## DCPI 2821/2018

[2020] HKDC 538

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2821 OF 2018

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BETWEEN

LI CHIU MUI Plaintiff

and

PO LEUNG KUK Defendant

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Before: Her Honour Judge Levy in Chambers (paper disposal)

Date of Plaintiff’s Skeleton Submissions: 8 April 2020

Date of Defendant’s Written Submissions: 9 April 2020

Date of Plaintiff’s Written Submissions in Reply: 15 May 2020

Date of Decision: 17 July 2020

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DECISION

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1. *Introduction*
2. On 12 May 2017, the plaintiff commenced this personal injury action in the High Court for a sprained back injury that she suffered in an accident on 9 June 2014 in the course of employment with the defendant. Interlocutory judgment was entered by consent on 16 October 2017, leaving the quantum of damages to be assessed.
3. On 4 December 2018, these proceedings were transferred to the District Court. On 22 October 2019, the plaintiff issued a summons for leave to adduce psychiatric expert evidence. The application was opposed.
4. This is the paper disposal of the summons. The plaintiff was represented by counsel, Mr Herbert Leung and the defendant by counsel, Miss Vanessa Kwok. Written submissions and the plaintiff’s written reply were lodged.
5. *Background facts leading to the summons*
6. Before discussing the parties’ respective stances and arguments, it will be convenient to set out the relevant background facts leading to the issuance of the summons. Miss Kwok has helpfully provided a chronology; on which I base some of the discussion below.
7. On 8 September 2015, two years before the writ was issued (May 2017), the plaintiff, upon referral, started attending West Kowloon Psychiatric Centre at Kwai Chung Hospital (**KCH**). The consultations were continuing when this application was issued.
8. On 22 August 2017, in the Statement of Damages (**SOD**), the plaintiff pleaded “psychiatric impairment” as one of her injuries.
9. On 13 October 2017, the plaintiff in the Questionnaire (at Item 4) stated that only orthopaedic expert was necessary.
10. On 31 October 2017, the court ordered by consent that the medical expert evidence was to be limited to one orthopaedic expert for each party, Dr Tio (for the plaintiff) and Dr Chun (for the defendant).
11. On 11 December 2017, the Certificate of Review of Assessment (**Form 9**) was issued by the Employees’ Compensation (Ordinary Assessment) Board and filed in the related employees’ compensation proceedings (DCEC 2705/2014). The plaintiff was assessed to have suffered from “psychiatric impairment” (in addition to her “right lower limb weakness and numbness”) resulting from back injury.
12. On 25 June 2018, the plaintiff’s Questionnaire (at Item 4) contained the same confirmation as the earlier Questionnaire (see §7 above).
13. On 30 June 2018, the joint orthopaedic report (**JOR**) was prepared. Under the heading of “Examination by other specialist”, Dr Tio recommended the plaintiff to be examined by a psychiatrist (**Dr Tio’s recommendation**”) while Dr Chun stated that such examination was not required.
14. After Dr Tio’s recommendation, the plaintiff started to raise the issue of psychiatric expert with the defendant, and when met with the latter’s opposition, went on to issue the summons.
15. *Grounds in support of the application*
16. In the supporting affirmation, the plaintiff stated that she started to suffer from low mood after the accident and was referred to consult a psychiatrist at KCH. According to the consultation notes of the KCH, the diagnosis was “adjustment disorder with prolonged depressive reaction”. She was prescribed medication, and has all along been and was still receiving follow-up consultations at KCH.
17. In averring that psychiatric expert evidence will assist the court in evaluating the plaintiff’s psychiatric condition and determine its causation, the plaintiff relies on (i) Dr Tio’s commendation; (ii) a bundle of consultation records issued by KCH; and (iii) a written note (“**Dr Chung’s Note**”) of Dr Chung See Yuen, a psychiatrist, who examined the plaintiff on 25 September 2019. Dr Chung’s diagnosis of the plaintiff was “adjustment disorder with depressed mood”.
18. *The Opposition*
19. The defendant’s primary objection is that the causal connection between the accident and the plaintiff’s psychiatric condition is weak and tenuous. Apart from contending that the plaintiff’s condition was not related to the accident, the defendant further averred that the plaintiff’s psychiatric condition was not serious with most of her complaints having been, according to Dr Chun, exaggerated. It was therefore contended that the proposed expert evidence would not add anything further to the various treatment records and reports that the plaintiff already produced in the proceedings.
20. Secondly, Dr Tio’s recommendation is not a recent material event. Notwithstanding that the alleged psychiatric condition was a known matter to the plaintiff and her solicitors, the plaintiff had, prior to Dr Tio’s recommendation, conducted the proceedings in a matter inconsistent with the plaintiff’s new position.

