## DCPI 2318/2017

[2021] HKDC 281

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2318 OF 2017

--------------------------

BETWEEN

WONG KWEI PIU Plaintiff

and

CHOW CHI CHEUNG

trading as SUN LEE CO. Defendant

-------------------------

Coram: His Honour Judge H. Au-Yeung (Paper Disposal)

Date of the Plaintiff’s Submissions: 19 January 2021

Date of the Defendant’s Submissions: 22 January 2021

Date of the Plaintiff’s Submissions in reply: 26 January 2021

Date of the Defendant’s Supplemental Submissions: 22 February 2021

Date of the Plaintiff’s 2nd Submissions in reply: 24 February 2021

Date of Decision: 4 March 2021

--------------------------

DECISION

--------------------------

*THE APPLICATIONS*

1. Before this court are two summonses, both filed by the plaintiff:
   * 1. The summons filed on 30 June 2020 for leave to adduce psychiatric expert evidence (**“the Expert Directions Summons”**); and
     2. The summons filed on 12 January 2021 for leave to file and serve the plaintiff’s Affirmation[[1]](#footnote-1) (affirmed on 4 January 2021) (**“the plaintiff’s Supplemental Affirmation”**) in support of the Expert Directions Summons (**“the Affirmation Summons”**).
2. I will consider the Affirmation Summons first.

*THE AFFIRMATION SUMMONS*

1. On 3 August 2020, Master Matthew Leung gave some usual directions for the filing of affirmations for the purpose of the Expert Directions Summons, and directed that no further affirmation may be filed without leave of the court. The learned Master also adjourned the Expert Directions Summons for substantive argument to be heard on 9 December 2020[[2]](#footnote-2).
2. Affirmation in reply (his 2nd Affirmation) was filed by the plaintiff pursuant thereto on 19 August 2020.
3. The Affirmation Summons was subsequently filed only 8 days before the date fixed for substantive argument[[3]](#footnote-3).
4. Order 32 rule 16A(4) of the Rules of the District Court (Cap.336H) (**“RDC”**) provides that:

“Where the determination of the application is adjourned for the hearing of the summons, no further evidence may be adduced unless it appears to the Court that there are exceptional circumstances making it desirable that further evidence should be adduced.”

1. In *Jose Miranda Da Costa Junior & Another v Lorenzo Yih, also known as Yu Chuan Yih & Others* (HCA 156/2010, unreported, 28 April 2014), Deputy High Court Judge Le Pichon had the following to say:

“11. …where a direction prohibiting further evidence to be adduced without leave has been given, it has to be read with RHC O 32, r 11A (4).  That provides that where the determination of the application is adjourned for the hearing of the summons, no further evidence may be adduced unless it appears to the Court that there are exceptional circumstances making it desirable that further evidence should be adduced.

12. It will be seen that the rationale of O 32, r 11A (4) is to ensure that a case is dealt with as expeditiously as is reasonably practicable and to ensure fairness between the parties (those being the objectives of the CJR stated in O 1A, r 1 (b) and (d)): *Fortune Assets Development Ltd v De Monsa Investments Ltd*, HCA 167/2009, (unrep) 21 August 2009 at §§10-11 and the annotation in Hong Kong Civil Procedure 2014 at 32/11A/3 which states that the sort of ‘exceptional circumstances’ envisaged are likely to be along the lines of the exceptions laid down in *Ladd v Marshall* [1954] 1 WLR 1489.

13. ‘Special circumstances’ are not made out if a proper review of the potential issues that might arise in proceedings ought to have resulted in the information contained in the affidavit being filed within the time limits imposed: *Fortune Assets* at §12.  I agree with that approach which is in line with the rationale underlying O 32, r 11A (4) and furthers the CJR objectives identified above.”

