## DCPI 2660/2019

[2021] HKDC 1634

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2660 OF 2019

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BETWEEN

YEUNG YIN KWAN Plaintiff

and

KA LOY COMPANY trading as Defendant

CALIFORNIA SEAFOOD RESTAURANT

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

Dates of Submissions: 4, 19 and 27 October 2021

Date of Decision: 31 December 2021

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DECISION

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*THE APPEAL*

1. By summons filed on 5 November 2020 (**“the 2020 Expert Directions Summons”**), the plaintiff applied for, among other things, directions for:
2. Updated examination and supplementary orthopaedic expert report;
3. Examination and report by psychiatric expert (single or joint).
4. The 2020 Expert Directions Summons was disposed of by a Master on paper. By order dated 19 April 2021, the learned Master allowed:
   * 1. Evidence from psychiatric expert be adduced[[1]](#footnote-1);
     2. A supplemental orthopaedic expert report be adduced to address on the issues of the neck injury allegedly suffered by the plaintiff, rotator cuff tear and symptom magnification.
5. By Notice of Appeal to Judge in Chambers filed on 29 April 2021, the defendant sought to appeal against the learned Master’s aforesaid order.
6. By consent, the appeal is to be dealt with by way of paper disposal.

*GENERAL PRINCIPLES*

*Appeal against Master’s Decision – the approach*

1. It is well established that an appeal brought against Master’s decision is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the judge treats the matter as though it came before him for the first time.  The judge will give the weight it deserves to the previous decision of the Master, but he is in no way bound by it.  The judge in chambers is in no way fettered by the previous exercise of the Master’s decision. (*Hong Kong Civil Procedure 2021*, Volume 1, paragraph 58/1/2).

*Expert directions*

1. The applicable legal principles applicable to an application for expert directions 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.”

*PREVIOUS APPLICATION FOR PSYCHIATRIC EXPERT EVIDENCE*

1. The 2020 Expert Directions Summons is actually the 2nd application made by the plaintiff for psychiatric expert directions. The first one was made by virtue of a summons filed on 10 February 2017 which was supported by the plaintiff’s 1st Affirmation. In a gist, it was alleged in the said affirmation that:
2. The plaintiff had depression symptom and suffered from insomnia soon after the accident which happened on 26 June 2013. In as early as October 2013, she was already prescribed with anti-depression medicine;
3. Her psychiatric problem became more and more serious after the stabilisation of her physical problem;
4. She was first seen in Castle Peak Hospital on 14 December 2015;
5. At the time when the Statement of Damages, witness statement and Revised Statement of Damages were prepared, the plaintiff had only consulted her doctor for her psychiatric problem for 2 to 3 times, and her condition was not stable at the time, therefore, she had not instructed her solicitors to apply for psychiatric expert directions;
6. It was during the mediation which took place on 29 December 2016 that she informed her solicitors that she had attended a total of 5 follow-up sessions with her psychiatrist. It was only then that she instructed her solicitors to obtain her medical reports so as to assess the need for adducing expert evidence;
7. The plaintiff received her medical records from Castle Peak Hospital on 2 February 2017 to which a medical report dated 25 January 2017 prepared by Dr MQ Wu was attached.
8. The plaintiff’s 1st application for psychiatric expert directions was heard before Master Leong of the High Court[[2]](#footnote-2) on 6 June 2017. According to the notes of hearing prepared by the plaintiff’s solicitors, the learned Master had expressed the following views during the hearing:
   * 1. While the plaintiff was still complaining about persistent pain 4 years after the accident, there was no objective sign in support of her allegation;
     2. Psychiatric symptoms are all subjective. All psychiatric experts could do is to recite what the patient told them;
     3. Whether the plaintiff was really suffering from psychiatric problem depended on whether she was having persistent pain, and in this regard, one of the two experts (Dr Lam Yan Kit) expressed the view in the joint orthopaedic expert report dated 16 April 2015 that there was symptom magnification;
     4. It is crucial for the court to decide whether there was symptom magnification. Hence, the orthopaedic experts should attend the trial to be examined on this issue, especially when Dr Peter Tio (the expert nominated by the plaintiff) did not express his view on this matter;
     5. There might well be a bit of uncertainty on the follow-up treatment required and medication needed if no psychiatric expert evidence is adduced. However, the time and costs of adducing psychiatric expert evidence do not justify the calling of such evidence. The court has to balance the future medical expenses, etc., against the costs of engaging 2 psychiatric experts;
     6. Under the Civil Justice Reform, not every single bit of evidence has to be adduced. The court has to take into account proportionality of costs;
     7. It was a very late application. The case had to move on.
9. At the end of the day, Master Leong dismissed the plaintiff’s application. He also granted leave to the parties for them to call their respective orthopaedic experts at the trial so that they could give oral evidence on the question of whether there was symptom magnification on the part of the plaintiff.
10. The plaintiff did not appeal against Master Leong’s decision.