1. Thirdly, the application was issued late, 4 years after the plaintiff first sought psychiatric treatment, and without any justification for the delay.
2. *Applicable legal principles*
3. In this application, there are two stages of criteria the plaintiff needs to satisfy the court – the *prima facie* stage and the discretion consideration.
4. The *prima facie* consideration, according to the established principles, requires the plaintiff to show that the proposed psychiatric expert evidence is relevant, necessary and of probative value (i.e. it is likely to be of real assistance to the determination of the issues and reasonably required to enable the court to resolve the issues in dispute) : see *Bai Siba Kumar v Nishimatsu[[1]](#footnote-1).*
5. However, leave would be refused where the causal link between the alleged tort and the psychiatric illness was tenuous, where the cost of obtaining such evidence was disproportionate, or where leave would be contrary to the need to ensure a cost-efficient and speedy resolution of the personal injury litigation: see *Lai Yuk Shim v Hung Ling Kwok (Practice Note)[[2]](#footnote-2)* at §5.
6. When doing the balancing exercise in the exercise of the discretionary decision as to whether or not to grant leave to obtain and adduce psychiatric exercise, this court should weigh the materials placed before it and assess (i) whether or not there is a causal connection between the accident and the plaintiff’s psychiatric condition; and if so, (ii) whether that causal link is strong or tenuous: *Lai Yuk Shim (supra.)* at §7.
7. In addition, I should weigh other relevant circumstances against the underlying objectives with the ultimate aim of striving to do justice between the parties and to secure the just resolution of the dispute in accordance with the substantive rights of the parties. Regard should be given to matters such as potential disruption to trial, the prejudice to the other parties and the explanation given for a late application[[3]](#footnote-3).
8. Ultimately, whether the trial judge will in fact be assisted by forensic psychiatric evidence would obviously depend on the circumstances of each case. It involves a balancing exercise of a court’s case management discretion.
9. *Discussion*

*F.1 Prima facie stage: whether necessary, relevant and of probative value*

1. The bundle of the consultation records of the KCH (exhibited to the plaintiff’s supporting affirmation as “LCM-2” for the period between 8 September 2015 and 13 July 2018), shows that the plaintiff, around 15 months after the accident, started receiving psychiatric treatment. The Form 9filed in the related DCEC 2705/2014 application further confirms that the plaintiff suffered from “psychiatric impairment”.
2. In the circumstances, I do not think that it is in serious dispute that the plaintiff suffered from psychiatric condition after the accident. Thus, for the *prima facie* stage, this court’s primary task is to consider whether, as the defendant contends, a trial judge for the assessment of damages (**Trial Judge**) can determine the plaintiff’s psychiatric claim on the existing medical evidence and the JOR.

*F.1.1 the available medical evidence*

*F.1.1a JOR*

1. The orthopaedic experts found that the plaintiff, about two years before the accident, had received treatment for the symptoms of her pre-existing orthopaedic-related conditions of scoliosis and multiple level degenerative changes at the lumbar back (lower back): see JOR at §§67- 69.
2. The plaintiff had no more back pain (apart from the complaint of right lower limb numbness) after 6 months of physiotherapy treatments at the government hospital: JOR §72.
3. The Waddell’s simulation tests administered to the plaintiff produced positive results. Dr Chun interpreted that as plaintiff’s symptom expansion and exaggeration. He opined that her complaint of continuous low back pain was unrelated to the injury, but rather related to the pre-existing symptomatic degenerative lumbar spine.
4. Dr Tio, on the other hand, attributed the positive result to the effect of the plaintiff’s psychiatric illness rather than exaggeration. He opined that the plaintiff’s sprain injury aggravated her pre-existing back pain.