1. Order 32 rule 11A(4) of the Rules of the High Court (as referred to by the learned Judge) and Order 32 rule 16A(4) of the RDC are identical. Therefore, what the learned Judge said above is equally applicable to District Court cases.
2. Under the criteria as discussed in *Ladd v Marshall* [1954] 1 WLR 1489, further evidence is admissible only where such evidence:
   * 1. could not have been obtained before with reasonable diligence;
     2. would or might, if believed, have a very important influence on the result of the case, though it need not be decisive; and
     3. is apparently credible though it need not be incontrovertible.
3. The evidence which the plaintiff now seeks to adduce is the Supplemental Psychiatric Report of Dr Tsang Fan Kwong (a specialist in psychiatry) dated 24 December 2020 (**“the Supplemental Report”**) which is exhibited to the plaintiff’s Supplemental Affirmation affirmed on 4 January 2021.
4. As far as the Supplemental Report is concerned, I am of the view that the *Ladd v Marshall* criteria are satisfied:
   * 1. The Supplemental Report provides up-to-date information on the treatment and diagnosis of the plaintiff since he returned to Dr Tsang for consultation on 3 October 2020. Hence, it could not have been obtained earlier;
     2. The Supplemental Report, if admitted as evidence, might have a very important influence on the plaintiff’s application to adduce psychiatric expert evidence; and
     3. The Supplemental Report is credible because, among other things, it was prepared by Dr Tsang who is a specialist in psychiatry.[[4]](#footnote-4)
5. In opposing the Affirmation Summons, Ms Yu for the defendant has made a number of arguments, which will be dealt with below.
6. Firstly, it was said that the plaintiff’s 3rd Affirmation (filed in support of the Affirmation Summons) has not suggested what “exceptional circumstances” may have arisen since the date when the plaintiff took out the Expert Directions Summons.
7. The plaintiff’s 3rd Affirmation is indeed a very short affirmation. However, it has set out the date of the Supplemental Report, and the Supplemental Affirmation together with the Supplemental Report were exhibited thereto. In other words, the plaintiff has placed before the court the required materials for the court’s consideration. Whether “exceptional circumstances” exist should be addressed by counsel in his submissions, and any argument should not be contained in the supporting affirmation. Ms Yu’s argument is therefore rejected.
8. Ms Yu for the defendant then submitted that the new evidence cannot strengthen the plaintiff’s argument in the Expert Directions Summons, in particular, it was pointed out that the plaintiff’s counsel did not rely on the new evidence in his submissions at all, and that the Supplemental Report does not address the key issue of whether the plaintiff’s psychiatric conditions may have been caused by the accident.
9. The first point can be dealt with quickly, for it is factually incorrect for Ms Yu to allege that Mr Wong, the plaintiff’s counsel, has placed no reliance on the Supplemental Report. He has plainly done so in paragraph 56 of his written submissions dated 18 January 2021.
10. In relation to the second point, with respect, I do not think it is a prerequisite for the Supplemental Report to address on the so-called “key issue” before it will be accepted as new evidence. The “key issue” should be dealt with by the experts nominated by the parties if the court allows the plaintiff’s application to adduce psychiatric expert evidence.
11. In submitting that the Supplemental Report has “no important influence on the result of the case”[[5]](#footnote-5) for the reason that the said report is silent on the issue of causation, it seems that Ms Yu has confused what “the case” should be, as it appears that she is referring to the ultimate outcome of the plaintiff’s personal injuries claim. In my view, that is not right. The “case” here should mean the Expert Directions Summons rather. In other words, the correct question to ask is whether the Supplemental Report might have a very important influence on the plaintiff’s application to adduce psychiatric expert evidence, rather than on the plaintiff’s personal injuries claim as a whole.
12. The Supplemental Report supports the plaintiff’s contention that he is still suffering from depression, and such a condition might have a bearing on, among other things, his ability to resume his pre-accident job. In my view, this might affect the court’s decision on the Expert Directions Summons.