*THE 2020 EXPERT DIRECTIONS SUMMONS*

1. The 2020 Expert Directions Summons was filed on 5 November 2020, in other words, 3 years and 5 months after the 1st application for psychiatric expert directions was dismissed. Apart from seeking to adduce psychiatric expert evidence, the plaintiff would also like to have the orthopaedic experts conducting a further examination and preparing a supplemental expert report.
2. This latest summons is supported by the second affirmation of the plaintiff, in which she explained, among other things:
   * 1. How the accident happened on 26 June 2013 and the treatment which she had received thereafter;
     2. Her criticisms on the joint orthopaedic expert report dated 16 April 2015;
     3. On 9 November 2015, she was suggested to have a special injection into her left shoulder. She did not take up the suggestion, and did an “ultra-scan” instead on 10 February 2017. She eventually received the injection treatment on 25 October 2019 which only reduced her pain initially but not permanently;
     4. A MRI scan was done on 17 August 2020, and this “has now confirmed that there was a rotator cuff tear in the left shoulder (it is still intact) – but there is a 20% tear in it)”[[3]](#footnote-3);
     5. She had been advised by her lawyers that an updated examination should be conducted so that expert opinion on the following may be provided:
        1. The cause of the rotator cuff tear;
        2. The treatment which she should receive in the light of the rotator cuff tear;
        3. Review her prognosis;
        4. Review her ability to work;
        5. The proper sick leave period.
     6. She was first recommended to seek proper treatment on her emotional problems in September 2014 and was referred to see a psychiatrist on 14 December 2015. She had continued to receive treatment all along;
     7. She had been advised by her lawyers that the psychiatrist expert opinion should cover:
        1. Diagnosis of her psychiatric condition;
        2. Cause of her psychiatric illness;
        3. The treatment required;
        4. Prognosis;
        5. The impact of her psychiatric illness on her ability to work
3. I will deal with the plaintiff’s 2 applications in turn below.

*Further orthopaedic expert report*

1. It was the plaintiff’s submission that:
   * 1. There were problems with the original orthopaedic examination and report in that the experts:
        1. did not have all the relevant documents before them (specifically, the actual MRI scan films of the neck and various referral letters), and they did not consider the cause and impact of her neck pain, the treatment she received at the Pain Clinic and the rotator cuff tear in her left shoulder;
        2. simply quoted from the hospital reports, but did not refer directly to the medical records;
        3. relied on the MRI report only and it appeared that they did not review the actual MRI films;
        4. arrived at the wrong conclusion that her neck pain was not caused by the accident on 26 June 2013, and did not tell her about this view at the time of the examination so that she could have a chance to give her view on the matter;
        5. did not make any reference to her being referred to the Pain Clinic;
        6. did not make reference to her being referred to the orthopaedic unit at Tuen Mun Hospital;
        7. did not take into account her psychiatric condition;
     2. The court should take note of the plaintiff’s determination in seeking medical treatment;
     3. The experts should do a supplemental report to review the issue of “symptom magnification”.
2. I will deal with these arguments in turn below.