*F.1.1b Other evidence*

1. In the bundle of medical consultation notes from the KCH, a number of reasons were stated for plaintiff’s diagnosed depression. They included the plaintiff’s (i) lower back pain; (ii) concern for her health after the accident[[4]](#footnote-4); and (iii) personal family relationships (such as her relationship with her son and married daughter).

*F.1.1c Dr Chung’s Note*

1. In Dr Chung’s Note, it was opined that the plaintiff’s psychiatric condition was caused by “worries about the back symptoms, unemployment, financial strain and the present litigation”.

*F.2 What additional evidence the proposed psychiatric expert evidence can likely provide to resolve the issue of causation*?

1. From the medical notes of the KCH, which were admitted as agreed evidence[[5]](#footnote-5), I do not think that it can be disputed that the plaintiff had suffered depression and low mood. Among the number of causes that the government psychiatrists have stated, apart from her lower back pain, the rest were plainly not related to the accident (see §30 above). Dr Chung’s Note also seems to be saying the same thing. Thus, the determination of the causation of the plaintiff’s orthopaedic complaint seems to follow the resolution of the question of whether the plaintiff’s alleged symptoms and complaints of pain were related to the injury caused by the accident or the undisputed pre-existing condition.
2. The orthopaedic experts differ in this issue. Dr Chun believed that the plaintiff had exaggerated her symptoms and that her complaints of pain were entirely due to the pre-existing condition and unrelated to the accident. Dr Tio, on the other hand, believed that her orthopaedic complaints were the result of the aggravation by the back sprain caused by the accident.
3. In determining the question of the pre-existing issue, the Trial Judge will be guided by the three scenarios identified by the Court of Appeal in *Chan Kam Hoi v Dragages et Travaux Publics[[6]](#footnote-6)*.
4. If the first *Chan Kam Hoi* scenario[[7]](#footnote-7) applies, the assessment of the damages awarded for pain, suffering and loss of amenities (**PSLA**) will be on the basis that the plaintiff’s orthopaedic-related complaints were entirely due to her pre-existing condition, and not related to the injury (as Dr Chun opines). It would follow from this scenario that the plaintiff’s psychiatric problem would not have been caused by the accident.
5. On the other hand, were the Trial Judge to determine that the accident aggravated the plaintiff’s pre-existing condition, giving rise to her orthopaedic complaints (as Dr Tio’s opined), the assessment of the award for PSLA will need to also take into account and apportion the extent of the plaintiff’s psychiatric condition, which was partly caused or aggravated by the accident. *Chan Kam Hoi*’s second and third scenarios will likely be applied.
6. Since the issue of whether the plaintiff’s psychiatric condition was caused by the accident is dependent on the determination of the plaintiff’s pre-existing orthopaedic condition, the adducing of the psychiatric expert report will not add anything further to the existing evidence. The Trial Judge should be able to resolve this issue and determine (in the event that this issue was resolved in favour of the plaintiff) the extent and seriousness of the plaintiff’s psychiatric condition with the help of the existing records/reports of the government hospitals and the JOR.
7. Dr Chung’s Note, which the plaintiff relies on, further tends to undermine the plaintiff’s application. Since Dr Chung, an experienced psychiatrist expert of the plaintiff’s own choice, had already given, at the preliminary assessment, a similar diagnosis and causation for the plaintiff’s psychiatric condition as the government psychiatrists, the plaintiff’s proposed psychiatric expert evidence will unlikely add anything beyond what is already stated in Dr Chung’s Note, which I believe can be admitted as part of the plaintiff’s medical evidence.
8. In the circumstances, I am of the judgment that the facts of this case are very different to those of *Bai Siba Kumar (supra.),* in which plaintiff did not suffer from a pre-existing condition as the plaintiff has in this case. I agree with Miss Kwok that the proposed psychiatric expert evidence would not add anything further to the already available medical records of KCH.
9. In conclusion therefore, I am inclined to the view that the adducing of the psychiatric medical expert report will have little probative value, and find that the plaintiff fails the *prima facie* stage. For completeness, I will next briefly discuss the discretionary consideration.

