DCPI 244/2019

[2023] HKDC 671

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 244 OF 2019

BETWEEN

RAI CHANDRA KALA	Plaintiff
and	
LA CREPERIE 8 LIMITED	1st Defendant
EMPLOYEES COMPENSATION ASSISTANCE FUND BOARD	2nd Defendant

Before: His Honour Judge Andrew Li in Court

Date of Hearing: 13 September 2022

Date of Decision: 19 May 2023

ASSESSMENT OF DAMAGES

INTRODUCTION

1. This is a simple assessment of damages which took place before me on 13 September 2022.

2. As in most personal injuries ("PI") cases these days, it involves 2 medical experts whose opinions are vastly different, if not completely polarized. It calls into question of whether it is time for the court to review the exercise of its management power provided under the Civil Justice Reform ("CJR") and Practice Directions 18.1 ("PD 18.1") and to make wider use of Single Joint Expert ("SJE") in PI cases, especially those in the District Court.

BACKGROUND

3. The plaintiff is a 53-year-old Nepalese lady who was 46 at the time of the accident. She is a permanent resident in Hong Kong. On the day of the accident, ie 6 March 2016, she worked as a cook for the 1st defendant which was running a French restaurant at the time. While working in the kitchen at the 1st defendant's restaurant, she slipped on the floor due to the wet surface and sustained injuries as a result ("the Accident").

4. The writ of summons in the present proceedings was first issued by the plaintiff's solicitors who were assigned by the Director of Legal Aid on 17 January 2019. The statement of claim ("SOC") and statement of damages ("SOD") were filed and served on 17 January 2019. Interlocutory judgment was entered against the 1st defendant on 24 June 2020 as no defence had been filed by the 1st defendant.

5. Pursuant to an order of Master Catherine Cheng dated 9 August 2021, the 2nd defendant, ie Employees Compensation Assistance Fund Board ("the Fund Board"), was granted leave to join as the 2nd

defendant in this action under section 25A(a)(v) of the Employees Compensation Assistance Ordinance, Cap 365 ("ECAO"), for the purpose of contesting the issue of quantum.

6. Pursuant to another order of Master Catherine Cheng of the same date, it has been recorded that the 2nd defendant elected not to adduce any documentary or witness evidence in this case.

7. Further, pursuant to the order of Master Catherine Cheng dated 21 February 2021, this case was set down for assessment of damages before me with an estimated length of 2 days.

DISCUSSION

The plaintiff's injuries and treatments

8. As a result of the Accident, the plaintiff suffered from a left wrist fracture. She was first taken by an ambulance to the Ruttonjee and Tang Shiu Kin Hospitals ("RTSKH") and subsequently was transferred to the Pamela Youde Nethersole Eastern Hospital ("PYNEH") for further treatment.

9. Physical examination showed acute traumatic closed fracture of the left wrist, ie distal radius. Closed reduction and fixation were done with a cast applied to the left radius on the day after the Accident. On 10 March 2016, the plaintiff was admitted to the Orthopaedic and Traumatology Department ("O&T") of RTSKH where open reduction and fixation to the left radius was done. The plaintiff was subsequently

discharged on 15 March 2016, ie after 9 days of hospitalization. She was then referred to the physiotherapy department and occupational therapy department of the same hospital for further treatment and rehabilitation.

10. Sick leave was granted to the plaintiff from 7 March 2016 to 1 December 2016, ie a period of approximately 9 months, by the doctors at the public hospitals. The Medical Assessment Board assessed the plaintiff to have suffered from 5% loss of earning capacity under the certificate of review of assessment.

The plaintiff's current complaints

11. As pleaded under the SOD, the plaintiff still complained of the following as of January 2019:-

(a) pain around the whole left wrist, feels the pain at all time but of fluctuating intensity;

(b) continuous numbness; and

(c) weak grip of the left hand.

The Joint Medical Report of Dr Wong & Dr Chun

12. The plaintiff was jointly examined by the orthopaedic experts appointed by the plaintiff and the 1st defendant in this case, namely, Dr Patrick Wong for the plaintiff ("Dr Wong") and Dr Chun Siu Yeung for the 1st defendant ("Dr Chun"). The joint examination took place on 28 August

2017, ie approximately 18 months after the Accident and a Joint Medical Report ("JMR") dated 23 January 2018 was produced by the experts. The JMR was originally prepared by the experts for the purpose of the related employees' compensation proceedings when the 1st defendant was still represented. As is common in such cases where the Fund Board was allowed to join as a party for the purpose of contesting the issue of quantum, the 2nd defendant did not seek for an order to appoint their own expert to examine the plaintiff. The 1st defendant did not participate in the present proceedings and did not appear at the assessment of damages hearing before me.

13. Pursuant to the order of Master Catherine Cheng dated 8 December 2020, the JMR was directed to be adduced at the assessment of damages without calling the experts to give oral evidence.

14. The complaints of the plaintiff as recorded by the experts in the JMR are as follows:-

> "(1) Pain around the whole L wrist, felt the pain at all time but of fluctuating intensity. Pain intensity varies from VAS 3/10 to 7/10 (0=no pain, 10=most excruciating pain). Pain increases to 7/10 in cold temperature, swinging the hand for over 10 minutes, or holding something eg a glass of water for 5-10 minutes leading to sharp pain. Analgesic is needed before going to sleep every day.
>
> (2) Numbness (meaning finger do not belong to her, no power) of radial 3 digits. Symptom first appeared 2 months after the injury. Numbness is continuous nonstop, intensity varying from VAS 3/10 to 7/10. Numbness increases to 7/10 when not moving her hand for 15-20 minutes, with no other factor noted to cause increase numbness.

