DCPI 3551/2020

[2022] HKDC 1332

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 3551 OF 2020

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BETWEEN

CHENG SIU MING Plaintiff

and

CHAN YUNG MAN Defendant

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Before: Master Louise Chan in Chambers (paper disposal)

Date of Plaintiff’s Skeleton Submission: 13 September 2022

Date of Defendant’s Skeleton Submission: 16 September 2022

Date of Decision: 14 November 2022

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DECISION

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1. By way of a Summons dated 3 May 2022, the Plaintiff sought leave from the Court, *inter alia*, “to obtain a medical report from a dermatologist, with liberty to the Defendant to engage his own expert to join in for a joint examination if he so wishes” (“the Summons”). Although the Summons asked for a “medical report”, it is apparent from the supporting affidavit of Ms. Mandy Wan, the Plaintiff’s solicitor, that their real intention was to adduce expert medical evidence from a dermatologist to assess the Plaintiff’s alopecia areata condition, which was allegedly suffered by the Plaintiff shortly after a traffic accident on 31 August 2018 (“the Accident”).
2. At the time of the Accident, the Plaintiff was a passenger of a private vehicle that collided with the Defendant’s car. The Plaintiff was admitted to the A&E Department of North District Hospital for treatment and was found to have suffered tenderness over his left shoulder and left buttock with abrasion over his left face. He was diagnosed of left lower limb pain and discharged on the same day with 7 days’ sick leave. The Plaintiff pleaded in his Statement of Damages that he suffered from persistent left hip pain, and a MRI revealed that there was, *inter alia*, tear and fracture of the cartilage and bone around his femur area. Furthermore, the Plaintiff pleaded that he suffered from an auto-immune disease of alopecia areata, which was caused by the stress brought to him by the Accident. He started losing hair on 6 September 2018, which was around a week after the Accident. He therefore started receiving dermatological treatments including intralesional and topical steroid and protopic ointment to cope with his hair losing problem.
3. Based on the parties’ consent summons that was filed back in August 2021, the Court made an order that the medical evidence be limited to one orthopaedic expert for each party.  For the purpose of this application, the Court would not go into the details of the joint orthopaedic report that was compiled on 7 February 2022 (“the JOR”), save that both doctors recommended that the Plaintiff to be examined by a dermatologist for his alopecia areata condition.
4. The Plaintiff therefore took out the Summons to adduce further expert medical evidence in the specialty of dermatology so to allow the Court to determine, in the main action, the causation of the hair loss and the appropriate award of damages. I gave an order for this application with a timetable for exchange and filing of affidavits and written submissions. The substantive hearing was scheduled to be heard on 14 October 2022 but upon the parties’ joint application dated 12 July 2022, I allowed this application to be dealt by way of paper disposal.
5. The Plaintiff did not file any affidavit in reply but relied on his solicitor’s affidavit in support of his application. The Defendant opposed the Plaintiff’s application with a lengthy submissions filed on 16 September 2022, upon which I do not intend to go through each and every point. In gist, the Defendant submitted that the dermatologist evidence would not be relevant in determining the cause of the Plaintiff’s alopecia areata, which is essentially a psychiatric illness. The quality of the evidence, i.e. photos of the Plaintiff’s scalp before and after the Accident, was criticized as they could not show the actual time the Plaintiff has started to develop alopecia areata. Furthermore, it was suggested that the medical report from the Plaintiff’s treating dermatologist Dr. Au Tak Shing (“Dr. Au”) dated 11 July 2020 (“Dr. Au’s Report”) should be inadmissible, and in any event, should not be preferred or adopted as he does not have the qualification to comment on the Plaintiff’s psychiatric or psychological problems. Last but not least, the Defendant contended that the proposed expert evidence in dermatology is unnecessary and of no probative value, and the costs of seeking such expert report will be disproportionate to the damages sought.

LEGAL Analysis

Hearsay Evidence

1. The affidavit in support of this application was prepared by the Plaintiff’s solicitor with photographs of the Plaintiff’s scalp proving his hair loss after the Accident. None of these exhibits were submitted in the Plaintiff’s witness statement or other contemporaneous statements in the main action and thus they are intrinsically hearsay evidence. While hearsay evidence should not be excluded in civil proceedings under sections 47 and 47A(4) of the Evidence Ordinance, Cap 8, the Court could decide on the weight to be given to them.
2. In this respect, I am not prepared to evaluate the quality of the Plaintiff’s evidence and or thus to make a factual finding on when he started developing alopecia areata, because even if this Court is to take the Plaintiff’s evidence at its highest, this Summons is still bound to fail based on the following legal principals hereinbelow.

Is this a claim for damages for psychiatric injury?

1. Even the Court is to accept that the Plaintiff started to lose his hair shortly after the Accident, the Plaintiff must demonstrate a link between the alleged tort and the alopecia areata that he is allegedly suffering from. But what is alopecia areata? According to Dr. Au’s Report, he explained as follows:

“Alopecia areata is an autoimmune disease; the immune system attacks the hair follicles. Severe stress is one of the factors thought to cause alopecia areata.”