The orthopaedic experts’ report

1. The orthopaedic experts’ report was completed on 16 April 2015, in other words, more than 5½ years before the 2020 Expert Directions Summons was taken out on 5 November 2020.
2. The plaintiff was all along legally represented[[4]](#footnote-4). The present solicitors’ firm was appointed by the Director of Legal Aid to act for the plaintiff in place of the plaintiff’s former solicitors on 1 September 2017. If there were so many problems with the joint orthopaedic experts’ report as alleged, it is difficult to understand why the plaintiff’s solicitors (both her former and present solicitors) did not raise them in all these years. Even when the plaintiff made the 1st application for psychiatric expert directions on 10 February 2017, her solicitors did not see fit to ask for a supplemental report to cover the matters which allegedly had not been mentioned by the joint orthopaedic experts’ report.
3. No explanation had been given as to why this application could not be made earlier.
4. In my view, the delay in totally inexcusable.
5. In relation to the individual “problems” raised by the plaintiff, my views are as follows:
   * 1. The plaintiff’s submissions that the experts did not have the actual MRI scan films of the neck done on 7 May 2014 is rejected. Even if they really did not have the films at the time, there is nothing wrong for them to rely on the MRI report;
     2. There is no need for the experts to refer to the various referral letters in the expert report;
     3. There is nothing wrong for the experts to rely on the hospital reports without referring directly to the medical records, especially when the plaintiff did not point out which particular part of the medical records that had been overlooked;
     4. The experts have apparently considered the plaintiff’s complaint about neck pain and they have consensus that such neck complaint is unrelated to the accident. There is no reason why the experts should be asked to “review their opinion”[[5]](#footnote-5);
     5. The experts were not required to inform the plaintiff what their views were in respect of her neck pain at the time of the examination so as to give her a chance to express her comment as such;
     6. Neither do I think that there was any problem even if the experts did not refer to the fact that the plaintiff had been referred to receive treatment at the orthopaedic unit of Tuen Mun Hospital. The experts knew well that the plaintiff had been complaining about shoulder pain and neck pain, and they had given their opinion in relation thereto. The reference to such additional treatment in the expert report would not add anything with probative value;
     7. I do not agree that the fact that the plaintiff had been referred to the Pain Clinic would necessitate the preparation of a supplemental orthopaedic expert report. The said referral was done on the basis of the subjective complaint of pain made by the plaintiff, and it had already been opined by Dr Lam that there was symptom magnification on the part of the plaintiff. While Dr Tio also agreed that “submaximal effort was demonstrated with such a reduction in hand grip which was far below that documented in the OT report”[[6]](#footnote-6), it might well be because he did not expressly use the term “symptom magnification” that Master Leong considered it necessary to direct that oral expert evidence be adduced during the trial on this issue. In my view, it would be more procedurally economical for the experts to give their view in court rather than by virtue of another report. Indeed, given Master Leong’s decision that the experts should attend court and give oral evidence on “symptom magnification” (which was not appealed against), it is not open to the plaintiff to make another application and submit that a supplemental expert report should be prepared and review the issue at all;
     8. I do not agree that the discovery of the 20% rotator cuff tear in the left shoulder of the plaintiff on 17 August 2020 would necessitate the calling of a supplemental orthopaedic expert report. The experts had already opined in their joint report that the plaintiff’s left shoulder was intact as at 4 February 2015. A new injury found 5½ years later could not be related to the accident which happened in 2013;
     9. I do not think there is anything wrong on the part of the orthopaedic experts not to take into account the plaintiff’s alleged psychiatric condition, since they are not experts in that area.

Other grounds

1. The plaintiff’s solicitors stated that the court should take note of the plaintiff’s determination in seeking medical treatment. I agree that this may well be one of the matters which the trial judge may take into account, especially when the issue of “symptom magnification” is considered. However, this is not something which the experts should take into account when they prepared their expert report. The solicitors’ submission in this regard is not helpful to the plaintiff’s application for supplemental orthopaedic experts’ report.
2. In relation to the plaintiff’s last argument that a supplemental expert report should be obtained on “symptom magnification”, as aforesaid, Master Leong had already directed the experts to give oral evidence in court rather than preparing a supplemental expert report on the matter. The plaintiff has not explained why Master Leong’s approach should be reviewed. This issue should therefore not be allowed to be re-opened.
3. Having taken the above matters into account, I am of the view that there is no need to obtain a supplemental orthopaedic expert report as suggested by the plaintiff.