> (3) On direct question, Dr Wong asked about her strength of hand, which she said it was a little bit improved but compared to pre-injury status it was reduced by 80% with only 20% remaining. She also has difficulty taking shower and need cousin sister to help her to shower and that she put on clothes/dress slowly and with difficulty."

15. The physical examination by the experts revealed no swelling and no deformity. There was only a surgical scar of 8 cm long, which was mildly hypertrophic but well healed. There was tenderness reported at radial side dorsum and ventral of the wrist. Full finger extension was achieved but the plaintiff cannot make a full fist. For the tinel sign test, the plaintiff complained of pain at localized site of tapping, no complaint of electrical sensation down distally. For the compression test for Carpal Tunnel Syndrome ("CTS"), the plaintiff complained of sharp pain shooting to finger tips of 3 digits. As for phalen sign, it was recorded as negative for carpal tunnel compression but the plaintiff complained of pain at wrist. The plaintiff reported that her right thumb, index, middle finger sensation has been reduced by 30% and ring finger radial side reduced by 20%. However, the little finger and ulnar side of ring finger were reported as normal.

16. The X-ray examination revealed evidence of fracture distal radius which was healed in good alignment, with no dorsal and radial deviation. The radio-carpal joint space was well preserved and articular surfaces were smooth. The distal radio-ulnar joint was normal.

17. As in most PI cases in Hong Kong these days, it is not surprising to find the opinions expressed by the 2 medical experts in this case are poles apart. This is despite the fact that the injuries sustained by

the plaintiff are relatively minor and straightforward and the damages claimed by her are quite modest.

18. While both Dr Wong and Dr Chun agreed upon a common diagnosis of 'fracture distal radius', Dr Wong added 'fractures ulna styloid' on top of that. Both experts however agreed the fractures are consistent with the mode of injury sustained by her in the Accident.

19. What the 2 experts have vastly diverted in their opinions are on the issue of whether the *bilateral* CTS suffered by the plaintiff was caused by the Accident or not.

20. According to the medical records, the plaintiff first complained of the non-specific numbness on 31 August 2016. Subsequently, on 9 October 2017, the plaintiff had Nerve Conduction Study ("NCS") done showing features of *bilateral* CTS.

21. Dr Chun who was appointed by the 1st defendant (in the related EC proceedings) opined that the numbness of the hand was not caused by a slip and fall injury but was a "developmental condition".

22. Dr Wong on the other hand reported that, according to the O&T consultation records, on 6 July 2016, NCS had already been ordered for weak APB (for thumb abduction), reduced sensation of the left thumb, index and middle fingers. As her last follow up consultation was dated 11 May 2016, Dr Wong opined that her suspected left CTS symptoms had probably started sometime in between, ie around 3 months after the

Accident. Dr Wong also noted that the plaintiff did not have any clinical CTS symptom on the right side all along up to that time.

23. Dr Wong provided the following 4 reasons of why he considered the plaintiff's *left* CTS was more likely to be related to the Accident rather than as a totally coincidental finding:-

(1) Timing: Although CTS is a common condition in middle age ladies, Dr Wong opined the fact that it occurred shortly after the injury/surgery indicated that it was most likely related to the Accident;

(2) Same side: Dr Wong pointed out that there was no symptom of CTS on the right side but only on the injured side. Dr Wong opined that, the plaintiff's right wrist had slowed sensory nerve conduction velocity, she was therefore probably more prone to develop CTS symptoms in the future than an average person.

(3) Anatomy: The carpal tunnel is said to be in close proximity of the fractures, within an inch of each other. Therefore, Dr Wong opined the collateral injury to the soft issue around the fracture can contribute to subsequent thickening and stiffening around the median nerve.

(4) Surgery: Dr Wong further opined the soft issue trauma and insertion of the metal implants were likely to result in additional scarring around the carpal tunnel.

24. Dr Wong also made the comment that, due to the long waiting time in the Hospital Authority, the NCS could not be performed before the CTS release surgery was performed, hence one would not know the NCS figures before the surgery. However, he noted that the NCS performed 6 months after surgery showed "improved" left CTS (despite no pre-operation figures to compare with) but the figures were still not normal. In Dr Wong's opinion, this was compatible with her still having residual numbness now.

25. Dr Chun has basically disagreed with all the above points put forward by Dr Wong in the JMR.

26. In terms of the location of the fracture, Dr Chun considered that the fracture site is about 1-2 inches above the carpal tunnel. He opined that the surgery of open reduction and internal fixation did not involve the carpal tunnel but above it. Further, since the surgery did not extend into the carpal tunnel, there should be no scarring at all inside the carpal tunnel. Also, in his opinion, there was no progressive volar angulation after the open reduction and internal fixation surgery at the fracture site to cause median nerve compression/impingement. Therefore, according to him, the bilateral CTS was most unlikely to be caused by the Accident.

27. Dr Chun set out the anatomy and clinical presentation of CTS which according to him are well defined with respect to the sensory

impairment of the median nerve. Dr Chun made a salient point to say that the fact that the right side also showed electro-diagnostic feature of CTS (which is an objective finding) indicates a more "systemic condition" than caused by the fracture above the carpal tunnel. Dr Chun explained that it does not mean that symptom presentation must occur at the same pace and of the same severity and in most cases they do not. Dr Chun further commented that there is an association of CTS with pregnancy, rheumatoid arthritis, myxedema and diabetes mellitus, and also with space-occupying lesions (including swollen flexor tendons synovia) within the carpal tunnel.

28. Dr Chun further opined that the first post-operative rehabilitation should be related to the alleged injury sustained by the plaintiff in the Accident. In his opinion, the implant removal surgery is related to the alleged injury while the carpal tunnel release surgery should be unrelated to the alleged injury.

29. As for rehabilitation, Dr Chun opined that the post carpal tunnel release rehabilitation should be mostly related to the carpal tunnel release. For the implant removal post-operative rehabilitation, he considered that a reasonable period should not be more than 2 months. He considered that the subsequent sick leave after 2 months of rehabilitation for the implant removal should be related to the CTS.