1. Per the said Report, alopecia areata is one of the many known autoimmune diseases and *severe stress* could be a possible cause to it. Plainly, the Accident itself could not cause the hair loss, but it could be a psychiatric condition/reaction that has developed from the Plaintiff’s traumatic event. As such, there may be a psychiatric component to the Plaintiff’s claim for loss and damages in the present proceedings.

The Plaintiff’s burden of proof in claiming psychiatric illness

1. In ***Fung Chun Man v Hospital Authority & Others*** HCPI 1113/2006, 24 June 2011, Mr. Justice Bharwaney in paragraph 23 of his judgment said the follows:-

“… 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.”

1. In light of the above, the Plaintiff is not only required to prove to the Court that alopecia areata could be a recognizable psychiatric/ psychological illness or condition, but also to prove that the accident caused or contributed to such illness or condition. As such, the Plaintiff relies on Dr. Au’s report to support the nexus between the symptoms and the Accident, which stated “In this particular patient, he had the car accident resulting in fracture on 31 August 2018, and he noticed hair loss on 6 September 2018. The temporal relation was strong, and the severe stress of the car accident was a very likely cause of alopecia areata in this patient.”

The Admissibility of Dr. Au’s Report

1. I will pause at this juncture but to first deal with the Defendant’s suggestion that Dr. Au’s Report should be inadmissible because it is expert medical evidence that has been adduced without leave. In ***Hung Sau Fung v Lai Ping Wai*** [2012] 1 HKLRD 1, HCPI 204/2009, Mr. Justice Bharwaney explained in paragraph 46 of his judgment that:-

“A report of a treating doctor is always admissible to prove the fact that the injured person was receiving treatment, the nature of that treatment, and the opinion and diagnosis of the treating doctor which was communicated to the injured person. These are all matters of fact. Whilst the diagnosis reached and the treatment plan recommended by the treating doctor is the product of his expertise, his diagnosis and treatment plan and their communication to the injured person is a matter of fact. However, the opinions expressed by the treating doctor in his report are not admissible as expert evidence unless leave to admit it for that purpose has been obtained from the court …”

1. This authority was however addressing a situation where a party tried to introduce some medical reports from a treating doctor in the form of expert reports *at the trial*. In fact, reference should also be made to paragraph 25 of ***Fung Chun Man, supra*** which bears more relevance to this case “… 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 …”
2. Bearing in mind of these principles, the Court has little hesitation but to find Dr. Au’s Report being admissible. I nonetheless do not intend to treat it as an expert report *per se* but rather some evidence from the Plaintiff to justify his application.

Can Dr. Au’s Report support the need of dermatology expert evidence in this action?

1. Going back to Dr. Au’s opinion quoted in paragraph 11 above, the Court views that although his expertise and qualifications would allow him to give a diagnosis of alopecia areata, his finding on causation is based on some restrictive information provided to him by the Plaintiff. In ***Pak Siu Hin Simon v JV Fitness Ltd***, HCPI 574/2014, 4 September 2015, Deputy High Court Judge Marlene Ng, as she then was, said in paragraph 70 that:

“… Where the treating doctor simply makes a bald assertion that the psychiatric condition was caused by the alleged tort or where (as here) the treating psychiatrist only gave the diagnosis and treatment history without critically evaluating the causative nexus between the psychiatric condition and the accident, it is likely that the court will require forensic assessment by a psychiatric expert as to the attributable cause(s) in determining whether a casual link between the tort and the psychiatric illness has been established.”

1. While Dr. Au’s Report is admissible, I am not satisfied, on the strength of that report alone, that he or any dermatologist would be in the position to determine that the Accident is the operating cause of the Plaintiff’s alopecia areata. Dr. Au’s conclusion was based purely on the temporal relation between the Accident and the alleged time of hair loss without any investigation of the Plaintiff’s personal background. Given that stress is only one of the potential causes of alopecia areata, and in the absence of any psychiatric/psychological treatment evidence, the conclusion Dr. Au made seemed to be a bald assertion without any critical evaluation. And even if the Court is to accept that the Plaintiff’s hair loss problem was triggered by severe stress, neither Dr. Au or any other dermatologists would be in the position to comment that such stress be attributed to the Accident alone without any proper psychological or psychiatric assessment.
2. It is trite that expert evidence must be in a recognized discipline, reasonably required to enable the court to resolve the issues in dispute and proportionate. Given that the Plaintiff carries the burden of proving his claim, it is, in my view, plain that psychiatric over dermatology expert evidence is required in the present case to determine whether the Accident was the operating cause of the Plaintiff’s psychiatric complaints. There is no basis to translate the factual dermatology treatment evidence into an award of damages for psychiatric sequelae arising from the Accident.

