# DCPI 3365/2020

[2022] HKDC 276

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 3365 OF 2020

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BETWEEN

PIES, JOHN DAVID Plaintiff

and

SIU SHIU KEUNG Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (Open to public)

Date of Hearing: 18 February 2022

Date of Decision: 30 March 2022

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DECISION

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1. This is a personal injury (“PI”) case where the solicitors on both sides, especially on the part of the plaintiff, have flagrantly flouted the orders of the Court in appointing a new orthopaedic expert to prepare a so-called “supplemental” medical expert report. It was done not only without the leave of the Court but also was in clear breach of 2 orders made by the Court.

*BACKGROUND*

1. This case involved a traffic accident which happened on 24 August 2014 in Pokfulam, Hong Kong (“the Accident”). At the time of the Accident, the plaintiff was a cyclist and the defendant was the registered owner and driver of a truck/van. The plaintiff sustained serious multiple injuries as a result of being hit by the defendant’s vehicle in the Accident.
2. This case was commenced by the plaintiff originally in the High Court under HCPI 1189/2016. The writ was issued on 27 October 2016. Interlocutory Judgment on liability was entered against the defendant pursuant to a consent order filed by the parties on 10 March 2017, leaving damages to be assessed.
3. 6 experts in different specialties were ordered by Master Roy Yu of the High Court on 21 September 2017 to arrange examination on the plaintiff. The parties were ordered to jointly report to the Court within 28 days to advise on the dates of the examination and the dates for the completion of the expert reports. By another Order of Master Roy Yu dated 12 October 2020, 4 expert reports were agreed to be adduced without oral evidence.
4. Thus, the status of the expert reports as of the date of the hearing before me on 18 February 2022 is as follows:

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| --- | --- | --- | --- |
| Specialty | Expert | Report date | Remarks |
| ENT | Prof Michael Tong, single joint expert | 7 Feb 2022 | The parties were supposed to arrange the plaintiff to be examined by the ENT expert under the Order of Master Roy Yu dated 21 September 2017 and to report to the Court within 28 days to advise on the date of the examination and the date of completion of the report. However, the report was not compiled until 7 February 2022 with no explanations given. Hence, there was a delay of almost 4 years |
| Ophthalmologist | Dr Kenneth Ng Wing Ho, single joint expert | 24 Jul 2018 | This report was compiled in time. |
| Orthopaedic | Dr Li Wing Kin, single joint expert | 9 Jan 2018 | This report was compiled in time. However, in the plaintiff’s letter dated 5 January 2022 to the Court, the plaintiff for the first time informed the Court that he had decided to introduce Dr Peter Tio in place of Dr Li as the single orthopaedic expert in this case |
| Neurologist | Dr Kan Yiu Ting (for the plaintiff)  Dr Edmund Wood (for the defendant), joint expert | 22 Jan 2018 | This joint report was compiled in time. |
| Psychologist | Prof Peter Lee Wing Ho, single joint expert | 20 Jul 2021 | The parties were supposed to arrange the plaintiff to be examined by the psychological expert under the Order of Master Roy Yu dated 21 September 2017 and to report to the Court within 28 days on the date of the examination and the date of the completion of the report. However, the report was not compiled until July 2021 with no explanations given. A delay of almost 4 years. |
| Maxillofacial | Prof Cheung Lim Kwong, single joint expert | 24 Nov 2017 | Although the report was dated 24 November 2017, it was filed with the Court on 9 February 2022 only. A delay of over 4 years. |

*DISCUSSION*

*(A) History of the case*

*Case management directions given in the High Court*

1. This case was transferred from the High Court to the District Court by Master Roy Yu pursuant to his Order dated 12 October 2020. It is important to bear in mind that when the case was transferred to the District Court, it had already been more than 6 years after the Accident and 3.5 years after interlocutory judgment had been entered against the defendant. There was no explanation offered by the plaintiff as to why it had taken him 3.5 years to have the case transferred to the District Court as the increase of jurisdiction of the District Court took place in December 2018.
2. Despite the fact that the plaintiff has sustained serious multiple injuries in the Accident, this is still a relatively simple and straightforward PI claim for the following reasons. First, this case only involves with the issue of quantum as liability had been admitted at an early stage of the proceedings. Second, most of the expert reports prepared by the agreed single medical experts have been ready since 2018. Third, it involves a relatively modest amount of damages. The fact that the case was transferred to the District Court back in October 2020 where it has an upper jurisdictional limit of HK$3 million really speaks for itself. However, for reasons unknown to this Court, the case went idle between 2017 and 2019. A “Notice of Intention to Proceed after a Year’s Delay” was filed by the plaintiff in August 2019. Incredibly, it took another 14 months before the case was transferred to the District Court.
3. Judging from the above history, one can say that from the date of the interlocutory judgment was entered in March 2017 to the date when the case was transferred to the District Court in October 2020, there had already been inordinate and unexplained delays on the part of the plaintiff to bring this case to the assessment of damages.