30. Dr Wong on the other hand considered all the rehabilitation the plaintiff had attended were related to the Accident.

31. As to her condition at the time of the joint examination, Dr Chun opined that her alleged continuous pain at the left wrist was inappropriate in the absence of infection or cancer but very likely an exaggeration of symptoms. Equally, Dr Chun opined her complaint of continuous numbness if indeed present should not be related to the alleged injury but to the developmental CTS. He considered that the plaintiff is likely to have exaggerated her symptom as well. As to the sensory impairment on the fingers, Dr Chun opined that it should be related to the CTS and not to the alleged injury. He further opined the mild reduction of finger joint motions may or may not be related to the alleged injury.

32. On the other hand, Dr Wong cited the plaintiff's description of her left wrist pain was between 3-7 on a 0-10 scale. In Dr Wong's opinion, most of such mild to moderate pain can be explained by the radius fracture being intra-articular, the ulna styloid fracture non-untied with or without triangular fibro cartilage complex ("TFCC") tear and repeated surgeries. In his opinion, the 2-3 mm "ulna positive" may be fracture related to shorten radius or developmental longer ulna, either way, the TFCC in particular in the presence of a non-united ulna styloid fracture, may be torn in such setting.

33. While Dr Wong considered the plaintiff's description on a residual numbness between 3-7 on a 0-10 scale as likely to be "over-rated" to some extent, the improved figures after the release surgery suggest milder numbness is more likely. As for her very weak grip on the left hand which more or less was the same all along during her physiotherapy treatments, Dr Wong opined that it was probably due to numbness and pain inhibition rather than deliberate lack of effort.

34. On the prognosis, Dr Chun considered that in respect of the healed fracture distal radius, the prognosis is good. Some minor residual pain upon prolong heavy exertion may occur and some minor residual stiffness may persist. In respect of the unrelated CTS, with the surgical release done, Dr Chun considered the prognosis is very good.

35. On the other hand, Dr Wong opined that in respect of the healed fracture distal radius and the non-united ulna styloid with or without shortening/TFCC tear, the prognosis is satisfactory if no TFCC tear, fair if tear present. She will have mild to moderate residual pain upon repeated or heavy use of the left hand. Some residual wrist stiffness and some hand weakness is expected but probably less than her subjective perception if there is no TFCC tear. Mild residual numbness left hand is likely as the last NCS showed. Overall functional capacity of her left hand will be mild to moderately reduced according to Dr Wong's opinion.

36. In term of loss of earning capacity, in case she does not have any radius shortening or TFCC tear, her current impairment due to the fracture was assessed by Dr Wong at 6% of the whole person. The numbness due to the CTS was estimated at 2% of the whole person. Therefore, the loss of the earning capacity due to the Accident was estimated by Dr Wong at 8%.

37. On the other hand, Dr Chun considered that, based on the moderate radius stiffness at the wrist, there is only 4% impairment of the whole person which equals to 4% loss of earning capacity.

38. For sick leave, Dr Chun considered the reasonable sick leave for the fracture distal radius should be up to the end of September 2017 with the completion of the rehabilitation only. As for the removal of the implant, a reasonable sick leave in his opinion should be 2 weeks only.

39. Dr Wong on the other hand considered that her fracture associated with the CTS, her rehabilitation progress, the second operation required and the unresolved radius shortening/TFCC tear issue, the sick leave granted by the attending doctors in his opinion was reasonable.

The polarized opinions of Dr Wong & Dr Chun

40. The difficulties I have in deciding the true extent of the injuries of the plaintiff in this case, as in most of the cases involving 2 or more medical experts I have to adjudicate upon, are the polarized opinions expressed by Dr Wong and Dr Chun as stated in the JMR.

41. Having carefully studied the JMR, I am of the view that the injuries and the resulting impact from them come somewhere between the 2 experts' opinions.

42. For example, Dr Wong opined that her *left* CTS was caused by the Accident by offering 4 "reasons" in the JMR as listed above. This however does not explain why the plaintiff had developed CTS on her right wrist at or about the same time as her left wrist. In my view, the fact that her CTS was a *bilateral* condition suggests that it is more likely to be a natural developmental condition as opined by Dr Chun rather than caused by the trauma to her left wrist during the Accident. While Dr Wong spent a

long passage in explaining why the timing of ordering the NCS was consistent with her injury/surgery, he has basically kept silent on the cause of her *right* CTS. Further, the fact that the right side shows electro-diagnostic feature of CTS (which is an objective finding) as highlighted by Dr Chun indicates to me that Dr Wong could not be that objective when it comes to the cause of the *bilateral* CTS. Basically, Dr Wong did not offer any view on the cause of her right CTS. I think Dr Chun is fair to point out that the presence of abnormal feature of the right side as well indicates a more systemic condition rather than caused by fracture over the carpel tunnel. Dr Wong did not comment on this also.

43. While Dr Wong acknowledged that CTS is a common condition amongst middle age ladies, he did not comment on what Dr Chun has stated in the JMR regarding the association of CTS with "pregnancy, rheumatoid arthritis, myxedema and disabilities mellitus, and also with space-occupying lesions (including swollen flexor tendons synovia) within the carpal tunnel". Thus, basically CTS can happen to any middle age woman like the plaintiff at any time, with or without any trauma. Something not disputed by Dr Wong.

44. Further, in terms of anatomy, the fact that the carpal tunnel is in close proximity to the fracture (hence surgery) site in itself does not explain the development of CTS on her right wrist. In this regard, I agree with Dr Chun that in fracture distal radius, the surgery of open reduction and internal fixation did not involve the carpal tunnel but above it. As the surgery did not extent into the carpal tunnel, thus there should be no scarring at all inside the carpal tunnel. I also agree with Dr Chun that there

was no progressive volar angulation after the open reduction and internal fixation surgery to cause medical nerve compression/impingement.