*Psychiatric expert evidence*

1. It was the plaintiff’s submission that:
   * 1. There were problems with the 1st application for psychiatric expert directions in that the court:
        1. was not provided with all relevant information and documents, especially the medical records for psychiatric treatment which the court did not wait for these to be obtained;
        2. did not consider the diagnostic criteria for the diagnosis of Depression;
        3. did not differentiate between the pain caused by the plaintiff’s shoulder injury and neck injury;
        4. in refusing to allow psychiatric expert evidence to be adduced, the court cannot be assisted by opinion on further treatment, costs, prognosis and impact on the plaintiff’s working ability;
        5. The learned Master was wrong to say that a forensic psychiatric examination is all subjective;
     2. Relying on Order 38 rule 44[[7]](#footnote-7) of the Rules of the District Court (**“RDC”**), the court should reconsider the application. I quote the plaintiff’s submissions as follows:

“17. What is new now:

1. The court has all the relevant medical records.
2. The issue to decide is not only does the Plaintiff have pain – which has caused the depression BUT is that pain caused by the left shoulder injury and/or the neck pain.
3. We also say, that a proper determination of the issue is not one that can simply be done by providing the Judge with proof of pain – but diagnosis of “Depression” requires much more – and has to meet the diagnostic criteria as set out in DSM V or ICD – 10 (referred to in para.24 of standard PI directions Order – as a requirement for any psychiatric expert report).
4. A forensic expert psychiatric examination and report – will address the issue of Symptom magnification / Malingering, including by special psychological testing to determine if this is present.”
   * 1. As the plaintiff has to burden to prove the injury and causation of the psychiatric injury, psychiatric expert evidence is relevant, necessary and of probative value;
     2. The psychiatric report will set out in detail expert evidence on the following so as to assist the court to make a finding:
        1. Diagnosis;
        2. Causation;
        3. Length of treatment (including ongoing treatment) required;
        4. Appropriate period of sick leave;
        5. Impact on her work capacity;
     3. The cost to be incurred is proportionate to the value of the claim;
     4. The obtaining of such expert evidence would serve the purpose of giving the plaintiff justice;
     5. The defendant would not be prejudiced – “though it is accepted this could and should have been raised earlier (as the plaintiff did) at the end of 2017, but the application was dismissed”[[8]](#footnote-8);
     6. The trial date is not yet fixed; the trial will not be delayed as the supplemental orthopaedic expert report is still pending.
5. At the outset, I must emphasise again that this is the 2nd application for psychiatric expert evidence made by the plaintiff. Her first application had been dismissed by Master Leong on 6 June 2017. She did not appeal against the learned Master’s decision.
6. Although the court has the power to revoke or vary case management directions, such power is not unlimited. Order 38 rule 44 of the RDC provides that:

“Any direction given under this Part [Part IV of Order 38 – expert evidence] may **on sufficient cause being shown** be revoked or varied by a subsequent direction given at or before the trial of the cause or matter.” (emphasis added)

1. In *Beacons College Limited v Yiu Man Hau Alfred & Others* (HCA 4273/2001, unreported, 17 December 2002), Chu J (as her Ladyship then was) held that:

“In my judgment, it is not unheard of for interlocutory applications to be renewed: see, for example, Order 24, rule 17 Rules of High Court and Order 32, rule 8 Rules of District Court. Ultimately, it is a matter of judicial discretion. Whether the applications are identical in terms of the statutory provisions relied upon or the relief sought is not definitive of the matter. What is important is whether the substance of the applications or the issues involved are essentially the same. If they are, then the subsequent application should not be entertained, unless:

* + 1. there is material change in circumstances; or
    2. the grounds or evidence relied upon for the subsequent application are matters that could not reasonably be expected to be adduced at the earlier application: Chanel Ltd v. Woolworth & Co. Ltd [1981] 1 WLR 485, 492H-493A and Habib Bank AG Zurich v. Mindi Investments Ltd 131 SJ 1455, at p.5 of the transcript.”