13. Ms Yu further submitted that there is “a big question mark on whether the evidence is presumably to be believed”[[6]](#footnote-6) because there was allegedly a clear intention for the plaintiff to raise various complaints and symptoms in front of Dr Tsang, so that these complaints and symptoms can be put on record. First of all, as far as the record of complaint is concerned, while I agree that the plaintiff’s complaints may or may not be genuine (this has to be decided at the trial), it does not affect the credibility of Dr Tsang’s report. The focus should be on the accuracy and credibility of Dr Tsang’s record, rather than the plaintiff’s complaints.
14. Moreover, as pointed out by Mr Wong in his 2nd submissions in reply, if Dr Tsang took the view that the plaintiff was exaggerating his complaints, he would be duty bound to point that out in the Supplemental Report. On the basis of the materials placed before this court, there is nothing which supports any suggestion that Dr Tsang has failed his duty.
15. Lastly, Ms Yu submitted, by referring to paragraph 18 of *Jose Miranda Da Costa Junior & Another* (*supra*), that the plaintiff’s late application has created a dilemma for the defendant to his prejudice, because “in order to have the Expert Summons to be heard as soon as possible, the defendant has to give up its *(sic)* opportunity to adduce evidence in opposition to the plaintiff’s Affirmation Summons. The time spent by the defendant’s legal representatives on dealing with the plaintiff’s Affirmation Summons could have been better spent by the defendant in preparing for the Expert Summons.”[[7]](#footnote-7)
16. This submission is not accepted for the following reasons:
    * 1. The strength of the defendant’s argument is substantially weakened by this court’s order of “paper disposal” which was made by consent of the parties. There was thus no time-constraint (unlike the case of *Jose Miranda Da Costa Junior & Another* in which there were no more than 2 business days between the 1st plaintiff’s receipt of the 1st defendant’s new affirmation and the hearing) as such. If the defendant really needed to file and serve any affirmation in response, he could do so without delaying substantially the disposal of the Expert Directions Summons, because this court might start considering the application on paper once the affirmations in response and in reply were filed. There is no concern that the whole application has to be re-fixed to another date subject to the court’s diary. Hence, I do not accept that there was any “dilemma” as such.
      2. Furthermore, it should be remembered that when the court enquired with the parties (in writing) on 14 January 2021 as to how the parties would like to deal with the Affirmation Summons (which was fixed to be heard for 3 minutes on the same day as the substantive argument of the Expert Directions Summons), the defendant did not indicate at all that he intended to file any affirmation in opposition. He only stated that he would like to make submissions on the Affirmation Summons. Again, I cannot see there is any dilemma as alleged.
      3. Because the matter is dealt with on paper, and there is no time constraint (as in the case where there is an oral hearing), the argument that the legal representative’s time could have been better spent on the Expert Directions Summons is a non-starter. If necessary, the defendant could have requested this court to adjust the timetable on lodging submissions which was originally fixed without the Affirmation Summons in mind. Indeed, upon the receipt of the Affirmation Summons, this court had expressly invited the parties to consider whether the original timetable had to be adjusted, however, no such request had been made by the defendant.
      4. Given the nature of the new evidence (being the Supplemental Report), it is doubtful what further evidence the defendant may file in response thereto. Indeed, the defendant has not suggested in his submission what evidence he would file if he were given the time to do so. As aforesaid, when the defendant answered the court’s enquiry, he did not say that any affirmation in opposition would be necessary.
17. As I take the view that there are exceptional circumstances making it desirable for the Supplemental Report to be adduced, I would grant leave for the plaintiff to file and serve an affirmation which is identical to the plaintiff’s Supplemental Affirmation which was affirmed on 4 January 2021 within 14 days hereof. However, to avoid confusion, it should be named as the plaintiff’s 4th Affirmation.