45. Hence, having carefully analyzed their opinions, I agree with Dr Chun that the *bilateral* carpal tunnel syndrome was most unlikely to be caused by the injuries sustained by the plaintiff in the Accident.

46. On the other hand, I do not consider that the plaintiff's complaint of "continuous pain" at the left wrist is "very likely an exaggeration of symptoms" as opined by Dr Chun. Having carefully observed the plaintiff in giving her evidence in court and judging by the fact that she did try to obtain alternative employment within a relatively short period of time after the expiry of her sick leave, I do not think the plaintiff's complaints could be compared with people who suffered from "infection or cancer" and "could not be genuine" as opined by Dr Chun. On this issue, I prefer Dr Wong's more balanced view that the plaintiff has "over-rated" her complaint of residual numbness in this case. I agree with him that the "improved" figures after the release surgery suggest mild numbness is more likely. Thus, I tend to agree with the less extreme view taken by Dr Wong that the plaintiff's "demonstratively very weak grip was probably numbness and pain which was inhibition related rather than deliberate lack of effort".

47. I accept the fact that the plaintiff would not be suitable to return to work as a cook and at most can only work as an assistant in a kitchen to carry out light duties jobs. However, in my view, that is more to do with her *bilateral* CTS than any residual problems resulting from the fracture to her left wrist alone. In any event, I consider it is reasonable for

her not to return to work as a chef and her present employment as a cleaning supervisor seems to be a reasonable and suitable job for her.

Evidence given by the plaintiff in court

48. The plaintiff gave evidence at the assessment hearing. I find her to be a straight-forward, honest and reliable witness. Besides the contents of her witness statement which she adopted as her evidence-in-chief, she also expanded in her oral evidence of what difficulties she had experienced in finding a job after the Accident. She fairly accepted that it was mainly due to the inability of her in lifting heavy weight including big kitchen utensils, vacuum cleaners, carpet cleaners etc. As a result, she was not able to return to work in the kitchen of a restaurant anymore.

49. The plaintiff however has managed to find a job with a cleaning company by the name of Bestserve Cleaning Services Company Limited, which is a contractor responsible for cleaning duties at some high-end hotels since June 2018. She works as a supervisor whose duties include assigning work to her juniors; finding workers for her employer; inspect the works carried out by her workers; taking pictures for records; and sending work reports to her boss. Her workers were mainly Nepalese and with very few local Chinese which means that she can communicate with her co-workers in her own language most of the time. She only needs to carry out very light duties for cleaning herself as her job as supervisor as one mainly of supervision only.

Findings of the court on damages

(a) Pain, Suffering and Loss of Amenities (PSLA)

50. The plaintiff claims a sum of HK$200,000 under this head. Mr Chow on behalf of the 2nd defendant considers that as reasonable for the extent of injuries sustained by her based on the opinion of Dr Chun on the cause of her left wrist condition. I agree with him and will award a sum of HK$200,000 for PSLA in this case accordingly.

(b) Pre-trial loss of earnings

51. The 2nd defendant does not take issue with the plaintiff's monthly earnings at HK$13,925 (which is inclusive of her MPF contribution) at the time of the Accident.

52. The plaintiff received sick leave from 7 March 2016 to 9 January 2018 from the doctors at the public hospitals and out-patient clinics. This added up to a total period of approximately 22 months.

53. According to the documentary evidence adduced by the plaintiff, she has secured permanent full-time employment as a kitchen cleaner with Bestserve Cleaning Services Company Limited starting from 1 June 2018 at HK$20,000 per month. Since then, she has been promoted to the post of kitchen cleaning supervisor. As such, the plaintiff is now earning more than what she had been able to earn prior to the Accident and therefore suffers no loss.

54. In the aforesaid premises, the plaintiff claims pre-trial loss of earnings for 27 months (ie 22 months of sick leave granted by the doctors

at the public hospitals/clinics plus 5 months to look for a job) at the monthly sum of HK$13,925 per month.

55. As stated, Dr Chun's opinion is that an appropriate sick leave in this case should be for 18 months only, ie up to end of September 2017.

56. Given the fact that I find the plaintiff's injuries, in particular her bilateral CTS, were not caused by the Accident, I consider that a sick leave period of 18 months as opined by Dr Chun is reasonable in the circumstances. As such, I consider the pre-trial loss of earnings claimed by the plaintiff for a period of 27 months is excessive and will be rejected.

57. In the premises, I will allow a sum of HK$250,650 (HK$13,925 x 18) as loss of pre-trial earnings in this case.

(c) Loss of earning capacity

58. I agree with Mr Chow's submission that the evidence transpired during the assessment hearing suggests that the plaintiff is under no real risk of losing her current employment, let alone having any real difficulty in the open labour market in securing alternative employment. I therefore agree with Mr Chow that it will not be appropriate to award a separate claim for loss of earning capacity in this case.

(d) Special damages

59. The special damages has been agreed by the parties at HK$12,000 in this case. I so award such a sum under this head.

Interest

60. The 2nd defendant relies on section 20B(3)(a) of the ECAO on the issue of interest on damages in determining an application for relief payment as defined in ECAO, ie no interest will be payable by the Fund Board in such cases.

61. On the other hand, the plaintiff relies on the usual claim for interest at 2% for PSLA and at half of judgment rate for the pre-trial of loss of earnings and special damages claim. However, Mr Massie for the plaintiff did not explain why the usual interest rates should apply in a case where the Fund Board has joined in as a party.

62. I agree with Mr Chow that interest should be awarded in accordance with section 20B(3)(a) of the ECAO. I therefore make no award on interest in this case.