*F.2 Discretionary consideration*

*F.2.1 Whether the cost of obtaining the evidence was proportionate?*

1. In the exercise of this court’s discretion, I should also take into account the costs implication on these proceedings with regard to whether the costs of the additional expert are proportionate to the damages the plaintiff will likely recover. It is thus necessary to take a broad-brush approach in considering the seriousness of the plaintiff’s psychiatric condition on the basis of the existing evidence.
2. On the totality of the evidence, it appears that the plaintiff’s psychiatric condition is not serious as evidenced by (i) the plaintiff not having included any medical reports[[8]](#footnote-8) from KCH when the plaintiff filed the medical reports together with the statement of claim and the SOD in compliance with para 65(1) of PD18.1 and (ii) Dr Chung’s opining that (a) the sick leave granted by the treating psychiatrists for more than 3 years is not appropriate and reasonable; (b) further sick leave is not required; and (c) the plaintiff is mentally fit to resume her pre-accident job.
3. In any event, as I have stated above, the accident is only one of the many causes of her back pain that is her psychiatric condition is attributed to and her psychiatric condition will likely have very little impact on quantum. In the circumstances, the additional costs incurred by the psychiatric expert evidence will likely be disproportionate to the amount at stake.

*F.2.2 Explanation for the delay*

1. In reliance on Dr Tio’s recommendation, the plaintiff issued the present application. Even if the plaintiff were found to have acted reasonably in issuing the present application only after the availability of the JOR, the plaintiff only issued the application 16 months after the JOR. On the evidence, it cannot be disputed that the plaintiff’s application to seek psychiatric expert evidence is made late. As I have outlined above in relation to the plaintiff’s seeking of psychiatric treatments at KCH, her pleaded case in the SOD, and the Form 9 certificate, it was obvious to the plaintiff’s solicitors at the outset that the plaintiff had a psychiatric condition, and they had plenty of opportunities (such as the proposed medical expert directions at the early stage of the proceedings and in the time-tabling questionnaires) to seek leave for the adducing of expert psychiatric evidence. I do not accept Mr Leung’s submission that the plaintiff should be excused in its stance stated in the Questionnaires mentioned in §7 and §10 above. I therefore reject Mr Leung’s submission that there is no delay in the application. The plaintiff is required to give good reason for her delay.
2. The plaintiff gave three reasons for the delay:
3. First, the defendant delayed the application by objecting to the plaintiff’s proposal for the adducing of the psychiatric expert evidence. The plaintiff averred that her solicitors first wrote to the defendant’s solicitors on 19 November 2018 seeking their consent to arrange a joint psychiatric examination. Time was lost as a result of the defendant’s disagreement on 26 November 2018 in relation to the consent summons drafted by the plaintiff’s solicitors for the adducing of psychiatric expert evidence.
4. Secondly, the refusal by Legal Aid in granting the plaintiff’s consent to engage psychiatric expert. The plaintiff averred that time was lost between 27 November 2018 (for the seeking of the approval of the Legal Aid) and 14 December 2018 (on the refusal by the Legal Aid to grant approval).
5. Thirdly, the transfer of the proceedings to the District Court. The plaintiff stated after the proceedings were transferred to the District Court, that the further delay was caused by the time taken for the District Court to allot a new action number and fix a date for the Check List Review in the District Court. The plaintiff could only file a consent summons on 29 August 2019 for leave to take out the present application.
6. Mr Leung submitted that the plaintiff has provided a reasonable explanation for the delay by taking prompt action in the issuing of the application as soon as Dr Tio’s recommendation was available. Mr Leung faulted the defendant for having caused more delay after the proceedings were transferred to the District Court by:
7. First, the defendant’s deferring of the filing and service of its answer to the plaintiff’s Revised Statement of Damages “until further order” (consent order dated 30 August 2019 at §5). Without complete pleadings by the absence of an answer to the plaintiff’s Revised Statement of Damages, the defendant’s case in relation to the issue of psychiatric impairment the plaintiff had pleaded was not known to the plaintiff. In view of the outstanding answer to the Revised Statement of Damages, Mr Leung submitted that would not be any disruption to the case preparation.
8. Secondly, the defendant only informed the plaintiff of its objection to the plaintiff’s draft consent summons for the engagement of a psychiatric expert on 30 September 2019, leading to further delay in the issue of the present application.
9. Mr Leung urged me to exercise similar discretion to that exercised by Master Marlene Ng (as she then was) in *Leung Wan Lung v Cheng Wai Man*[[9]](#footnote-9) in which the court granted leave for the adducing of a psychiatric expert report notwithstanding that the application was only made 3 years after the accident and more than 6 months after the expert neurologist’s recommendation in the joint neurological expert report for a further psychiatric examination.