*THE EXPERT DIRECTIONS SUMMONS*

*Legal principles*

1. Parties agreed that the applicable legal principles have been set out in *Fung Chun Man v Hospital Authority* *and Another* (HCPI 1113/2006, unreported, 24 June 2011), in which Bharwaney J had the following to say:

“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.’

13. 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;

(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.’

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 recognised 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. In dealing with the specific question of whether expert evidence from clinical psychologists or psychiatrists should be allowed to be adduced, his Lordship stated that:

“23. There appears to be a misconception that the courts will not readily grant leave for evidence from a psychiatrist or a psychologist to be adduced.  The law of negligence does not provide a remedy for distress which does not amount to a recognised psychiatric illness, unless the distress, anxiety or fear is accompanied by a physical injury. The courts award damages where a party has suffered a recognisable psychiatric illness over and above emotional distress and disquiet.  The court will almost invariably require expert evidence to determine whether or not this is the case.  Even where it is not disputed that the plaintiff suffers from psychiatric illness, there may be a dispute as to causation: was the psychiatric illness caused or contributed to by the tort complained of.  A trial judge who has to determine this issue of causation may need assistance from an expert in this field.

24. Indeed, in most cases, the need for psychiatric treatment or psychological counselling is apparent long before the commencement of proceedings. Inappropriate conduct or speech is noted by family members or recorded on the hospital records.  Prolonged sadness, excessive anxiety, unusual irritability and temper tantrums are all indicia of possible psychiatric illness.  These are often recognised by treating doctors and nurses and the patient referred to a psychiatric unit, whether in-patient or out-patient, for assessment and treatment.  Even if the hospital records or treating doctors and nurses make no mention of a plaintiff’s psychiatric illness or possible psychiatric illness, orthopaedic or neurological experts examining a plaintiff in order to prepare expert medical reports on his physical condition will often recognise the presence of a psychological or psychiatric component and recommend that reports be obtained from relevant experts in that field.  Each case must depend on its own facts and a mere recommendation without supporting reasons by an expert from another field may be insufficient, but where the need for psychiatric or psychological evidence is clear and obvious, there can hardly be any realistic challenge to a request for relevant expert examination and reporting.

25. In other cases, where there is no apparent indicia of a psychological component in addition to the physical injuries suffered by the plaintiff, the request for leave to adduce evidence from a psychiatrist or a psychologist will need to be properly justified. Such justification may be provided by submitting a written note from the intended expert setting out brief reasons explaining why the expert opinion is necessary in the particular case. However, for the reasons set out in §§18 and 19 above, a full medical examination and report should not be commissioned without agreement from the other party or leave of court.

26. If the request is made late in the day, or close to the commencement of trial, it is likely to be refused even if justified. As Brooke LJ explained in *Baron v. Lovell* [2000] PIQR P20, each party is afforded an opportunity by the rules to make a well informed valuation of the claim and a well informed Part 36 offer (or, in Hong Kong, a sanctioned offer).  The regime simply will not work if the former latitude in serving late evidence is allowed to persist.  It is quite wrong for a trial to be delayed, and for the possibility of making an effective Part 36 offer (or, in Hong Kong, a sanctioned offer) to be rendered nugatory, because of the late service of an expert’s report.”

