# DCPI 2546/2020

[2023] HKDC 560

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 2546 OF 2020

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BETWEEN

LAW WAI CHUNG Plaintiff

and

WIDE GRAND INTERNATIONAL 1st Defendant

DEVELOPMENT LIMITED

DRAGAGES HONG KONG LIMITED 2nd Defendant

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##### Before: His Honour Judge Andrew Li in Chambers

Date of Hearing: 30 January 2023

Date of Judgment: 28 April 2023

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DECISION

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*INTRODUCTION*

1. A case management conference (“CMC”) was held before me to determine whether the 2 orthopaedic experts, ie Dr Lam Kwong Chin (“Dr Lam”) for the plaintiff and Dr Danny Tsoi Chi Wah (“Dr Tsoi”) for the 1st and 2nd defendants (“the defendants”) should be called to give oral evidence at the trial.

*BACKGROUND*

*Injury, treatments and findings by treating doctors*

1. The plaintiff says that as a result of the accident happened on 13 November 2018 (“the Accident”) he had persistent back pain. There was no fracture and the experts agreed that the clinical findings were suggestive of a back sprain with right sided nerve root irritation.
2. Initially the plaintiff consulted a traditional Chinese medicine practitioner but when the pain got worse, he went to the A&E of Pok Oi Hospital (“POH”) on 16 November 2018. The chief complaint was low back pain since 13 November 2018 after lifting heavy object on that day. His lower limb power was full and no numbness on both lower limbs was reported. X-ray of lumbosacral spine done on 16 November 2018 showed no fracture. He was treated and discharged. The diagnosis of mode of injury was sprain injury.
3. On 20 November 2018 the plaintiff attended a private clinic by the name of Town Health-PHC Medical Centre (“Town Health”). It has been recorded that he was brought to the clinic through “Total Rehabilitation Scheme”[[1]](#footnote-1) and was not required to pay any fees to them. On that occasion, he reported right sided sciatic pain and obtained sick leave.
4. The plaintiff was referred by Total Rehabilitation Management (“TRM”) to consult orthopaedic specialist Dr Kou Sio Kei (“Dr Kou”). The plaintiff attended Dr Kou’s clinic on 3 December 2018. He claimed that after the Accident he experienced right sided lower back pain and the pain radiated to the right lateral thigh and calf. He also complained of numbness of the right lateral calf. Physical examination showed tightness over the right paraspinal muscles. SLR was 20/60 and there was positive nerve tension. The lower limb fine-touch sensation and reflexes were normal. Dr Kou’s diagnosis was back muscle pain with a possibility of right first sacral nerve root sensory function disturbance by a prolapsed intervertebral disc (“PID”). MRI done on 18 December 2018 showed a perineural cyst at the right lateral recess at L5/S1 level, causing compression on the right S1 descending nerve. The clinical diagnosis was muscle pain in the back with possible right S1 nerve root irritation. Dr Kou stated that the role of the cyst was unknown and it might be a coincidental finding, there might be right nerve root irritation but the location of the impaired fine-touch sensation in the right leg did not correspond with the anatomical territory of the right S1 nerve root. The plaintiff was informed that the cyst was not injury related. He was granted sick leave from 3 December 2018 to 19 May 2019.
5. The MRI done on 18 December 2018 at iRad showed a 0.9 cm x 0.6 cm x 1.4 cm epidural cystic lesion at the right lateral recess of L5/S1. This may represent a perineural cyst. The comment of the radiologist was that it was likely compressing on the right S1 descending nerve.
6. According to the MRI report from POH, the MRI done on 22 March 2019 showed a 0.6 cm lesion at the intraspinal epidural region of L5/S1 at the right side. This could be a perineural cyst and was seen encroaching on the right L5/S1 lateral recess. The comment of the reporting doctor, Dr Leung On Cheung was, “This cystic lesion touchesthe anterior aspect of right S1 nerve roots”.
7. In a report dated 30 January 2020 by Dr Law Hing Yuen, consultant of Department of Neurosurgery, Tuen Mun Hospital (“TMH”), it stated that MRI done on 22 March 2019 showed right S1 perineural cyst had reduced in size when compared to MRI done in December 2018. It also stated that the plaintiff volunteered numbness over right calf and posterolateral thigh. Right SLR was 60°, lower limb power was full and sensation was intact.
8. The plaintiff was examined by Dr Lo Wing Nin Raphael (“Dr Lo”) on 19 June 2019, another orthopaedic surgeon in private practice. On this occasion, the plaintiff was referred to Dr Lo for consultation by TRM again. Dr Lo stated, in a report dated 3 July 2019, that the prognosis was good and the plaintiff should be able to resume his current work capacity as a general labourer. The only limitation was the leg numbness caused by the incidental finding of epidural cyst which was not related to the injury in question. In a further report dated 8 July 2019, Dr Lo stated that the incidental finding of the L5/S1 epidural cyst seen on the MRI performed 1 month after the Accident ie 18 December 2018, could not be caused by the Accident as it was not traumatic in nature and could not occur in such a short period of time. The right leg numbness could only be explained by the presence of the L5/S1 epidural cyst, but the nature of the cyst was not traumatic and it takes time to develop to such size.