10. In objection, Miss Kwok contended that the plaintiff’s explanation for the delay was not reasonable. Given that the plaintiff has all along been legally represented, Miss Kwok stated that the plaintiff would have been properly advised in deciding whether to take out an application for leave to adduce psychiatric expert evidence much earlier. That the plaintiff only raised the issue of psychiatric expert evidence after Dr Tio’s recommendation, Miss Kwok argued, is not justified.
11. The excuse on the account of the refusal by the Legal Aid Department to approve the engagement of a psychiatric expert, Miss Kwok suggested, could not have been a relevant consideration as it was purely a matter between the plaintiff and the Legal Aid Department.
12. Miss Kwok urged me to exercise similar discretion to that of the District Judge in *Lee Chui Ying & Anor v Chan Yee Ling Elaine[[10]](#footnote-10)* in respect of a late application for the adducing of psychiatric expert evidence. She suggested that I should similarly find that there was not reasonable justification for any material change of circumstances to explain the delay.
13. I agree with Miss Kwok’s submissions, and reject the plaintiff’s explanations for the delay.
14. According to the existing evidence, the plaintiff started receiving psychiatric treatment at KCH even before the writ was issued in May 2017 in the High Court, and continued doing so throughout the proceedings. In my view, the plaintiff had no reasonable explanation as to why she had to wait until Dr Tio’s recommendation before issuing the present application. The plaintiff’s psychiatric condition is plainly not a recent occurrence, but a matter already within the knowledge of the plaintiff and her legal advisers. I am thus in respectful agreement with Miss Kwok that the plaintiff and her legal advisers had ample opportunities to raise the issue of psychiatric expert evidence were the plaintiff’s psychiatric condition indeed serious and related to the accident. There is no justification for the plaintiff to have waited until sometime after Dr Tio’s recommendation.
15. I also do not think that Mr Leung was entitled to rely on the defendant’s outstanding answer to the Revised Statement of Damages to excuse the delay, particularly when the deferring of the defendant’s answer was with the plaintiff’s consent.
16. All in all, I have identified the following instances of delay which I find the plaintiff has failed to provide valid reasons.
17. First, I find that the plaintiff could have raised the issue of psychiatric medical expert in the two Questionnaires she filed as early as 13 October 2017 and later on 25 June 2018 when the plaintiff was already receiving psychiatric treatment at KCH. There is a complete absence of explanation for the plaintiff’s failure in raising the matter sooner.
18. Secondly, there is no explanation for the 4 and ¼ months’ delay (between 30 June 2018 and 19 November 2018) for the seeking of the defendant’s consent for the adducing of psychiatric expert evidence after Dr Tio’s recommendation. Miss Kwok was correct in stating that the awaiting for the approval of the Director of Legal Aid could not be a reasonable explanation for the delay.
19. Thirdly, I do not accept that the transfer of the proceedings from the High Court could have constituted a reasonable excuse for the delay. Before or after the transfer of the proceedings, the plaintiff was never at any stage of the proceedings precluded from making the present application. The explanation that the plaintiff needed an order from court for the issuing of the present summons clearly cannot stand. Thus, I find that the plaintiff has not provided any reasonable explanation for the further one year’s delay between 21 November 2018 when the defendant by letter informed the plaintiff’s solicitors of its objection (to the adducing of the psychiatric expert evidence) and the issue of the present summons on 22 October 2019.
20. For the reasons stated above, I am not satisfied that the plaintiff’s delay is justified or reasonable.
21. Lastly, I reject Mr Leung’s submission that there is no disruption of proceedings albeit that this action has not yet been set down for trial. Further delay and incurring of costs will be likely should the plaintiff be allowed to adduce psychiatric expert evidence at this late stage about 3 years after the writ was issued. This action should move forward and be set down for the trial for the assessment of damages without delay particularly given that the parties have agreed to stay the related employees’ compensation case pending the conclusion of this action.
22. *Conclusion and order*
23. For the reasons given above, I dismiss the plaintiff’s summons, and grant a costs order *nisi* that the plaintiff do pay the costs of the defendant (including any costs reserved) with certificate for counsel, such costs to be taxed if not agreed. The plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations. If no application for the variation of the costs order *nisi* is made within 14 days of the handing down of this Decision, the costs order *nisi* stands absolute.
24. I further give the following directions: -
25. In view of the prevailing Covid-19 pandemic, the Check List Review (**CLR**) will be disposed of on paper in lieu of a hearing. The order date (**Order Date**) is fixed on 31 August 2020.
26. The parties’ solicitors shall file and lodge all the requisite documents in compliance with PD18.1, Section M by treating the Order Date as if it were a date for a CLR hearing, seeking directions, including but not limited to, for the setting down of this action for trial.
27. Since the defendant’s answer to the Revised Statement of Damages is still outstanding, I order that the defendant shall file and serve the same within 14 days of the handing down of this Decision.