*Relevance of psychiatric expert report*

1. It is the plaintiff’s case that expert evidence by specialists in psychiatry is required in the present case because of his psychiatric conditions. In this regard, he referred this court, among other things, to:
   * 1. the Patient Referral Form dated 19 June 2019 issued by Dr Clarence Lee (a specialist in respiratory medicine) in which it was stated that the plaintiff was diagnosed as suffering from post-traumatic stress disorder, having depressive symptoms with chronic insomnia and vague suicidal thoughts;
     2. the single joint expert report dated 16 December 2019 prepared by Dr Henry Cheung (a specialist in cardiothoracic surgery) in which it was stated that the plaintiff has begun to exhibit symptoms of depression with chronic insomnia, depressive symptoms and thoughts of suicide;
     3. his treatments received at the West Kowloon Psychiatric Centre of Princess Margaret Hospital on 23 March 2020, 18 May 2020 and 10 August 2020;
     4. the medical report dated 22 June 2020 by Dr Yan Kam Sun (who held a Postgraduate Diploma in Community Psychological Medicine) who took the tentative view that the plaintiff was suffering from post-traumatic stress disorder;
     5. the medical report dated 21 June 2020 by Dr Tsang, who opined that the plaintiff was suffering from Major Depressive Disorder and that this mental problem is likely to be caused by the injury suffered as a result of the accident; and
     6. the medical report dated 24 December 2020 by Dr Tsang, who opined that the plaintiff was still suffering from depressive disorder and the prognosis was not as optimistic as before.
2. Ms Yu submitted that the causal link between the accident and the psychiatric illness appears to be tenuous and that the plaintiff has failed to demonstrate that the proposed psychiatric expert evidence is relevant, necessary and of probative value, because:
   * 1. there was nothing which suggested that the plaintiff has suffered from any psychiatric illness shortly after the accident on 18 February 2016, and the first time when “psychiatric illness” was mentioned was in the referral letter prepared by Dr Clarence Lee dated 16 June 2019. As mentioned by Bharwaney J in *Fung Chun Man* as quoted above, in most cases the need for psychiatric treatment would be apparent long before the commencement of the proceedings, and indicia of possible psychiatric illness would often be recognised by treating doctors for assessment and treatment;
     2. it was agreed by the orthopaedic experts in their report dated 24 August 2017 that examination by other specialists would not be required;
     3. Dr Henry Cheung’s opinion that the plaintiff’s apparent signs and symptoms of depression were likely to be caused by the accident is unsupported by any explanation;
     4. Dr Tsang’s assertion that the plaintiff’s mental problem is likely to be caused by the injury suffered in the accident is based on the wrong premise that the plaintiff’s mental symptoms appeared shortly after the injury and insufficient information.
3. In the present case, the first question we need to ask is whether psychiatric expert evidence is reasonably required to enable the court to resolve the issues in dispute. It is just another way to express the same consideration: whether psychiatric expert evidence is likely to be of real assistance to the determination of the issues before the court. Such evidence will not be helpful, and needs not be adduced, where the issue to be decided is one on which the court is able to come to a fully informed decision without hearing such evidence.
4. In my view, this court should only give negative answers to the aforesaid questions if it can be concluded at this stage and with the materials placed before the court that the plaintiff will not be able to establish, on the balance of probabilities, that his psychiatric illness (if any) is caused by the accident on 18 February 2016.
5. I do not think I can come to that conclusion.
6. It is true that the plaintiff’s alleged psychiatric illness was not diagnosed until Dr Clarence Lee referred to it in the Patient Referral Form dated 19 June 2019. By then, it was already 3 years and 4 months since the date of the accident. However, there is a question mark as to whether it is really the case that the plaintiff’s mental illness symptoms had never been mentioned in medical records at all until June 2019 (as alleged by the defendant), because it can be seen that:
   * 1. In the triage assessment record of the A & E Department of Princess Margaret Hospital dated 7 October 2016, the plaintiff’s “condition on arrival” was described as “distress”;
     2. In the triage assessment record of the A & E Department of Princess Margaret Hospital dated 16 November 2016, the plaintiff’s “condition on arrival” was described as “distress”, and it was recorded “sleep disturbed occasionally”.
7. When the plaintiff consulted Dr Tsang on 25 May 2020, he told the doctor that, shortly after the injury, he was unable to get to sleep, that he had excessive worries, and became very irritable and hot tempered. He also stated that he was very unhappy and unable to cheer up. It was on this basis that Dr Tsang gave his medical opinion.
8. In the light of the aforesaid triage assessment records, I do not think I can reject Dr Tsang’s opinion outright on the basis of his acceptance that the plaintiff’s mental symptoms appeared shortly after the injury.
9. Even if the mental illness symptoms only appeared 3 years and 4 months after the accident, I still cannot come to the conclusion that the alleged psychiatric illness must be unrelated to the accident by reason of the lapse of time. I have no basis to make that finding without expert evidence.
10. Furthermore, Ms Yu’s reliance on what Bharwaney J said in *Fung Chun Man* as quoted above, with respect, is misconceived, as I do not think his Lordship was minded to lay down any principle as such. As his Lordship pointed out, each case must depend on its own facts.
11. Neither do I think the orthopaedic experts’ view that examination by other specialists would not be required should be regarded as conclusive. In any event, such a view may have to be revisited in the light of Dr Tsang’s opinion.
12. For the above reasons, I hold the view that the plaintiff has overcome the first hurdle in satisfying this court that psychiatric expert evidence is relevant, necessary and of probative value in the circumstances of the present case.