*The Joint Medical Reports*

1. The plaintiff was jointly examined by the appointed experts Dr Lam and Dr Tsoi on 21 September 2020 and 3 joint medical reports (“JMRs”) have been written by them. The first JMR was dated 10 November 2020 (“the JMR”). The first supplemental report was dated 10 December 2021 (“the 1st Supp JMR”) and the second supplemental report was dated 18 May 2022 (“the 2nd Supp JMR”). The 2nd Supp JMR was obtained to cover the MRI scan of 6 November 2021 which showed that the previous MRI noted a cystic lesion at L5/S1 right side had by then completely resolved.
2. Whilst Dr Lam agreed with Dr Kou that the perineural cyst might be a coincidental finding and like most perineural cysts would not cause any symptoms, Dr Lam opined that the sudden increase in pressure during the lifting of heavy weight on 13 November 2018 could enlarge the cyst and turn it symptomatic. Dr Lam also opined that the relationship of the Accident and symptomatic cyst was evident from the fact that the plaintiff had been working actively without any problem until the Accident and the site of the cyst matched well with the symptoms[[2]](#footnote-2).
3. In relation to the cyst having completely resolved as shown in the MRI of 6 November 2021, Dr Lam stated that due to the chronic compression on the nerve root, there could be residual symptoms even if the cyst is gone.
4. In the JMR, Dr Tsoi stated that the mechanism of the injury described by the plaintiff suggested musculotendinous strain of lower back only. The cyst was not an uncommon finding and most cysts are asymptomatic. He opined that this was an incidental finding. The MRI also revealed multiple levels of facet joint hypertrophy. These are pre-existing from overuse/degeneration. The degenerative facet joint can be a source of pain radiating down to leg and mimic radiculopathy. Further, but for the Accident, the natural progression of the pre-existing degenerative facet joints and disc would give rise to on and off back and leg pain. Symptoms can be triggered by sprain injury. The pre-existing back degeneration belongs to category (b) of the 3 categories specified in the joint instruction letter. Dr Tsoi took the view that the thigh and calf muscle thinning cannot be explained by the MRI findings. The cyst, if it really causes any nerve root compression, only affects the S1 nerve root. Should it be the case, there will be focal weakness on ankle/toe movement, absent ankle reflexes and impaired sensation over foot and sole. It would not give rise to thigh muscle wasting. There is no orthopaedic explanation for the generalized weakness of the entire right lower limb. It is highly unlikely related to the captioned back sprain. The plaintiff’s claim of chronic back pain and generalized weakness of the entire right lower limb is inconsistent with the diagnosis of S1 radiculopathy.
5. After the repeat MRI on 6 November 2021 showing that the cyst had completely resolved, Dr Tsoi’s comment is that the perineural cyst was not caused by the Accident, nor was it the source of the alleged chronic back pain, right lower limb pain and the apparent generalized right lower limb weakness/muscle wasting. The alleged chronic back pain was a combined effect of the soft tissue low back injury and the pre-existing degeneration with the latter contributing to 70%. Dr Tsoi maintained his view that the Accident caused no more than a simple musculotendinous strain of the low back.