1. It should be noted that Order 32 rule 8 of the RDC which was in effect at the time of the hearing in *Beacons College Limited* read:

“Any interlocutory direction or order made or taking effect under these Rules (including any order made on appeal) may, **on sufficient cause being shown**, be revoked or varied by a subsequent direction or order of the Court made at or before the trial of the action in connection with which the original direction or order was made.” (emphasis added)

1. Similar wordings could be found in Order 24 rule 17 of the Rules of the High Court (Cap.4A) which was in effect at the material time:

“Any order made under this Order (including an order made on appeal) may, **on sufficient cause being shown**, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.” (emphasis added)

1. Hence, in order to justify the making of a second attempt, the plaintiff has to show either a material change in circumstances or that the grounds or evidence relied upon for this renewed application are matters that could not reasonably be expected to be adduced at the earlier application.
2. I should also add that even if the plaintiff is able to prove either of those matters, it does not necessarily mean that the court has to grant the application. This is just the starting point. Put it in another way, if the plaintiff cannot show either of those matters, the court would not even start to consider the renewed application.
3. On the basis of the aforesaid, I do not think the court should entertain any argument by which it was asserted that the learned Master was wrong when he made his decision on 6 June 2017. The plaintiff should have appealed against such a decision, if he was so advised. The fact that her new legal representative is holding a different view on the matter does not amount to “sufficient cause”.
4. The crucial question to ask is: is there any material change in circumstances or is there any ground or evidence which could not have been relied on in the 1st application for psychiatric expert evidence?
5. Out of the 4 matters which were described as “new” in paragraph 17 of the plaintiff’s written submissions, the 2nd, 3rd and 4th points are in fact not new evidence as such. They are arguments which could have been made in the hearing before the learned Master in 2017.
6. For the 1st new matter, it was said that “The court has all the relevant medical records”. In her 2nd Affirmation, the plaintiff has produced a “table of psychiatric consultation” which covers documents which were dated from 14 December 2015 up to 11 June 2020. I think these documents can be put into 3 different categories:
   * 1. Documents which were in the plaintiff’s possession when she made the 1st application for psychiatric expert directions;
     2. Documents which were related to consultations or referrals which took place before the hearing on 6 June 2017 but which the plaintiff had not obtained yet;
     3. Documents which were related to consultations after 6 June 2017.
7. The 1st category of documents is the most straight-forward. These cannot be relied on in the present application because the plaintiff could have produced them for the purpose of the 1st application for psychiatric expert directions.
8. In respect of the 2nd category of documents, according to the plaintiff’s 1st Affirmation, her lawyer was told in a hearing on 9 February 2017 by another Master that his preliminary view was that the court would be able to decide on whether psychiatric expert evidence should be obtained without waiting for all the medical records. She therefore proceeded to make the 1st application for psychiatric expert directions without further ado. Since the plaintiff was legally represented at all times, she must have sought advice on whether she should make an application for psychiatric expert directions there and then without waiting further. That being the case, I do not think it is right if she now complains that she did not have the chance to get those documents to support her 1st application.
9. The 3rd category of documents relates to consultations which had not even taken place yet at the time of the 1st application. They are therefore new evidence.
10. They are all “consultation summary” prepared by Dr MQ Wu, which show that the plaintiff had attended 20 consultations with Dr Wu in the period between 21 August 2017 and 11 June 2020.
11. The plaintiff has also obtained another medical report from Dr Wu dated 11 April 2019. This letter is basically identical to the earlier letter issued by him which was dated 25 January 2017 (save that the medicine prescribed was different). This earlier letter, in which it was stated that the plaintiff was diagnosed to be suffering from Depression, was also placed before Master Leong during the 1st application for psychiatric expert directions.
12. In my view, there had been no material change in circumstances since Master Leong’s dismissal of the plaintiff’s 1st application for psychiatric expert directions. By the time of the earlier application, the plaintiff was already alleging that she had been receiving psychiatric treatment for her Depression and taking anti-depression medicine. Yet, Master Leong considered it unnecessary to obtain psychiatric expert report. If the plaintiff was not satisfied with the approach adopted by Master Leong, she should have appealed against his decision. However, no such appeal had been made. Under these circumstances, the court should not exercise its discretion in allowing her to adduce psychiatric expert evidence.
13. The plaintiff’s solicitors emphasized how the trial judge would be assisted if psychiatric expert evidence is obtained. These are matters which could have been relied on in the 1st application.
14. I also disagree with the plaintiff when she submitted that the defendant would not be prejudiced by her late application. Although no milestone date has been fixed yet, I should take into account the fact that the case could have been set down for trial back in 2017: At the end of the hearing for the plaintiff’s 1st application for psychiatric expert directions, Master Leong directed that “Parties shall on or before 13 June 2017 fix a date for a direction hearing to take place (not earlier than early August) for directions to set down.” However, it seems that no such hearing had been fixed. Even though both parties should be blamed for such inaction (there is no evidence that the defendant had ever taken any initiative in pushing the plaintiff to fix such a date), it should be appreciated that in the event the 2020 Expert Directions Summons is dismissed, the action can be set down right away for assessment of damages. On the other hand, if the plaintiff is allowed to adduce further expert directions, this action would have to be dragged on for longer. This is an important matter on which the court should place great weight, because one of the underlying objectives under the CJR is to ensure that the case is dealt with as expeditiously as is reasonably practicable.
15. It is noted that the plaintiff’s solicitors had blamed the defendant’s solicitors for delaying decision on seeking expert opinion. It is suggested that if the defendant’s solicitors did not raise any objection, psychiatric expert report would have been obtained by the end of 2015 at the latest.
16. With greatest respect, this is a very bold submission. The fact is that the plaintiff’s 1st application was dismissed by Master Leong and such a decision was not appealed against. Hence, on the face of it, it must be reasonable for the defendant to raise objection. I do not understand how the defendant could be blamed.
17. The plaintiff also laid blame on the defendant’s solicitors for their late reply to the plaintiff’s second suggestion to adduce psychiatric expert evidence. It was submitted in paragraph 34 of the plaintiff’s written submissions dated 16 February 2021 that:

“As regards psychiatric expert examination:

* + 1. We obtained all the psychiatric medical records and sent these to the Defendant’s solicitors by letter dated 21 January 2019 (YYK-10 – page 1) – over 2 years ago and asked that their client reconsider the need for psychiatric expert examination.
    2. The Defendants solicitors asked for updated Hospital psychiatric reports (by letter dated 28 March 2019 – YYK-10 page 6) which were obtained (and sent by letter dated 17 April 2019 – YYK 10 page 8), and then we considered the previous ruling of Master Leong (it took time to get the audio, our first request is by letter dated the 5 July 2019 with approval given by court letter dated the 4 September 2019) and it was only by the Defendants solicitor dated 3 April 2020 (YKK 10 page 36 – 38) that final response received – that would oppose.
    3. We had raised the issue of Psychiatric expert examination in the plaintiff’s CLR Questionnaire filed for CLR on the 23 March 2020.
    4. That CLR was adjourned due to general adjournment, to the 18 May 2020 (and later to the 31 August 2020 and then to the 28 October 2020) with a direction from the court that the parties should seek agreement on directions.
    5. We reported on the matter by letter to court dated the 23 September 2020 that there was no agreement.
    6. Direction for this application given at CLR on the 23 October 2020.”

1. With greatest respect to the plaintiff’s solicitors, they had misrepresented the situation when they alleged that it was only by letter dated 3 April 2020 that the defendant’s solicitors confirmed that the defendant would oppose the plaintiff’s intended application. This is **not** the case. It is clear from the correspondence placed before the court by the plaintiff’s solicitors themselves that, the defendant’s solicitors, having considered Dr Wu’s latest letter dated 11 April 2019, did inform the plaintiff’s solicitors by letter dated 3 May 2019 that:

“We also refer to the medical report prepared by Dr. MQWU of Castle Peak Hospital dated 11 April 2019. We are of the view that the contents of the said medical report are similar to the medical report prepared by Dr MQWU of Castle Peak Hospital dated 245 January 2017, which has already been dealt with at the hearing dated 6 June 2017 before Master Leong, during which your client’s application to adduce psychiatric expert evidence was dismissed. Hence, we consider that the medical report dated 11 April 2019 did not constitute new evidence to support your client’s application to adduce psychiatric expert evidence.

In light of the above, we are of the view that the new documents provided by your client do not constitute new evidence and do not add any value to the issue of adducing psychiatric expert evidence. Hence, we consider it unnecessary and unsuitable to adduce psychiatric expert evidence.