*Case management directions given in the District Court*

1. The first Checklist Review (“the 1st CLR”) hearing at the District Court was scheduled on 4 March 2021 but was vacated by way of a consent summons filed by the parties a few days before the hearing with subsequent case management directions made by Master Louise Chan (“the Master”), one of the PI Masters, under an Order dated 3 March 2021 (“the March 2021 Order”). On that occasion, the plaintiff informed the Court of his intention to undergo a propsoed nose operation and why in his view the ENT expert examination could only be done after the nose operation: (See the plaintiff’s letter to the Court dated 2 March 2021).

1. The March 2021 Order required the parties, *inter alia*, to report to the Court the progress of the plaintiff’s nose operation and thus the date of the ENT expert examination. The 1st CLR hearing was adjourned to 28 October 2021.
2. The plaintiff wrote to the Court on 22 October 2021 seeking further adjournment of the CLR hearing scheduled on 28 October 2021 (“the 2nd CLR”). The Court declined and the hearing was ordered to proceed as scheduled with the solicitors on both sides requested to attend the hearing.
3. In the plaintiff’s letter dated 22 October 2021 to the Master, the plaintiff reported, *inter alia*, the following:-
   1. No nose operation had taken place;
   2. Notwithstanding the treatment recommended by the single joint orthopaedic expert Dr Li Wing Kin (“Dr Li”), the plaintiff sought “second opinion” from one Dr Raymond Yip, who recommended some other treatments. The plaintiff was then receiving those treatments and thus wanted to wait until “the situation became clearer”.
4. The hearing of the 2nd CLR took place before the Master on 28 October 2021 as scheduled. At the hearing, the Master asked the plaintiff’s solicitor Mr Patrick Burke (“Mr Burke”), who is the principal of the plaintiff’s solicitors, why the plaintiff did not undergo the nose operation as reported by them to the Court in their letter dated 2 March 2021. Mr Burke informed the Court that it was because the plaintiff did not want to lose his job and therefore did not take time off to have the operation. The Court did not accept such explanation and asked further why it is necessary to have the ENT examination after the nose operation. Mr Burke said because *“he believes this would be better for the plaintiff”.* The Master did not accept such explanation also. She ordered that no further adjournment of this examination would be allowed unless there is some expert evidence to show that the ENT examination is best to be conducted after the operation.
5. Mr Burke then conceded that his client would undergo the ENT examination without waiting for the nose operation.
6. At that hearing, Mr Burke also informed the Court of the plaintiff’s intention in seeking supplemental report(s) from his medical expert(s) but the Master apparently reminded the parties that a list of 6 medical examinations were proposed to take place in 2017/2018: (See Master Roy Yu’s Order dated 21 September 2017.) Regrettably, the ENT examination was still outstanding after a 4-year time lapse. The parties were specifically reminded by the Master at the hearing that, pursuant to §3 of the March 202l Order, besides the psychology and ENT experts, “(N)o further or additional medical expert evidence shall be obtained or adduced without leave of the Court.”
7. In view of the remarks made by Mr Burke at the hearing, the Master made a similar order at the 2nd CLR hearing (“the October 2021 Order”): (See §2 of the Order), which specifically stated that, besides the ENT expert,[[1]](#footnote-1) “(N)o further or additional expert medical reports shall be obtained or adduced without leave of the PI Master.”
8. The Master specifically pointed out to the parties at the hearing that the progress of this case had been painfully slow and, in the spirit of the Civil Justice Reform (“CJR”), the Court would purposely set out a “roadmap” to the parties anticipating the assessment of damages to be heard by the end of 2022, which incidentally will be more than 8 years after the Accident, an already unacceptable delay on any account for a simple and straightforward case like this.
9. Hence, the Master made an order requiring the parties to report to the Court the arrangement of the ENT examination within 35 days. The Master also deliberately set a short adjournment date for the parties to come back to report to the Court of the progress of the case in early February 2022.
10. However, despite of the Orders made by the Master, the parties did not report anything in respect of the ENT examination, but instead a joint letter dated 19 November 2021 (“the Joint Letter”) was sent to the Court, mentioning some nonessential matters: (See the Court’s written remarks to the parties dated 9 December 2021 requiring the parties to specifically address the ENT issue.)
11. Finally, on 5 January 2022, in response to the Court’s remarks, the plaintiff’s solicitors wrote to the Master, enclosing their “draft directions” for the consent of the defendant’s solicitors, which states:
12. ENT examination was to be done on 30 December 2021; and
13. Dr Li, who’s the orthopaedist jointly instructed by parties, “is retired and the parties have jointly instructed Dr Peter Tio (“Dr Tio”) to do examination on 7 Jan 2022 in place of Dr Li’s”.
14. Thus, while it is not clear whether the defendant at that stage had already agreed to instruct a new orthopaedic expert in place of Dr Li, the plaintiff decided to introduce one disregard of the 2 very clear Orders of the Master of not to do so without leave of the Court. It was also the first time that the Court heard Dr Tio has been appointed in substitution of Dr Li as an orthopaedic expert.
15. Further, in §3 of the Joint Letter, the plaintiff listed out all the “new treatments” and “opinions” he was receiving and what supplemental reports he was then trying to obtain. They were all done without leave of the Court and without so much as the courtesy of informing the Court first before doing so.
16. The plaintiff’s solicitors wrote 2 further letters to the Court respectively on 5and 7January 2022. The defendant solicitors wrote a similar letter to the Court on 6 January 2022.
17. The plaintiff solicitors’ second letter dated 5January 2022 attached a draft letter to the Court of even date and §2 of it informed the Court as follows:

“The Single joint orthopaedic expert Dr. LI Wing Kin has retired, and the parties have jointly instructed in has (sic) place Dr. Peter Tio, to do examination on the 7th January 2022;…”

1. Given the 2 clearly worded Orders, it came as a total surprise to the Master to learn that an orthopaedic examination was arranged without leave of the Court which was in blatant breach of the terms of the March 2021 Order and the October 2021 Order.

*Order of Master Louise Chan dated 12 January 2022*

1. After reading the plaintiff’s letters dated 5 and 7 January 2022 and the defendant’s letter dated 6 January 2022 to the Court, the Master made the following written directions (“the January 2022 Order”):-

“1. A CMC Hearing be fixed on 18th February 2022 at 9:30am in Court 8 with 2 hours reserved;

2. The Court shall not grant an application to vary such milestone dates unless there are exceptional circumstances pursuant to O. 25, r.3 of Cap. 336H;

1. No later than 5 days before the CMC hearing, parties do file the CMC bundle and serve on the other side;
2. No later than 5 days before the CMC hearing, the Plaintiff and the Defendant do submit a skeleton submissions addressing the following issues:
   1. Whether a joint orthopaedic examination was conducted by Dr. Tio after the last CLR hearing;
   2. If so, explanations to the breach of Orders as stated in paragraphs 2 and 3 hereinabove;
   3. Whether the parties are anticipating to adduce other new medical experts and/or supplemental and/or additional medical reports;
   4. If so, parties are to provide a list of these new experts/ supplemental reports they intend to adduce.”

*The plaintiff’s written submissions*

1. Pursuant to the January 2022 Order, the plaintiff’s solicitors purportedly tried to provide an “explanation” to the Court on 11 February 2022 but without admitting that they were in breach of the 2 previous Court Orders, let alone offering an apology.
2. In the submission, the plaintiff’s solicitors confirmed that the joint orthopaedic examination was conducted by Dr Tio on 7 January 2022 and it was done “by agreement between the parties, and pursuant to a joint letter of instructions dated 28th December 2021” which of course is a *fait accompli* on the part of the plaintiff.
3. The plaintiff’s explanation for what I would regard as a clear and flagrant breach of the Orders of the Master is that “(S)o far as the Plaintiff is concerned, this is not a new expert as such – but an updated expert report.” The plaintiff further explained that “(T)he need for an updated orthopaedic expert report has been explained in the letter to PI Master dated 22nd October 2021”, which of course was not the case as the letter had not mentioned the need for obtaining a new report from a new expert. It was another *fait accompli* on the part of the plaintiff.

*The defendant’s written submissions*

1. Pursuant to the January 2022 Order, the defendant had, on 11 February 2022, provided the following explanation and apology to the Court:-

“On 29th October 2021, the Plaintiff’s solicitors wrote to us requesting payment from the Defendant the costs of a spinal disc replacement surgery which the Plaintiff has been advised to undertake with an estimated costs at not less than HK$650,000 to HK$750,000. The Defendant did not agree. So the parties agreed to have the Plaintiff re-examined by Dr. Li Wing Kin (the parties’ single joint orthopaedic expert) and to produce an updated expert report. However, according to the Plaintiff’s solicitors, Dr. Li has retired and is unwilling to do the examination. Subsequently, the parties have agreed to instead appoint Dr. Peter Tio and failed to check the previous Orders and seek prior approval from the court for the new appointment of Dr. Tio. It is an oversight on our part to fail to check the previous Orders of which we do sincerely apologize to the court. We urge the court to accept that there is no intention on our part to deliberately breach the Orders of the Court.”