Employees' compensation received

63. Both parties agree the sum of HK$294,541.35 which has been received by the plaintiff as employees' compensation should be deducted from the final award to be obtained by the plaintiff in this case.

Summary of calculation

64. In summary, based on my above findings, I would assess damages in this case as follows:-

(a) PSLA		$200,000.00
(b) Pre-trial loss of earnings		$250,650.00
(c) Loss of earning capacity		nil
(d) Special damages		$12,000.00
		$462,650.00
Less: EC received		($294,541.35)
Total:		$168,108.65

Costs

65. I am grateful to Mr Chow for the following submissions he made in relation to the issue of costs in a case where the Fund Board is involved:-

(a) the 1st defendant should pay the plaintiff's costs insofar as they are between the plaintiff and the 1st defendant and the 1st defendant also should pay the costs of the 2nd defendant, such costs to be taxed if not agreed, with certificate for counsel;

(b) As between the plaintiff and the 2nd defendant, there should be no order as to costs (save as to costs wasted as a result of the poor preparation of the plaintiff's list of authorities and the trial bundle which should be awarded to the 2nd defendant in any event and such costs to be taxed if not agreed, to be personally borne by the plaintiff's assigned solicitors); and

(c) The plaintiff's own costs to be taxed in accordance with the Legal Aid Regulations.

66. I agree with Mr Chow's submissions and so make the costs order in the present case accordingly.

SINGLE JOINT EXPERT

Difficulties created by polarized medical expert opinions

67. As any experienced PI practitioner or tribunal will know, determining the cause of a medical condition or the true extent and effects of the injuries on an accident victim is not an exercise of simply preferring one expert's opinion to another's. It is not like answering a multiple choice question in a test or examination in school where one can simply put a tick on a certain answer and reject the rest. It is least like throwing a dice and simply accept one expert's view and reject the other one. It involves a careful examination of all the available medical evidence and records and study them in light of the plaintiff's claims and complaints. In particular, the court has to take into account of the initial injuries sustained by the victim in the accident; the treatments received by him or her in the public hospitals and/or clinics; the response to the treatments and the progress of the condition. It also involves consideration of the subjective complaints made by the victim (especially the initial complaints made to the treating doctors); whether those complaints match with the objective signs or medical evidence; the diagnosis and prognosis made by the treating doctors; the length of sick leave given; the history of the recovery; post-accident work records and so on. Medical experts' opinions are one

of the matters to be taken into account but it is by no means the most important matter.

68. Further, it is trite that expert evidence would only be allowed in a PI case when such evidence is relevant and necessary to resolve the issues in dispute, whether those issues are on liability or quantum. In the post-CJR era, the court will also take into account the probative value of an expert report at the case management stage in order to decide whether to allow such evidence to be adduced: See *Thapa Kamala v Tang Wing Kit* [2021] 2 HKLRD 757 at §§57-61; *Wong Hoi Fung v American International Assurance Co (Bermuda) Ltd* [2002] 3 HKLRD 507; [2002] 4 HKC 225 at §12.

69. In addition, I think it has now been generally accepted in our jurisdiction that the court will not usually grant leave to allow expert evidence on liability in road traffic cases. Successive cases have established that granting leave on issue of liability in a "running down" case should be considered as the exception rather than the norm: See for example *Fong Sai Ho v Harifast Company Limited & Others,* unreported, HCPI 1199/2003 (Deputy High Court Judge Carlson; 4 March 2005); *Leung Ping Yeung v Jetour Holiday*, unreported, HCPI 707/2008 (Fung J; 5 February 2020); *Lai Ying v Lam Lung Tin & Another,* unreported, HCPI 313/2009 (Fung J; 16 March 2010).

70. Thus, in the context of PI cases, when we talk about expert evidence, we usually are dealing with medical experts' opinions and reports.

Use of medical experts in PI cases in the District Court

71. In my opinion, there have been several misconceptions amongst some practitioners about the use of medical expert evidence in a PI case, particularly those involving smaller claims in the District Court.

72. First, I think it is a mistake to think that in every PI case it would require the appointment of a medical expert, least 2 medical experts of the same discipline from opposing sides. In fact, I consider the contrary is true. In a simple and straightforward case, often the medical records and reports from the government hospitals/clinics would be sufficient to allow the court to determine the cause of injuries as well as the long term impact from the injuries on the victim's daily activities and earning capacity. Therefore. it is not uncommon for the court to approve settlements involving infant interests or persons under disability under O 80, r 10-12 of the Rules of the District Court ("RDC") without the assistance of any medical experts' opinion, even when the injuries are contested or disputed by lawyers representing the defendants and/or their insurers.

73. Secondly, for a simple and straightforward case in the District Court where a victim suffers from minor injuries, even when the case goes to trial, it is not uncommon in my experience to see a plaintiff able to prove his/her case without the benefit of producing a medical expert's report. I certainly do not find the plaintiffs are handicapped or disadvantaged as a result of not appointing a medical expert to "establish" what can be easily proved on balance of probabilities in such cases. On those occasions, the plaintiffs would simply refer to the medical records and reports from the

public hospitals together with descriptions of the injuries and the impact they have on them in their witness statements.

74. In my view, hence, the starting point in each case before a PI practitioner decides whether to appoint a SJE or Joint Medical Experts ("JME") is to consider whether it is relevant and necessary for them to do so. In particular, in the post-CJR era, whether they would meet the underlying objectives of the CJR as set out under O 1A of the RDC. While I am sure that most of the practitioners are familiar with them, I see no harm to remind ourselves of what they are:-

> " 1. The underlying objectives of these rules are–
>
> (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
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> (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
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> (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
>
> (d) to ensure fairness between the parties;
>
> (e) to facilitate the settlement of disputes; and
>
> (f) to ensure that the resources of the Court are distributed fairly."
>
> (O 1A r 1)

75. In my judgment, amongst all the above objectives, the 3 most important factors in deciding whether to appoint a SJE or JME in each case are: (i) cost-effectiveness; (ii) proportionality; and (iii) facilitating settlement of disputes.

