments.

Analysis

1. I shall consider the Plaintiff’s application on the assumption that the Plaintiff has filed her Revised Statement of Damages as those referred to in paragraph 17 hereinabove and the quantum pleaded falls within the District Court jurisdiction.
2. The issue, as in any other application for leave to adduce medical expert evidence in personal injures claim, is whether such evidence is necessary, relevant and with probative value. Whether Dr. Chow’s 1st and 2nd Reports are helpful to the trial judge in resolving issues at trial. i.e. to assist the trial judge to determine damages (if any) on pain, sufferings and loss of amenities; pre and post trial loss of earnings; and special damages.

*Relevance & Necessity*

1. It is the Plaintiff’s burden to produce prima facie evidence to establish relevance of Dr. Chow’s 1st and 2nd Reports. In Farman Khan v. Lau Lai Hong & anor (HCPI 850 of 2008), Fung J decided if a plaintiff is looking for expert evidence over a particular area, he should first consult his treatment doctors, not to the extent of getting a full opinion, but at least some explanation of a possible link with the accident.
2. Our case is distinguishable because the Plaintiff was a known mental patient, she has been suffering from schizoaffective disorder prior to the accident, it is expected that her doctors of treatment and care the medical reports has stated her psychiatric history in their respective medial reports. Therefore, the crucial point is, as Fung J has pointed out in Farman, whether the Plaintiff is able to demonstrate her psychiatric injuries possessed “at least one possible link with the accident”.
3. I am satisfied the Plaintiff is able to meet the requirement laid down in Farman. In Dr. Nadasa Liu’s report dated 27th April 2010, she identified: “Ms Man had adjustment disorder with anxious mood secondary to the traffic accident. She also had history of schizoaffective disorder but she showed no insight and refused medication.”
4. Ms Wong, solicitor for the Plaintiff, also argued the Dr. Chow’s reports are necessary and relevant because it is not desirable for the trial judge to assess quantum only with Dr Nadasa Liu’s brief account. I agree.
5. I find Dr. Fu’s recommendation for further psychological and /or psychiatric treatments and assessments to follow are far from neutral stance.
6. I am satisfied the Plaintiff is able to demonstrate a prima facie case that psychiatric expert evidence is relevant.

*Probative Value of Dr. Chow’s 1st and 2nd Reports*

1. Albeit psychiatrist expert evidence is relevant, the Court has to consider whether such evidence is probative; whether they can be of assistance to the trial judge. If the two reports merely repeated those observations of the doctors of treatment and care without adding anything, even the expert evidence is “relevant”, leave to adduce the two reports should not be granted because it would defeat the purpose of providing assistance to the trial judge.
2. The 1st – 3rd Defendants cited Chan Man Sze v. Chan Siu Wai & anor (HCPI 290 of 2007). Master B Kwan stated the role of the Court at this interlocutory stage as,

“The law requires that, at this interlocutory stage of the proceedings, I look at the report “at face value” only. As explained in para 20 of the Judgment of the former PI Judge in Chan Kwok Ming v. Hitachi Electrical Service Co. (HK) Ltd, HCPI 322/2002, the weight to be attached to the contents be a matter for the Trial Judge.”

1. In Chan Sze Man, Master B Kwan then assessed the contents of the psychiatric expert report together with the government treating doctors and had found the former one did “not add much more to the available information contained in the report of the government psychiatrists.”
2. In our case, Dr. Chow’s stated in his 1st Report that the Plaintiff has suffered from “Adjustment Disorder with Depressed Mood” of which was related to the 1st Accident. After taken into account the impact of the 2nd Accident, he confirmed the same in his 2nd Report with identifiable stressors as (i) physical injuries; (ii) subsequent employment and (iii) financial difficulties. She was found to be particularly difficult in coping with the unemployment and financial difficulties arising from the 1st Accident. In this regard, the opinion is more comprehensive.
3. I aware Dr Chow did not address much on the degree of pain suffered by the Plaintiff, but rather, commented two other “identifiable stressors” i.e. subsequent employment and financial difficulties in the concluding paragraph. It is matter for trial judge to decide whether to attach weight or to reject Dr. Chow’s opinion. At least, at this interlocutory stage, I could not say Dr. Chow’s opinion added nothing to the medical reports written by doctors of treatment and care of government hospitals.
4. Finally, I am unable to find a person who had refused medication or treatment came without the kind of medical problem that she has suffered. I do not agree, for this reason, Dr. Chow’s opinion lacks probative value.

Conclusion

1. I grant leave to the Plaintiff to adduce both Dr. Chow’s 1st and 2nd Reports as medical expert evidence at trial.
2. The forthcoming Checklist Review Hearing be fixed on 7th September 2011 at 2:30 pm in Court 46. I invite parties to make submissions on costs of the argument at the Checklist Review Hearing.

(J Chow)

District Court Master

Representation:

Ms PY Wong of Messrs. KY Woo & Co. for the Plaintiff

Ms. Li Yuen Sze, Christine of Messrs. Charles Yeung Clement Lam Liu & Yip for the 1st – 3rd Defendants

1. post traumatic syndrome disorder [↑](#footnote-ref-1)
2. (i) Dr. Leung Ho Chung, a medical officer of PYNEH stated in his medical report dated 31st March 2010 that the Plaintiff had refused medical treatment as suggested by psychiatrist in November 2006.

   (ii) Dr. Joshua Ko of the Orthopaedics and Traumatology Department stated in the medical report dated 8th April 2010 that “psychiatric medication was recommended but the patient refused.”

   (iii) Dr. Fu Wai Kee stated in page 12 of his report that the Plaintiff also had depressive disorder after divorce. The Plaintiff told Dr. Fu that she been admitted to Castle Peak Hospital for a few months in 2004. She claimed she had attended follow up treatment for few months after discharge. She then defaulted further treatments. [↑](#footnote-ref-2)
3. Para 5, page 15 of his report. [↑](#footnote-ref-3)
4. Para 25 - 28, page 22 - 23 of the 1st Report [↑](#footnote-ref-4)
5. Para 29, page 23 of the 1st Report. [↑](#footnote-ref-5)
6. Para 37 – 38, page 24 – 25 of the 1st Report. [↑](#footnote-ref-6)
7. New para 29 of the 2nd Report. [↑](#footnote-ref-7)
8. PSLA : $250,000; Pre Trial Loss of Earnings: $180,000; Post Trial Loss of Earnings: 108,000 and Special Damages : $100,000. The quantum exceeds $1 million in the Revised Statement of Damages, it is premature to say whether the Plaintiff will transfer the action or she will elect to waive the excess amount outside the jurisdiction of the District Court. [↑](#footnote-ref-8)