The recommendations made by the Orthopeadic experts under the JOR

1. The Plaintiff submitted that both of the instructed orthopaedists recommended him to seek further expert evidence from dermatologist to assess his alopecia areata condition. The following paragraphs were extracted from the JOR:

*“33.* ***Dr. Miu:*** *Mr. Cheng also noticed extensive hair loss after the subject accident and was seen be a dermatologist, Dr. Au. He commented that the severe stress of the car accident was a very likely cause of alopecia areata in him and he will need a long term treatment and monitoring. Dermatologist/ plastic surgeon assessment would be necessary.*

*34.* ***Dr. Miu:*** *Mr. Cheng still suffers from social withdrawl and psychiatric expert assessment should be sought to assess the corresponding impairment, if any, as a result of the subject accident.*

*…*

*36.* ***Dr. Lam:*** *Mr. Cheng complained of hair loss after the subject accident. Dr. Lam agrees that assessment by a specialist in Dermatology is recommend (sic.) because this problem falls outside the field of orthopaedics.*

*37.* ***Dr. Lam:*** *Although Mr. Cheng complained that he felt stress because of hair loss, there is no record that he consulted psychiatrist. Dr. Lam would leave it to the court to decide whether opinion from a psychiatrist is necessary.*

*…*

*51.* ***Dr. Miu*** *opines that psychiatric & dermatological/ plastic surgeon expert assessment should be sought.*

*52.* ***Dr. Lam*** *opines that assessment by expert in dermatology is recommended. There is no medical record that Mr. Cheng required psychiatric treatment…. Would leave it to the court to decide whether assessment by a psychiatrist is necessary.”*

1. The extracts of the JOR above impressed the Court that both experts were simply suggesting that dermatologist should be consulted as alopecia areata would be in the discipline of dermatology, and their qualifications in orthopaedics would not allow them to make much assessment to the Plaintiff’s complaints.
2. It must be borne in mind that while alopecia areata is a dermatological condition, the Plaintiff’s case is that such condition was triggered by the stress he suffered from the Accident. It is trite that an application to adduce expert evidence must be supported by prima facie evidence of relevance and yet, there has been no evidence of consultation of any psychiatrist or psychologist where one would have expected to be the first step if there were any such complain from the Plaintiff.
3. As explained in paragraph 16, I do not accept Dr. Au has the qualifications to determine if the Accident was the cause to the Plaintiff’s alleged severe stress, and thus alopecia areata. In my view, the recommendation in seeking consultations from dermatologist was made to reflect the physical condition that the Plaintiff alleged to be suffering, but at the same time, the need of seeing psychiatrists is to determine the Plaintiff’s alleged mental conditions, which could otherwise provide some explanations of possible link with the Accident.

*Is expert evidence in dermatology necessary and of probative value?*

1. Even if a prima facie case is made out for the admission of expert evidence, the Court must also have regard to other relevant circumstances in order to meet the underlying objectives of the Civil Justice Reform, that is to ensure cost effectiveness and economy, expedition, proportionality and fairness between the parties.
2. The Plaintiff’s claim in his Statement of Damages was under $500,000 including $300,000 for PSLA and roughly $30,000 of pre-trial medical expenses. The loss of hair could hardly bear any relevance to other headings but these two kinds of damages.
3. According to Dr. Au’s report, the Plaintiff spent $18,810 for 9 consultations/treatments at his clinic but with no estimation of total future medical costs. No prognosis or plan of treatment was provided by Dr. Au, and it is unknown to this Court should psychiatric treatment be desirable the same time as the cause of the Plaintiff’s alopecia areata, as suggested by Dr. Au, was due to the severe stress he suffered from the Accident.
4. No indication as to the potential costs should dermatologists are required to prepare the report, but with the experience of this Court, an estimation of $30,000 would be incurred in the event that the parties opt to instruct their own experts. The costs would almost certainly be over $50,000 should experts are to be tendered giving evidence in the trial. Whilst it is accepted that the loss of hair would cause the Plaintiff certain degree of sadness and frustration, the Plaintiff has failed to persuade this Court that such damages would be a lot higher, if at all, than the costs of engaging an expert to give evidence. In any event, the Plaintiff could still submit Dr. Au’s Report in the trial as evidence of him receiving treatment from dermatologist under the principle of ***Hung Sau Fung, supra.*** as stated in paragraphs 12-13 hereinabove.

**CONCLUSION**

1. Since the cause of alopecia areata, as suggested by Dr. Au, comprised of psychiatric components, I therefore have little hesitation in concluding that a dermatologist would not be in the position to show the casual link between the alleged tort and the hair loss condition. Further, the cost of obtaining such evidence would be disproportionate, and the grant of leave to adduce such evidence would be contrary to the need to ensure cost efficient and speedy resolution of the personal injury litigation. I therefore dismiss the Summons.
2. There is no reason why costs should not follow event in respect of the Summons. I therefore grant a costs order nisi to be made absolute in 14 days that the Plaintiff do pay the Defendant costs of the Summons, to be taxed if not agreed.
3. I further direct that the parties do jointly submit to the Court a list of agreed case management directions within 14 days from the date hereof. This is a straightforward personal injuries case with little outstanding matters, and I expect this case to be ready for setting down for trial at the next checklist review hearing, which should be heard no later than 5 months from today.

( Louise Chan )

Master

Mr. Meyrick Wong, instructed by Mandy Wan & Co, for the Plaintiff

Leung & Lau, Solicitors LLP, for the Defendant