*The CMC hearing before me on 18 February 2022*

1. Just the day before the CMC hearing took place before me, ie on 17 February 2022, the plaintiff’s solicitors faxed a copy of Dr Tio’s report dated 16 February 2022 to the Court, totally uninvited, unauthorized and without any prior approval. This is a substantial and comprehensive 22-page report provided by an “expert” which was not only unsanctioned by the Court, but was specifically prohibited by the Master to do so. It was sent to the Court again as a *fait accompli.*
2. Without going into the details of Dr Tio’s report, it is clear to me why the plaintiff was so eager to obtain a completely fresh report from a completely different expert as both the contents and conclusions are very different from those found by Dr Li in his report dated 9 January 2018. They are “opinions” which obviously would put the plaintiff’s case in a more favourable light.
3. What was more shocking is that the plaintiff’s solicitors sent to the Court a “draft order” by fax on 16 February 2022, fully expecting the Court would endorse the order, which, *inter alia*, states: “BY CONSENT, leave be granted to the parties to change the nomination of single joint orthopeadic expert from Dr. Li Wing Kin to Dr. Tio Man Kwun Peter”. This in my view not only shows a clear breach of the 2 previous Orders made by the Master but also displays a contemptuous and disrespectful attitude of a solicitor to the Court.
4. It is yet another attempt of a *fait accompli* on the part of the plaintiff’s solicitors.
5. Further, the “draft order” contained some of new “proposed directions” suggested by the plaintiff which basically included the timetable of when Dr Tio should examine the plaintiff and when his report should be compiled. It also tried to introduce a completely new and up until then never been mentioned idea of the “need for an employment expert”.
6. One must bear in mind that the suggestion of having a new orthopaedic expert and an “employment expert” was put forward for the first time 7.5 years after the Accident and almost 5 years after interlocutory judgment was entered against the defendant. In my judgment, to say this is a naked and shameless attempt on the part of the plaintiff’s solicitors to usurp the case management functions of the Court perhaps is an understatement.
7. At the hearing before me on 18 February 2022, Mr Burke for the plaintiff remained unrepentant and unapologetic about his attempts to introduce a completely new orthopeadic expert without leave of the Court and in what I would find as a deliberate and contemptuous defiance of the Master’s 2 very specific Orders.
8. According to his own “interpretation”, Mr Burke considers that Dr Tio is not a “new” or “additional” expert as he was merely asked to give an “updated” report of the plaintiff’s orthopeadic condition. I find nothing is further from the truth as reading from the joint instruction letter to Dr Tio (which incidentally was only produced to the Court at the hearing upon the Court’s request) and Dr Tio’s subsequent unsanctioned and unsolicited report, they show that he was asked to prepare (and duly obliged) a completely *fresh* *and new* orthopaedic expert report, contrary to the plaintiff’s so-called “interpretation”. I find this arrogant and egotistical way of “interpretation” of the plaintiff’s solicitors not only falls far short of the standard to be expected from an experienced PI solicitor but also an insult to the integrity of the Court. In my judgment, the plaintiff’s attempts to have a new orthopaedic expert report is nothing short of having a second bite of the cherry when the plaintiff and/or his solicitors are clearly not happy with the opinions expressed by Dr Li in his single joint expert report written back in 2018. What they were hoping for and did receive was a report consisted of completely different findings and conclusions reached by a new “expert”. They then tried to present it to the Court as a *fait accompli,* fully expecting the Court will accept the “done deed”.
9. It was after much direct questionings from the Court at the hearing before me that Mr Burke finally was prepared to *“accept that there has been a breach of the (March 2021) Order”*. However, he still refused to accept that there was a breach of the October 2021 Order as he considered that by informing the Court by a letter before the CLR hearing containing the suggestion of a treating doctor of the plaintiff to do a fusion operation could justify him in introducing a complete new orthopaedic expert without leave. I find such feeble excuse to be contemptuous and totally disingenuous.
10. Mr Tsang on the other hand repeated the explanations he had given in the defendant’s written submissions dated 11 February 2022 and again apologized profusely to the Court of the mistake they made in agreeing to the appointment of Dr Tio as an expert without leave. Mr Tsang stated that as the parties were concentrating in discussing the substantial amount of money for a proposed fusion operation (which the plaintiff has up to now not undergone), he had omitted to check the Orders of the Master and to seek the Court’s leave to do so before jointly instructed Dr Tio. He regretted such an action and stated that with hindsight he should have raised this matter with the Court first before agreeing to the appointment of a new expert without leave.
11. I accept Mr Tsang’s explanations and apology to the Court.

*Protocol for commissioning expert reports*

1. It is perhaps worth reminding practitioners of the protocol of commissioning expert reports which has been clearly set out under §§69-90 of Practice Directions 18.1.
2. Of particular relevance to our case are §§69-71 which is produced here for ease of reference:-

“69. As a general rule, leave of the Court or consent of the parties is required before any expert evidence can be adduced at trial.

70. A party who obtains expert evidence before obtaining leave, other than from a single joint expert or pursuant to joint examination and joint expert report with the expert(s) of the other party or parties, does so at his own risk as to costs and / or eventual refusal of leave to adduce such expert evidence.

71. As soon as it is realized there exists a need or an anticipated need for adducing expert evidence at trial or if parties failed to reach agreement on arranging joint examination and / or compiling joint expert report by the parties’ respective experts before or after the commencement of proceedings or if no agreement can be reached as to directions on obtaining expert evidence and / or for permission to adduce expert evidence, a party shall apply (by *inter partes* summons or by restoring the case for Check List Review Hearing) or the parties shall jointly apply (by Consent Summons to expedite or restore the hearing of the Check List Review) to the PI Master as soon as possible upon the commencement of or in the course of proceedings, as the case may be, for directions on obtaining expert evidence and / or for permission to adduce expert evidence.”