76. Hence, before appointing any medical expert in a PI case, a lawyer should ask himself/herself the questions of: (i) whether it is more cost effective to appoint a SJE or JME in a particular case; (ii) whether the costs in appointing one expert on each side (even jointly), with all the associated costs in instructing them, followed by analyzing the report, arguing over the difference of the opinions; and the almost inevitable step of seeking for a supplemental/follow up report or reports, etc. is proportionate to the size of the claim; and (iii) whether the appointment of a SJE or JME will be more likely to facilitate the settlement of the disputes in the case.

77. Thirdly, I think it is high time to remind ourselves of what I would consider as the "original design" of the CJR and PD 18.1 (which of course came into effect on the same date as the CJR on 2 April 2009) when it laid down the rules and procedures of how medical expert evidence should be introduced in a PI case.

78. As one of the 2 judges who had drafted PD 18.1, HH Judge Marlene Ng (as she then was) had this to say regarding the use of SJE in the post-CJR era *in Ansar Mohammad v Global Legend Transportation Limited*, unreported, DCEC 1090/2006 (HH Judge Marlene Ng; 8 May 2007):-

> "66. The future as envisaged by the Civil Justice Reform may bring wider powers to the courts in the shape of a single joint expert (see *Civil Justice Reform Interim Report and Consultative Paper* by the Chief Justice's Working Party on Civil Justice Reform paras.507-510 at pp.189-192 and the proposed new Order 38 rule 4A of the Rules of the High Court (and Rules of the District Court) discussed in *Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform* by the Judiciary's

> Steering Committee on Civil Justice Reform (April 2006) pp.D85-86, E151 and I18). If such reform proposal is implemented, the court may in future order two or more parties to an action to appoint a single joint expert. In those circumstances, it is likely the single joint expert will have to depend on a reputation for impartiality. Time will tell whether such measure will be effective in preventing perpetuation of adversarial experts."

79. This is what the learned judge envisaged would happen in regard to the use of expert medical evidence under the CJR regime as stated by her in §§41-44 of the case:-

> "*(d) Case Management*
>
> 41. On the other hand, even though the Civil Justice Reform is still in the wings, it is plain that active case management is already an integral part of the civil courts. The court can ameliorate some of the aforesaid ills of the adversarial system by exercising its inherent case management powers.
>
> 42. In respect of expert medical evidence, the primary goal of case management is to encourage useful, proportionate and cost-effective expert medical evidence/reports, to reduce delay and cost, to narrow the issues and reduce the scope of the evidence, and to enable just and efficient resolution of the real issues. Close scrutiny of the preparation of expert medical reports and early adoption of effective procedural measures can help ensure that expert medical evidence in each case will be in the most appropriate form, will not stray from the identified issues and will be made available in a timely fashion for doing justice between the parties.
>
> 43. Given such objectives, an exercise of these case management powers may involve approaches that seem to depart from party-driven litigation under the adversarial model where the parties carry the primary duty of identifying the issues, adducing relevant evidence and generally advancing their own case.
>
> 44. In the area of personal injuries litigation, the shift towards tighter control by judges and masters on the progress and carriage of such litigation was spearheaded by Seagroatt J whose trenchant remarks on case management serve as useful

> reminders to litigants and their legal representatives to take all necessary steps to minimise delay/costs, facilitate early settlement of cases and improve decision-making in the course of the proceedings. Practice Direction 18.1 gives further guidance on effective, expeditious and cost-minimising case management. Whilst there is no specific practice direction for employees' compensation cases, judges have all along "borrowed" good sense case management directions that are not infrequently made in personal injuries cases."

80. The then PI Judge of the High Court The Hon Fung J in *Mok King Sun v Turn Around Company Limited & Others,* unreported, HCPI 865/2007 (Fung J; 25 March 2009) at §25 highlighted the important fact that the court "retains the control of how expert evidence should be presented in order to attain the saving of costs and fair disposal of the cause or matter".

81. The above views of the 2 learned PI judges echo with what I would describe as the "procedural framework" later provided by O 38, r 4A of the RDC for appointment of SJE. In my judgment, O 38, r 4A introduced under the CJR provides exactly what the 2 learned judges had envisaged and expected would happen after April 2009.

82. O 38, r 4A of the RDC states:-

> "(1) In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, order 2 or more parties to the action to appoint a single joint expert witness to give evidence on that question.
>
> (2) Where the parties cannot agree on who should be the joint expert witness, the Court may–
>
> (a) select the expert witness from a list prepared or identified by the parties; or
>
> (b) direct that the expert witness be selected in such manner as the Court may direct.

(3) Where an order is made under paragraph (1), the Court may give such directions as it thinks fit with respect to the terms and conditions of the appointment of the joint expert witness, including but not limited to the scope of instructions to be given to the expert witness and the payment of the expert witness's fees and expenses.

(4) Notwithstanding that a party to the action disagrees with the appointment of a single joint expert witness to give evidence, the Court may, subject to paragraph (6), make an order under paragraph (1) if it is satisfied that it is in the interests of justice to do so after taking into account all the circumstances of the case.

(5) The circumstances that the Court may take into account include but are not limited to–

(a) whether the issues requiring expert evidence can readily be identified in advance;

(b) the nature of those issues and the likely degree of controversy attaching to the expert evidence in question;

(c) the value of the claim and the importance of the issue on which expert evidence is sought, as compared with the cost of employing separate expert witnesses to give evidence;

(d) whether any party has already incurred expenses for instructing an expert who may be asked to give evidence as an expert witness in the case; and

(e) whether any significant difficulties are likely to arise in relation to–

(i) the choosing of the joint expert witness;

(ii) the drawing up of his instructions; or

(iii) the provision to him of the information and other facilities needed to perform his duties.