Should your client insist to take out an application to adduce psychiatric expert evidence, we are instructed to object to it vigorously and shall seek all costs against your client.”

1. The stance that the defendant would oppose any application for psychiatric expert evidence was also repeated in its solicitors’ letters dated 8 May 2019, 24 June 2019 and 3 April 2020 respectively. The explanation contained in the letter dated 3 April 2020 on why any application for psychiatric expert evidence would be opposed was actually a repetition of what was already stated in the letter dated 3 May 2019 (which was expressly referred to in the 3 April 2020 letter as well).
2. The plaintiff’s solicitors then sat on the matter for 1½ year before the present application was made on 5 November 2020. Even if I take into account the time (2 months) for the court to process the plaintiff’s application for an audio CD of the hearing before Master Leong, the delay is still inexcusable.
3. I should add that, if the plaintiff is blaming the “general adjournment period” (**“GAP”**) for any delay by virtue of paragraph 34(4) of her written submissions quoted above, such a submission is rejected. First of all, there was no explanation as to why the plaintiff’s solicitors had to wait until July 2019 before they requested the court to provide them with the audio recording. Further, in any event, she had had adequate time to make her application for expert directions between September 2019 (when she received the audio recording) and the beginning of GAP in February 2020. Moreover, even after the commencement of GAP, the plaintiff was still at liberty to take out summons for expert directions, and her solicitors knew well about this. Indeed, Master David Chan had made the following remarks on 6 May 2020 in writing when he adjourned the Checklist Review Hearing scheduled for 18 May 2020 to 31 August 2020:

“It is noted from the plaintiff’s Questionnaire dated 20 March 2020 that he intends to obtain psychiatric expert evidence and seek re-examination by orthopaedic experts,

Assuming that the parties cannot agree on this, the plaintiff’s solicitors shall, as soon as practicable, take out proper application for leave to do the same by way of a summons. Parties can then agree on the directions to be sought regarding: (1) time for filing and service of affirmations in support/opposition/reply; (2) time for lodging and service of submissions, list and copies of authorities; and (3) time required for substantive argument (with diaries of parties provided for the purpose of fixing date).”

1. To conclude, I am of the view that the court should not accede to the plaintiff’s request for directions for psychiatric expert evidence.

*ORDER*

1. For the aforesaid reasons, I hereby allow the defendant’s appeal, set aside the learned Master’s decision dated 19 April 2021, and dismiss the 2020 Expert Directions Summons.

*COSTS*

1. I make a costs order *nisi* that the plaintiff shall bear the defendant’s costs of the 2020 Expert Directions Summons before the learned Master and its costs of this appeal in any event, to be taxed if not agreed.
2. The above order *nisi* shall become absolute in the absence of application to vary (which, if any, shall be made by letter, and will be disposed of on paper) within 14 days hereof.

( H. Au-Yeung )

District Judge

Messrs. Burke & Company, for the plaintiff

Messrs. Leung & Lau, Solicitors LLP, for the defendant

1. Parties were directed to “endeavour to agree on … whether separate psychiatric experts or a single joint expert shall be instructed” [↑](#footnote-ref-1)
2. The present action was by then still pending in the Court of First Instance. It was subsequently transferred to the District Court on 6 September 2019 [↑](#footnote-ref-2)
3. Paragraph 17 of the plaintiff’s 2nd Affirmation [↑](#footnote-ref-3)
4. Except for the period between 17 January 2019 (when the Plaintiff’s Legal Aid Certificate was discharged) and 3 May 2019 (when Messrs. Burke & Company filed a Notice to Act herein) [↑](#footnote-ref-4)
5. Paragraph 8(2)(d) of the plaintiff’s written submissions dated 16 February 2021 which is relied on herein again [↑](#footnote-ref-5)
6. Paragraph 49 of the joint orthopaedic expert report dated 16 April 2015 [↑](#footnote-ref-6)
7. The plaintiff’s solicitors referred to Order 38 rule 43 of the Rules of the High Court by mistake in their written submissions [↑](#footnote-ref-7)
8. Paragraph 28(4) of the plaintiff’s written submissions dated 16 February 2021. While this was lodged for the application placed before the learned Master, these submissions are relied on in this appeal [↑](#footnote-ref-8)