*Other discretionary considerations*

1. Ms Yu submitted that in any event the court should not exercise its discretion in granting leave for the plaintiff to adduce psychiatric expert evidence because:
   * 1. if the plaintiff was aware of his psychiatric illness by 16 June 2019, he should have sought expert directions much earlier, for example, at the Checklist Review hearing on 3 September 2019, rather than waiting until June 2020;
     2. the plaintiff had given no explanation on the said delay;
     3. allowing the plaintiff’s application would increase costs and make the speedy resolution of the present action impossible given Dr Tsang’s opinion that ideally the examination by psychiatric experts cannot take place until 12 months after Dr Tsang’s report (dated 21 June 2020).
2. It is evident that the plaintiff’s solicitors had, by virtue of their letter dated 18 December 2019, proposed to the defendant’s solicitors, on the strength of Dr Clarence Lee’s Patient Referral Letter dated 19 June 2019 and Dr Henry Cheung’s expert report dated 16 December 2019, that psychiatric expert report(s) be obtained. However, the defendant’s solicitors did not give any reply to this letter at all.
3. The plaintiff did not take out any summons for expert directions immediately thereafter. He only did so after he had attended the first appointment at the Psychiatric Unit of the Princess Margaret Hospital on 23 March 2020[[8]](#footnote-8) and consulted another specialist in Dr Tsang on 25 May 2020.
4. I am of the view that the plaintiff, at most, can only be blamed for not bringing up this matter at the Checklist Review hearing in September 2019. He only did so in December 2019 by solicitors’ correspondence. There was thus at most a 6-month delay. I do not think the plaintiff’s application should be dismissed for this reason alone.
5. The plaintiff should not be blamed for not taking out a summons immediately after he has sent his solicitors’ letter in December 2019. If the defendant was minded to give consent to the plaintiff’s proposed expert directions as suggested in December 2019, the defendant would have done so there and then, rather than choosing to give no reply at all. Facing such a situation, a prudent litigant would have waited to gather more evidential support before incurring further costs on applying for expert directions. It can be seen that the plaintiff has taken out the Expert Directions Summons around a month after he has obtained Dr Tsang’s report dated 21 June 2020. The time taken is acceptable.
6. In relation to the defendant’s argument that allowing further expert evidence would increase costs, I think the point to consider is whether the costs to be incurred would be proportionate in the circumstances. In this regard, I agree with Mr Wong’s argument that, taking into account the potential amount of damages which the plaintiff may be able to claim, the further costs to be incurred on psychiatric expert evidence would be proportionate.
7. I have not lost sight of the fact that giving leave for the parties to adduce psychiatric expert evidence would necessarily mean that there will be further delay caused to the progress of the present case, which, according to Ms Yu, would otherwise be ready to be set down for trial.
8. It should be mentioned at this point that according to the Supplemental Report, the plaintiff’s psychiatric condition has become static in the last quarter of 2020. In other words, Dr Tsang’s initial recommendation that the plaintiff should only be assessed in June 2021 seems to be no longer valid.
9. Furthermore, delay to the progress of the case is just one of the matters to be considered. I also have to bear in mind fair administration of justice between the parties and the fact that the primary aim of the court’s case management powers is to secure the just resolution of the dispute in accordance with the substantive rights of the parties. In my view, if I do not allow psychiatric expert evidence to be adduced, the prejudice to the plaintiff would be far greater than that which will be caused to the defendant by reason of the delay in the final resolution of disputes.
10. It is also noted that no milestone date has been fixed in the present case.
11. I will therefore exercise my discretion in giving leave for the parties to adduce psychiatric expert evidence.