1. In *Fung Chun Man v Hospital Authority & Another*, unreported, HCPI 1113/2006 (Bharwaney J; 24 June 2011), the Court has summed up the consequences of when a party or parties in a PI case in obtaining an expert report without leave of the court in §§18-21 of the reason for decision:-

“18.   It must be emphasised that the courts do not purport to control or inhibit a party’s right to consult experts and to obtain reports from them.  The party with means may do so.  The party, not under disability, who has obtained an interim payment, may deploy part of that payment towards the costs of such experts.  In a recent case involving a plaintiff who was either in a permanent vegetative state or minimally conscious state, I indicated that I might be willing to grant leave for part of the interim payment received to be used in obtaining a functional MRI report to ascertain the true level of consciousness of the plaintiff.  In a legal aided case, such as the present one, the plaintiff or his legal advisers may be able to persuade the Director of Legal Aid to grant permission to obtain an expert’s report.  However, the point to emphasise, as reflected in §70 of PD18.1, is that, whilst a party is free to obtain his own expert report, he does so at his own risk as to costs and possible refusal of leave to adduce such expert evidence. In addition, parties need to know that non-compliance with PD18.1 and the pre-action protocol set out therein without good reason may result in adverse costs consequences and sanctions, including wasted costs orders.

19.   Another point to emphasise is that the party who obtains an expert’s report, without agreement of the other party and without leave of court, runs the risk of disqualifying that expert from appointment by the court as the single joint expert. The risk may not be high at the beginning of proceedings when the court, although refusing leave for the party to adduce his solo expert report, may be amenable, nevertheless, to grant leave for a joint examination to be carried out by the expert concerned in conjunction with the expert nominated by the other party, and for a joint report to be prepared by them. However, if application is made, late in the day and when trial is imminent, for expert evidence to be adduced, the court may refuse the application or may only allow it on the basis of a single joint expert being appointed.

20.   Another point to note is that the party who obtains an expert’s report without agreement of the other party and without leave of court runs the risk of losing his right to claim privilege over such a report, if leave is later granted to appoint the same expert as one of the 2 joints experts to examine the plaintiff and to report on the case.

21.   A detailed exposition on the protocol for commissioning expert reports, both at the pre-action stage and at the post-writ stage, is contained in the post-CJR decision of Master Marlene Ng in *Siu Fook Cheong v Siu Kwok Fai* (HCPI768/2009, 2 February 2010).  The judgment provides particular guidance on the proper approach to be adopted in commissioning expert reports at the pre-action stage.  If pre-action communications do not result in agreed arrangements for single joint report or joint expert medical examination and report, the intended plaintiff is entitled to commence legal proceedings forthwith, without risk as to costs, and to issue an *inter partes* summons, as soon as possible after the commencement of proceedings, returnable before the PI Master, to seek directions on obtaining expert medical evidence. Alternatively, the intended plaintiff can apply for the CLR hearing to be expedited for the same purpose.”

1. I would like to reiterate that the Court will not normally dictate or control a party’s right to consult experts or obtain reports from them. In the spirit of the CJR, in fact the parties are encouraged to appoint single joint expert, and, if possible, to do so by consent together. However, where there is a specific Court order to prohibit a party to do so, the parties must not go ahead to appoint a new or additional expert without leave of the Court. To do so will not only amount to a breach of the Court’s order but also any report obtained in such a way, whether with or without the consent with the other party, will most likely not going to be recognized by the Court with adverse costs consequences.

*(B) Findings of the Court*

1. In this case, I do not dispute the fact that there is a genuine need for an updated orthopeadic expert report as Dr Li’s single joint report was dated back to January 2018. However, there had been inordinate and unexplained delay in obtaining it. In my view, the delay was not caused by the defendant or Dr Li but by the plaintiff alone. The fault in my view lies squarely with the plaintiff’s failure to prosecute the case conscientiously. As mentioned, there have been inordinate and unacceptable delays on the part of the plaintiff in prosecuting the case since interlocutory judgments was entered against the defendant in March 2017. Instead of obtaining the agreed single joint expert reports in an expeditious manner pursuant to the Order of Master Roy Yu dated 21 September 2017, the plaintiff was clearly dragging his feet, particularly in the case of the ENT and psychology experts as those reports had not been obtained until February 2022 and July 2021 respectively only. In my view, in respect of the orthopaedic expert report, the plaintiff should have asked for the updated report from Dr Li when the case was first transferred to the District Court in October 2020 or at the latest by way of the consent summons when they sought the Court’s directions at the 1st CLR in March 2021. However, in my judgment, it is not whether the parties should or should not have obtained such an updated orthopaedic report or even the delay in obtaining such a report that maters in this case, it is the arrogant and supercilious way of going about it by the plaintiff’s solicitors that I find to be extremely disturbing.
2. There is no doubt in my mind that the directions of the March 2021 Order and October 2021 Order of the Master in prohibiting the parties to obtain or to adduce further medical reports or evidence without leave of the Court have been breached by the parties, particularly on the part of the plaintiff. In my judgment, there is absolutely no room for argument that it was not the case. To suggest anything otherwise as the plaintiff’s solicitors have arrogantly been trying to do at the hearing before me is an insult to the integrity of the Court.
3. Nonetheless, the plaintiff’s solicitors, in clear defiance of the Court’s March 2021 and October 2021 Orders, went ahead to perform several *fait accompli* as highlighted above, thinking that by doing so it would force the Court to accept the new and unsanctioned report of Dr Tio. The plaintiff’s handling solicitor obviously thought that he could do whatever he liked and whenever he liked when it comes to appointing new medical experts in an ongoing case, despite of the clear directions of the Court to the contrary. Perhaps he thought all he needed to do is to report to the Court *after the event* when the matters have already become “done deeds”.
4. In doing so, I find the plaintiff has completely taken matters in his own hands and deliberately defiled the Orders of the Court. This makes the underlying objectives of the CJR to expedite the proceedings in a time efficient and economic manner difficult if not impossible to achieve.