(6) Where a party to the action disagrees with the appointment of a single joint expert witness to give evidence, the Court shall not make an order under paragraph (1) unless the party has been given a reasonable opportunity to appear before the Court and to show cause why the order should not be made.

(7) Where the Court is satisfied that an order made under paragraph (1) is inappropriate, it may set aside the order and allow the parties concerned to appoint their own expert witnesses to give evidence." (L.N. 152 of 2008)

83. The learned editors of the Hong Kong Civil Procedure 2023 ("the White Book") summed up the effect of O 38, r 4A by stating that this is *"another way"* in which the court may exercise its power to control expert evidence for the purpose of reducing costs and delay. Further, it supposed to strengthen the impartial roles of experts: See §38/4A/1 on p 944.

84. The editors of the White Book went on to say that "(I)n any case in which expert evidence is required, parties *must* consider the appropriateness of appointing a single joint expert. This is because the court will not give permission for a party to adduce any expert to adduce any expert evidence without the parties having done so (PD 5.2, para. 20(1)(c)." [emphasis added]

85. I cannot agree more.

86. In fact, §§89-90 of PD 18.1 provides as follows:-

> "**(4) Single Joint Expert**
>
> 89. In appropriate cases, the Court may give directions for the appointment of a single joint expert (see RHC, Order 38, rule 4A).
>
> 90. If it is anticipated that a single joint expert is appropriate in the light of the considerations identified in RHC, Order 38, rule 4A(5), the direction of the PI Judge or PI Master should be sought as soon as possible and preferably not later than the first Check List Review Hearing."

87. It is true to say that by allowing the parties to select the SJE, the court preserved some of the beneficial aspects of the adversarial system

and avoids, for instance, being seen to descend into the arena on its choice of expert. However, 14 years after the implementation of the CJR and PD 18.1, I regret to say that I do not see our courts and practitioners are making good use of the mechanism provided for appointing SJE in PI cases under O 38, r 4A, particularly in those cases which involve relatively modest amount of damages or less serious injuries as often found in the District Court. In fact, the contrary is true in my experience.

88. In the vast majority of PI cases in the District Court which I have come across, no matter how big or small the claim is, it seems that the parties inevitably make use of the mechanism provided for joint examination and appointment of JME under §§81 to 84 instead of that provided for SJE under §§89-90 of PD 18.1.

89. This may be due to the ingrained distrust amongst lawyers and their clients (whether they are plaintiffs or defendants) for the respective medical expert the other party nominates as they think that whoever one side suggests or appoints may be more incline to speak on their behalf rather than being impartial or objective. Thus, it leads to the inevitable result that the other side would want to appoint their own expert to "speak on their behalf". There may be other reasons that I am not aware of. But whatever the reasons, in my judgment, this is not in accordance with the "original design" of the CJR or PD 18.1 when it comes to appointing medical expert(s) in a PI case.

Time to make wider use of SJE in DCPI cases

90. Given the above, I am of the view that it is high time for the courts and practitioners not only to consider but to actually make wider use of SJE in PI cases, particularly those in the District Court.

91. My reasons are as follows.

92. First, the immediate and obvious benefit of using SJE in a PI case is that it will substantially reduce costs and delay.

93. In terms of costs, in my view, it simply does not make economic sense for the parties to appoint their own expert in each and every single case no matter how simple and straightforward the injuries and medical issues are without exhausting the possibility of appointing SJE first. I have been told by some experienced PI practitioners as well as taxing masters that these days a "run-of-the-mill" JMR from an orthopaedic expert (which is the most common type of expert opinions to be obtained in a PI case) will cost around HK$25,000 to HK$30,000 on each side. There will be further fees incurred for the commission of any supplemental report by the JME to clarify or expand on any issues arising out of the original JMR. They can cost anything between HK$5,000 to HK$10,000 on each side. Thus, even for a simple and straightforward case involving a modest amount of compensation, the cost of instructing 2 orthopaedic experts to jointly examine and then write a JMR will easily cost between HK$60,000 to HK$80,000. This does not include the cost of instructing and later arguing over the inevitable differences in their opinions.

94. Further, I have been informed that the cost of appointing a plastic surgery expert to jointly examine and then prepare a JMR would range from an average of HK$30,000 to HK$40,000; a psychiatrist from an average of HK$40,000 to HK$50,000; and a neurologist as much as HK$60,000 to $90,000.

95. The cost of compiling a JMR will be doubled if each side appoints their own expert or experts.

96. On the other hand, I was told that the cost of instructing a SJE to compile a report on his own is exactly the same as he would charge for preparing a JMR.

97. Thus, in my view, in terms of saving of costs, this is a "no brainer".

98. In terms of delay, I think it must be obvious that by using a SJE (as contrast to JME), it will save time and unnecessary arguments. This will surely meet one of the important underlying objectives stated in O 1A of the RDC which is to ensure that a case is dealt with as expeditiously as is reasonably practicable.

99. Second, in my judgment, in terms of proportionality, the lesser the claimed sum, the more it is difficult to justify the use of JME, even more so for more than one set of JME for different medical disciplines. Take this case as an example, I certainly do not consider spending an estimated sum of say between HK$50,000 to HK$60,000 to obtain a JMR together with the associated cost of instructing and

subsequently arguing over the difference in the experts' opinions is proportionate to the ultimate damages recoverable by the plaintiff. I am quite sure that this case could have been disposed of much earlier and costing less legal costs had a SJE been appointed at an early stage.