# (Katina Levy)

# District Judge

Mr Herbert Leung, instructed by Kenneth W. Leung & Co, assigned by the Director of Legal Aid, for the plaintiff

Miss Vanessa Kwok, instructed by Au & Associates, for the defendant

1. HCPI 883/2011 (unrep.) Deputy High Court Judge Marlene Ng (as she then was), 8 October 2013, at para 37, citing *Fung Chun Man v Hospital Authority & anor*. HCPI 1113/2006 (unrep.) 24 June 2011, at paras 9-11 and 15. [↑](#footnote-ref-1)
2. [2013] 1 HKLRD 580, Bharwaney J. [↑](#footnote-ref-2)
3. *Bai Siba Kumar*, supra. [↑](#footnote-ref-3)
4. In a number of medical notes if KCH, it was stated that “worries about the health being undermined”: Hearing Bundle (**HB**) 129, 131, 133, 139, 143, 145, 147. [↑](#footnote-ref-4)
5. See the order dated 31 October 2017, §3, HB38. [↑](#footnote-ref-5)
6. [1998] 4 HKC 523 at 527. [↑](#footnote-ref-6)
7. “where the plaintiff was almost certain to have gone through life unaffected by the condition… In the first, the defendant would be liable for all damage caused”. [↑](#footnote-ref-7)
8. In the “Plaintiff’s List of Medical Report”, the plaintiff only filed 4 medical reports from Yan Chai Hospital, namely (1) a MRI report; (2) a physiotherapy report; (3) a medical report of the Department of Orthopaedics & Traumatology; and (4) a medical report of the A & E Department. [↑](#footnote-ref-8)
9. HCPI 6/2009 (unrep.) 7 December 2009. [↑](#footnote-ref-9)
10. DCPI 1665/2011 (unrep.) Deputy District Judge Winnie Tsui, 16 November 2015. [↑](#footnote-ref-10)