1. In my judgment, to use Dr Li’s retirement as an excuse to justify the appointment of an unsanctioned expert is not only pathetic but entirely self-serving. First, before agreeing with the defendant’s solicitors to appoint Dr Tio to examine the plaintiff and to compile a report, the plaintiff’s solicitors did not even bother to mention to the Master before the 1st CLR hearing or at the 2nd CLR hearing of the fact that Dr Li had retired, a fact which was fully known to the plaintiff’s solicitors at the time. Second, they had failed to provide any evidence or record of correspondence to the defendant to show when Dr Li was supposed to have retired and why, even if he has retired, he could not continue to act as an expert of the Court. Third and most important of all, they had failed to seek the Court’s direction on this when they had ample of time and opportunities to do so.
2. In another act of *fait accompli*, the plaintiff wrote a letter on 30 December 2021 to the defendant enclosing a draft letter to the Master by purportedly jointly “reporting” to her that, *inter alia*, “the Single joint orthopaedic expert Dr. LI Wing Kin has retired, and the parties have jointly instructed in has (sic) place Dr. Peter Tio, to do examination on the 7th January 2022”. When the defendant was not able to reply in time on the unilaterally imposed deadline by the plaintiff due to the case handler at the defendants’ solicitors Mr Tsang had been taken ill at the time, the plaintiff’s solicitors saw fit to send the letter to the Master, by unilaterally assuming that the defendant did not object to such an appointment. In my view, this is an oppressive and reprehensive way of conducting litigation.
3. Further, it was not until at the hearing before me on 18 February 2022 that copies of the correspondence between the plaintiff’s solicitors and Dr Li were produced to the Court for the first time. Mr Tsang confirmed that they were not shown copies of those correspondence until the day before the hearing.
4. A quick glance of those correspondence confirmed that the plaintiff’s solicitors wrote to Dr Li as early as in May 2020 to ask him for an update examination of the plaintiff and to review the further treatments the plaintiff had received up to that time and to advise his current condition and further treatment that he may require: (See letter from the plaintiff’s solicitors to Dr Li dated 4 May 2020). However, despite Dr Li was appointed as a single joint expert by both parties, the letter was not copied to the defendant. Dr Li replied by an email on the same date and indicated that he had retired and had removed himself voluntarily from the specialist register and was not entitled to practice anymore. Hence, he thought he was not able to conduct the subject re-examination.
5. As said, this matter was not reported to the Master. Nor was it mentioned to the defendant.

1. Then, after the 1st CLR was vacated and with the March 2021 Order still fresh in the parties’ mind, on 1 April 2021, the plaintiff’s solicitors wrote to Dr Li by email again and asked him to prepare an updated expert opinion. Again, Dr Li replied by email on the same day reiterating his position. However, nothing in Dr Li’s reply suggests why he could not continue to act as an expert. In fact, Dr Li asked the plaintiff’s solicitors for suggestions as to how he may offer further help in this case. Further email exchanges took place in May and June 2021 between the plaintiff and Dr Li where Dr Li repeated the same position. However, these email exchanges between the plaintiff and Dr Li were being kept away from the Court and the defendant. In other words, both the defendant and the Court were being kept in the dark by the plaintiff’s solicitors on this matter.