*Expert directions*

1. Parties are directed to discuss between themselves on the precise expert directions to be obtained, having regard to the availability of the two experts nominated by the parties (Dr Wong Chung Kwong and Dr Peter Yu respectively). They shall inform this court within 14 days of this Decision their agreed directions by a joint letter for approval. In the event they cannot agree on such directions, they shall each propose their respective directions in writing within 21 days hereof for the court’s consideration.

*COSTS*

1. The defendant should bear the plaintiff’s costs of both summonses because he has failed to resist both of them, subject to the followings:
   * 1. the costs of the non-agreed bundle should not be allowed because the only document which was referred to in this bundle (which comprises 213 pages) by the plaintiff’s counsel was a letter dated 18 December 2019 issued by the plaintiff’s former solicitors to the defendant’s solicitors, which should have been exhibited to the plaintiff’s 1st Affirmation (and included in the agreed bundle as an exhibit) as this letter was expressly referred to therein.
     2. Only 85% of the costs of the plaintiff’s 1st Affirmation filed on 30 June 2020 should be allowed because paragraphs 17 and 19 thereof are repetition of what he had already stated in paragraphs 7 to 9 of the same affirmation;
     3. Only 20% of the costs of the plaintiff’s 2nd Affirmation filed on 19 August 2020 should be allowed because:
        1. Paragraphs 3 to 12 are basically repetition of what he had already stated in paragraphs 3, 7 to 9 and 17 to 19 of his 1st Affirmation;
        2. Around 2/3 of the very long paragraph 18 is a repetition of paragraphs 4 to 6 of the same affirmation, which in turn, as aforesaid, are matters which have already been covered in the plaintiff’s 1st Affirmation;
        3. Paragraphs 19 to 25 are nearly identical to paragraphs 22 to 26 and 10 to 11 of the plaintiff’s 1st Affirmation;
        4. In other words, only slightly more than 5 paragraphs in this affirmation should have been included.
2. I therefore make a cost order *nisi* that the defendant shall bear the plaintiff’s costs of the Affirmation Summons and of the Expert Directions Summons, with certificate for counsel, to be taxed if not agreed, subject to the deductions mentioned in the preceding paragraph.
3. For the avoidance of doubt, the costs of the psychiatric expert evidence to be obtained shall be in the cause of the action.
4. The plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations.
5. The above order *nisi* shall become absolute in the absence of application to vary within 14 days hereof.

( H. Au-Yeung )

District Judge

Mr Tim Wong, instructed by Ellen Au & Co, for the Plaintiff

Ms Christine Yu, instructed by Cheung & Yeung, for the Defendant

1. This Affirmation has been named by the plaintiff’s as his 2nd Affirmation. However, the plaintiff has already filed his 2nd Affirmation on 19 August 2020 in reply to the defendant’s Affirmation in opposition. Therefore, the plaintiff’s Affirmation affirmed on 4 January 2021 will be referred to in this Decision as “the plaintiff’s Supplemental Affirmation” so as to avoid confusion. [↑](#footnote-ref-1)
2. The hearing was subsequently re-fixed to be heard before this court on 20 January 2021. [↑](#footnote-ref-2)
3. The substantive argument was fixed to be heard before this court on 20 January 2021. By consent, this court directed on 15 January 2021 that the hearing be vacated and the Expert Directions Summons shall be dealt with on papers. [↑](#footnote-ref-3)
4. See further below under the sub-heading “Relevance of psychiatric expert report” [↑](#footnote-ref-4)
5. Paragraph 2 of the defendant’s supplemental submissions dated 22 February 2021 [↑](#footnote-ref-5)
6. *Ditto* [↑](#footnote-ref-6)
7. Paragraph 27(3) of the defendant’s submissions [↑](#footnote-ref-7)
8. It appears that it has taken around 9 months for the plaintiff to be able to have a first appointment at the Psychiatric Unit of the Princess Margaret Hospital upon Dr Clarence Lee’s referral [↑](#footnote-ref-8)