*DISCUSSION*

1. As can be seen from the above, the experts hold entirely different views on the cause of the back pain.
2. Mr Lim for the defendants submits that this is one of those cases where it is better to have the experts give oral evidence to assist the court than for the court to decide on paper as to which expert’s view is correct.

*Legal principles involved*

1. At the CMC hearing, Mr Lim has helpfully referred me to the Court of Appeal’s decision in *Chau Chin To Chadow v Wing Fung Financial Group Limited* [2018] HKCA 573; CACV 196 of 2017 (Lam VP; Cheung JA & Kwan JA; 7 September 2018) where the Court of Appeal has made the 2 following observations in relation to the mechanism of when to call experts to give oral evidence at trial:-

“ 41. First, where there is disagreement between the medical experts engaged by the parties as revealed in the joint expert report, the parties should seek a direction from the court prior to the trial, either at the Check List Review Hearing or the Pre‑Trial Review, whether the experts should attend for cross-examination. They should put forward for the consideration of the court the reasons why the experts should or should not give oral evidence. Other than the underlying objectives in Order 1A rule ‍1 of the Rules of the High Court, the court would take into account matters such as the importance of the disagreement to the core issues before it, whether it is necessary to resolve the disagreement, and if so, whether this could be done without hearing oral evidence.

42. Second, where the evidence of one expert is preferred to that of another, reasons should be given in the judgment, particularly if this would have a material bearing to the findings or conclusion of the court. Adequate reasons need not be elaborate. It would suffice if the reasons set out succinctly why the court is persuaded to accept the views of one ‍expert and not the other. Where the court has resolved the conflict between the experts without hearing oral evidence, there is all the more reason that the court should explain why it has adopted a particular view.”

1. Mr Lim also referred me to my own judgment in *Ting Siu Ki v Wun Che Ming & another* (2013) unreported, DCPI 1463/2011 (HH Judge Andrew Li; 13 December 2013) where at §21 I described the case as *“one of those rare cases these days where the medical experts are called to give oral evidence at the assessment hearing”.*
2. The case of *Ting Siu Ki, supra,* was analyzed in great details by the then PI Judge of the High Court in *B K Amrit v G-Cladds Limited & another* [2022] HKCFI 585; HCPI 1183 of 2016 (Marlene Ng J; 3 March 2022) where the learned judge made the following comments at §§151-152:-

“151. In my view, since any case management direction on whether or not oral expert evidence is required at trial must be a case-specific decision in the unique context of the particular case, there is no need to consider whether such case management directions are “rare” or otherwise. The guidance from the Court of Appeal in the above authorities clearly shows there is no overall case management practice that aims to cull oral expert evidence from personal injury litigation, which concept flies against the primary aim of securing the just resolution of disputes in accordance with the substantive rights of the parties (see Order 1A rule 2(2) of the RHC). But that said, oral expert evidence has to be properly justified in the manner as I have explained lest unnecessary time, costs and effort be incurred to no useful purpose, which needless endeavour also flies against the underlying objectives of efficiency, economy and proportionality (see Order 1A rule 1 of the RHC).

152. I should say, however, that empirical experience *post*-CJR does suggest there is less call for oral expert evidence, which is probably the result of the detailed guidance in Part Iof Practice Direction 18.1, the comprehensive standard form for joint letter of instructions to medical experts on quantum matters adopted by legal practitioners, and the reminders by Personal Injuries Judges/Masters in case authorities that encouraged the experts to fully engage with each other, to fully set out their opinion in their expert reports, and to identify their disagreements and reasons therefor, which help to bring clarity to the schools of thought on the relevant issues and to expose those cases that do not truly require or will not benefit from oral expert evidence.”