1. I do not regard the mere fact that Dr Li has retired from private practice as an orthopaedic surgeon will necessarily prevent him from continuing to act as an expert in this case. In fact, Dr Li himself in his email replies back in April to June 2021 did not say so. He was simply asking for a practical solution as to how to go about providing an updated report and asked for suggestions from the plaintiff’s solicitors to do so.
2. In my judgment, in order to save time and costs and in order to achieve the underlying objectives of the CJR, whenever possible, an expert who has been appointed to examine a plaintiff and who has previously prepared an expert report in the case should be appointed to conduct further examination and to prepare for an updated or supplemental report. It is only in very rare and exceptional circumstances, like the untimely demise or serious ill health of the existing experts, which would prevent them to prepare an update and supplemental report, will justify the appointment of a new expert. After all, the expert’s duty is owed to the Court and not to the party or parties who appoint him or pay him. This has been clearly spelt out in the Code of Conduct referred to in §80 of PD 18.1 which every expert is now required to sign and declare at the end of their report. Hence, there is no room for any misunderstanding on all parties concerned.
3. In those very rare and exceptional circumstances, the parties should first seek the directions of the Court at the first available opportunity during the case management stage of the proceedings. If the Court considers appropriate, it will appoint a new expert in substitution of the existing expert, after hearing parties’ submissions. I should add that the closer the application for such new expert to be appointed to the trial or assessment date, which of course are “milestone dates”, the less likely the Court will grant leave to allow a party or parties to appoint a new expert. The parties however must not, like the plaintiff in this case, simply went ahead with the appointment (even with the agreement of his opponent) without leave and then to inform the Court as a *fait accompli* after the event.
4. In my judgment, the real issue in this case is not about Dr Li’s perceived inability in preparing an updated report due to his retirement. The real issue is whether the plaintiff could, even with the agreement of the defendant, bypass the case management power of the Court and in clear breach of the 2 Orders of the Master, to go ahead to appoint Dr Tio as a new expert in substitution of Dr Li without first seeking leave to do so. While I accept the defendant’s handling solicitor’s explanation and apology that they had done so unintentionally, I cannot say the same regarding the plaintiff’s solicitors appalling conduct.
5. Judging from the dates of the correspondence between the plaintiff’s solicitors and Dr Li, it is clear that the plaintiff had no intention to inform the Court of replacing Dr Li by Dr Tio as a new expert until after he was appointed and the examination took place, ie when it has become a *fait accompli*. In my judgment, such way of conducting PI litigation not only has completely undermined the authority of the Court but demonstrates a contemptuous and disrespectful attitude on the part of the plaintiff’s solicitors. It has no place in our litigation system. The Court will not allow practitioners to do things in their own way and usurp the functions of the Court. For that reason alone, I would not allow Dr Tio’s report to be introduced in this case. I will order Dr Tio’s report to be expunged from the court files and not to be referred to as evidence in this case. At the hearing, I ordered the costs of instructing and in obtaining the report from Dr Tio without leave of the Court to be borne equally between the parties. I further directed the parties’ solicitors to show cause within 14 days of why they should not be personally liable for bearing those costs and on an indemnity basis.
6. In that regard, Mr Tsang of the defendant’s solicitors had on 4 March 2022 wrote to the Court and confirmed that they would not oppose to the order of personally liable for the costs above and that they confirm that they will not charge their insurer clients for the same. I so order that they should bear half of those costs personally and on an indemnity basis.
7. Unsurprisingly, the Court has not heard from the plaintiff’s solicitors within the time limit specified under the Order. I take it that they are not interested to do so. Hence, I will make an order here that the plaintiff’s solicitors to personally pay half of the costs in obtaining Dr Tio’s report and on an indemnity basis.
8. However, this has not taken into account of all the other wasted costs incurred by the plaintiff in seeking to replace Dr Tio as the single joint orthopaedic expert in this case. I shall deal with them at the end of this decision.

*Orders made at the CMC in relation to appointing Dr Li to prepare the supplemental report*

1. At the CMC hearing, I made the following order in respect of the possibility of appointing Dr Li to provide the Court with an updated report which of course the plaintiff’s solicitors had not seriously explored at all:-

“1. The parties do write to Dr Li Wing Kin jointly within 7 days with a copy to the court to request him to provide a further single joint expert report to review the further orthopaedic medical evidence and treatments received by the plaintiff from the date of his last single joint expert report dated 22 January 2018;

2. Dr Li is reminded by the Court that in accordance with his declaration in relation to the Code of Conduct for expert witnesses stated at the end of his report dated 22 January 2018, that his duty in this case is to the Court and not to the parties who appointed him but it is unlikely that he will be called to give oral evidence in Court in this case;

3. If for any reasons that Dr Li considers that he is not able to or unwilling to provide such supplemental / updated expert report, he should clearly state to the Court as to the reason(s) thereof and to provide his explanation to the Court via the parties’ solicitors within 7 days from receiving the joint instructions;

4. The parties should jointly report to the Court the status regarding Dr Li’s examination and preparation of the proposed supplemental single joint orthopaedic report within 21 days for further directions.”

1. Pursuant to my Order above, the parties jointly wrote to Dr Li on 22 February 2022 and the response from Dr Li has been very positive, proving that the plaintiff’s earlier attempt to replace the orthopaedic expert in this case was totally unnecessary and uncalled for.
2. In Dr Li’s response by email on 23 February 2022, he mentioned the fact that the plaintiff had undergone surgery on 16 October 2021 and further treatment was planned to be given which includes PRP injections, he suggested that the assessment should be done after 6 to 12 months after the “major spinal surgery”.
3. Hence, pursuant to the parties’ above reporting to the Court on 28 February 2022, on the same day, I directed the parties to jointly appoint Dr Li to provide a supplemental report on or before 16 April 2022 with the current available medical reports and records, including the reports/records in relation to the surgery / medical procedures undertaken by the plaintiff on 16 October 2021.
4. In the unlikely event that Dr Li is not able to conduct the further examination or to prepare the updated supplemental report, the Court will order a new expert of its own choice to do the same, after consulting the parties but without being bound by their recommendations.

*Other Orders made at the CMC*

1. As said, I see no good reason why it has taken the plaintiff more than 5 years to get to this stage after interlocutory judgment had been entered against the defendant in March 2017. As mentioned, I find a lot of the delays were caused by the inaction and at least on 2 separate occasions deliberate flouting of the Orders on the part of the plaintiff’s solicitors. In my experience, even with the multiple injuries suffered by a plaintiff which requires experts from multiple disciplines to prepare reports on, it will not usually take more than 2-3 years before a case is ready to be set down for the assessment hearing from the date of entering interlocutory judgment. I find the main reason why it did not happen in this case was due to the dragging of his feet on the part of the plaintiff and/or his legal advisers. The inordinate delays, as happened in this case, will only lead to wasting of time and unnecessary accumulation of costs. Further, all these will only add unnecessary stresses on the plaintiff and his family. In my view, such continuous accumulation of unnecessary costs on the part of the plaintiff is disproportionate to a claim which is subjected to a HK$3 million ceiling.
2. In order to bring this case to a close within a reasonable time, at the hearing on 18 February 2022, I fixed the assessment of damages hearing before another judge in September 2022 with a further CMC hearing before me in June 2022 and a PTR before the trial judge in July 2022. By fixing those “milestone dates” above, it will not only give the parties a clear roadmap leading to the assessment hearing, but will also provide sufficient time and space for the parties to achieve an amicable out-of-court settlement, whether through without prejudice negotiations, sanctioned offers or payments and/or mediation. However, in my judgment, what a plaintiff cannot expect the Court to do is to allow him to wait until such time when he or his legal advisers subjectively think that his physical/mental condition has been settled before he will set down the case for trial or assessment. This is not a matter for the litigant or his lawyers to decide. It is a case management matter for the Court to determine, after taking into account of all the circumstances of the case, including the injuries sustained by the plaintiff in the accident; the medical condition and treatments undergoing by the plaintiff; reports/records in support of the injuries and treatments; the experts’ opinions; submissions of the parties and so on. What the Court will not allow the parties to do when there is a clear order to prohibit them to adduce further medical report or evidence without the leave of the Court is to take matters in their own hands and decide to do things in their own ways, just like the plaintiff’s solicitors have done in this case.
3. Hence, I will direct all the costs incurred by the plaintiff in relation to the unauthorized appointment of Dr Tio in substitution of Dr Li as a “new” expert in this case shall not be recoverable as party and party costs in this case. This will include all the correspondence (whether by letters or emails) between the plaintiff’s solicitors and Dr Li and the subsequent letters to the Court to purportedly “report” on the matter. The Court will not let a solicitor to earn fees in such a way when such work was totally uncalled for and unnecessary and was done in clear breach of the Court’s Orders. I will make a note of this in the court file to alert the taxing master on this matter.
4. Further, in this case, I notice that there has been at least a period of 3 years from 2017 (ie the last Order of Master Roy Yu dated 21 September 2017 on case management issues) to October 2020 (ie the Order of Master Roy Yu dated 12 October 2022 to transfer the case to the District Court) when there were totally unexplained inactions and delays on the part of the plaintiff in prosecuting this case. I do not think that the plaintiff should be entitled to claim interest on any damages that he may able to recover from the defendant at the end of the day during this 3 year period. I shall make a note on the court file in this case to ask the trial judge to take this into consideration when assessing the period of interest to be allowed at the assessment hearing, subject of course to any submissions that the parties may wish to make to the trial judge on the matter.

*CONCLUSION*

1. In conclusion, I would like to make the following summary.
2. First, the Court in fulfilling its case management functions in a PI case will not allow parties to openly defy the orders of the Court and will not allow the appointment of a new or substitute expert just because a party (or both parties) choose to deliberately ignore and disobey the orders of the Court.
3. Second, a party who obtains an expert report from a new expert without leave of the Court (with or without the agreement of the other party), runs the risk of disqualifying the expert from appointment by the Court.
4. Third, when the appointment of an expert is made in clear breach of an existing order, any *fait accompli* done by the parties will not be recognized by the Court and will very likely lead to wasted costs order made against the legal representatives personally and on an indemnity basis.
5. Fourth, any unnecessary and wasted costs incurred in relation to such acts will not be recovered by a litigant as party and party costs from the losing party in the case and the party who commits those acts will most likely have to bear those costs himself at the end of the day.

( Andrew SY Li )

District Judge

Mr Patrick Burke of Burke & Company, for the plaintiff

Mr Kevin Tsang of Krishnan & Tsang, for the defendant

1. By this time, the psychological expert report of Professor Peter Li has been filed. [↑](#footnote-ref-1)