1. In view of the principles set out in the above cases and the direction given by the master at the second check list review (“CLR”) hearing on 8 November 2022, Mr Lim prepared a list of proposed questions that could be asked of the experts at the trial and attached the same to his written submissions to the court prior to the CMC hearing before me.
2. I shall not repeat the list of questions here save to say that in my opinion there is no reason why any of those questions (if the court still considers them as necessary to resolve the issues) could not be asked (and resolved) by the experts by way of further joint instruction letter(s) and further JMR.
3. However, as pointed out by Mr James Li, the plaintiff’s solicitor, the list of questions was only drawn up by Mr Lim *after* the 2nd CLR hearing before Master Louise Chan on 8 November 2022. At that CLR hearing, the learned master had clearly expressed her view that the 3 JMRs by the experts are “very comprehensive” and both doctors have already covered their views as to the cause of the cyst. She did not see what else could be addressed by the experts. The plaintiff took a neutral stance on this issue at the time as it was the defendants who had wanted to call the experts to give oral evidence at the trial. The master took the view (in my opinion correctly) that it was not desirable for this matter to be decided at the pre-trial review hearing by the trial judge but should be referred to the PI judge to be dealt with at a CMC.

*Findings of the Court*

1. First, I echo with the master that the 3 JMRs are very comprehensive and the experts have already covered their opinions as to the cause of the cyst and its effects on the plaintiff very well. While their opinions may be very different, there is in my view no reason why a trial judge cannot determine those issues without the parties calling the experts to give oral evidence at the trial.

1. Second, I agree with Marlene Ng J that whether or not oral expert evidence at trial is required is a pre-eminently case management matter that is context-sensitive. Limited reliance can be placed on cases authorities for determining whether the court should or should not allow the experts to give oral evidence in a given case. I further agree with the learned judge that the guiding principle in whether oral evidence at trial is necessary in the interests of justice for the proper and just resolution of the disputed trial issues: see *B K Amrit, supra* at §149 per Marlene Ng J.
2. In this case, in view of the contents of the 3 JMRs, I do not consider it will be in the interests of justice nor will it be proportionate to the size of the claim in this case to justify the additional costs in calling the experts to give oral evidence at the trial.
3. Third, in my view, the defendants should have agreed to put the list of questions to the experts to resolve by way of a further JMR as proposed by the plaintiff at the second CLR hearing before the master rather than simply seeking leave from the court to grant leave for the experts to give evidence at the trial under a consent summons for directions at a CLR hearing.
4. Fourth, having looked at the list of questions prepared by Mr Lim and bearing in mind that the causation is a matter to be determined by the trial judge by using a common sense approach and by applying the standard of the balance of probabilities: (See *Ting Siu Ki, supra* at §§36-37), I do not consider them necessary in order for the trial judge to resolve the issues raised by the experts in the JMRs.

*CONCLUSION*

1. For the above reasons, I find it is not necessary for the parties to call the experts to give oral evidence at the trial in the circumstances of this case. I further find that it is not necessary for the defendants to put forward the proposed list of questions prepared by Mr Lim to the experts for their comments or for the purpose of compiling a further supplemental JMR.
2. I direct that this matter should be restored by the parties by way of a joint application for a further CLR hearing or CMC within 14 days before Master Jo Siu (who has taken over Master Louise Chan’s list in the District Court) with a view for fixing a PTR and/or trial dates in this case.

*Costs*

1. Costs should follow the event.
2. Since it was the defendants who have all along insisted to call the experts to give oral evidence at the trial and this court has ruled against them, I do not see why they should not pay for the costs of the CMC before me. I will therefore order that the defendants do pay the costs of the plaintiff for the CMC on a party and party basis, such costs to be taxed if not agreed.
3. It remains for me to thank Mr Lim for the helpful submissions he made on the law in this case.

( Andrew SY Li )

District Judge

Mr James Li, of Messrs Yu Sun Yau Mak & Lawyers, for the plaintiff

Mr Patrick D Lim, instructed by Messrs Norton Rose Fulbright Hong Kong, for the 1st and 2nd defendants

1. The proper name of the company should be “Total Rehabilitation Management (TRM)” as referred to correctly in Dr Kou’s report dated 2 March 2020 [↑](#footnote-ref-1)
2. Incidentally I note that Dr Lam is the only orthopaedic surgeon amongst all the treating doctors, orthopaedic surgeons and experts, whether in public and private sectors, who holds such an opinion. [↑](#footnote-ref-2)