100. Third, I consider the wider use of SJE will lead to more impartial and objective expert opinions in the long term in PI litigation in Hong Kong, which will only help to facilitate the settlement of disputes rather than prolonging them.

101. It is worth bearing in mind that at the infancy of the CJR, I understand that the Law Society's Personal Injuries Committee had prepared a draft "instruction letter' as a template for solicitors to use when engaging medical experts in PI cases. The letter was intended to explain to the medical experts what is expected of them in preparing a report. The letter, *inter alia*, reminds the medical experts of their duties when preparing their reports. Enclosure 4 of that letter reminds experts of their duties to the court. It reads:-

> "*(2) an expert witness has an overriding duty to help the court impartially and independently on matters relevant to the experts area of expertise.*
>
> *(3) an expert witnesses paramount duty is to the court and not to the person from whom the expert has received instructions or by whom he's paid.*
>
> *(4) an expert witness is not an advocate for a party."*

102. I believe that this "standard" instruction letter to medical experts has been used by most solicitors in PI cases in Hong Kong since then.

103. Despite of that and the declaration that each expert is required to make at the end of their report, including the fact that they have read the Code of Conduct and agreed to be bound by it and that they understand their duty to the court, I find the reality is not what the standard letter or the Code of Conduct have asked and expected the experts to do.

104. Having read hundreds of JMR in my role as a trial judge and in the past 2½ years as the PI Judge in the District Court, regrettably, I find in a great majority of cases, the medical experts appointed by the respective parties have tended to prepare their reports in such a manner that they are effectively advocating on behalf of the party who has engaged them. In most instances, reading JMR is like reading written legal submissions from counsel or solicitors. In other words, instead of being an independent expert trying to assist the court to understand the technical or medical issues involved, I regret to say that often they have become the "advocate" or "hired gun" arguing on behalf of the party who has paid them.

105. Unlike the early days when I was in private practice in the 80s and 90s where medical experts would always be willing and ready to act for either side of the litigation, I find in the past 10-15 years we have reached a very unhappy state of affairs where we see most of the medical experts have become either "plaintiff's expert" or "defendant's expert". For example, most of the orthopaedic experts I have come across over the

past 10-15 years would only act for the plaintiff and never for the defendant and the reverse is true for those who would only act for the defendant or its insurer. In fact, most of the opinions (or "arguments" should I say) they give are very similar if not identical. Often they appear to be a "cut and paste" job simply taken from another report of similar or identical injuries. I must say that when such similar if not identical arguments or opinions are repeated often enough in different reports written by the same expert and for the same side of the litigation, they tend to lose their appeal or at least the court will treat them with extreme caution or scepticism.

106. Fourth, using SJE in PI cases is now the norm rather than the exception in other common law jurisdictions like Singapore, Australia and the United Kingdom.

107. For example, under the new Rules of Court 2021 in Singapore ("ROC 2021"), it has been specifically stated that no expert evidence may be used in court unless the court approves. Parties are requested to inform the court during the case conference if they intend to rely on expert evidence. The court must not approve the use of expert evidence unless it will contribute materially to the determination of any issue in the case and the issues cannot be resolved without those expert evidence: See O 12, r 2 of ROC 2021.

108. Under O 12, r 3 (1) of the ROC, "as far as possible, parties must agree on *one common expert*". Further, under O 12, r 3(2), except in a special case and with the court's approval, a party may not "rely on expert evidence from *more than one expert for any issue.*" [emphasis

added]. In a special case, the court may appoint a court expert in addition to or in place of the parties' common expert or all the experts. Moreover, the court must give all appropriate directions relating to the appointment of experts, including the method of questioning in court and the remuneration to be paid to them: See O 12, r 3 (3) & (4) and Digest 7 issued by the Singapore Judiciary.

109. In Queensland, Australia, similar provisions can be found in their Supreme Court Practice Directions where it states that:

> "In any proceeding, or intended proceeding, where expert evidence will or may be called, early consideration must be given to the requirements of the Rules, particularly as to the appointment of an expert to be *the only expert witness* on a particular substantive issue in the proceeding." [emphasis added]
>
> (See §2 of Supreme Court of Queensland Practice Direction 2 of 2005)

110. In England & Wales, for "fast track" cases under Part/Rule 28 of the Civil Procedure 2022 (see also Practice Directions 28 – The Fast Track ("PD 28")), the court expects the directions agreed by the parties would include "the use of a *single joint expert*, or in cases where the use of a single expert has not been agreed the exchange and agreement of expert evidence (including whether exchange is to be simultaneous or sequential) and without prejudice discussions of the experts" [emphasis added]: See §3.7 (4) of Practice Direction 28 of Civil Procedure Rule ("CPR").

111. Where the court is to give directions on its own initiative, its "general approach" will be to give directions for a SJE unless there is good reason not to do so: See §3.9 of PD 28 of CPR.

112. Hence, as can be seen above, the use of SJE is now the "default" position in most of the other common law jurisdictions where they have similar civil procedures as ours. They obviously see the enormous advantage in using SJE in civil cases. I am afraid that we may lag behind other common law jurisdictions if we do not immediately start making wider and more common use of SJE, especially in PI cases.

What are the appropriate cases for use of SJE?

113. §89 of PD 18.1 states that in "appropriate cases" the court may give directions for the appointment of a SJE.

114. §90 refers to the considerations which the practitioners should take into consideration when appointing a SJE. It refers to the "circumstances" identified in O 38, r 4A(5).

115. What are the appropriate cases for the appointment of a SJE then?

116. In my judgment, most of the PI cases in the District Court will fall within the category of "appropriate cases". In my view, the smaller the claim and more simple and straightforward the injuries, the stronger the argument it is for the use of SJE in a particular case.

Proposed directions to use for appointing SJE in DCPI cases

117. Having consulted the 3 PI masters in the District Court who deal with procedural matters on a daily basis and having adopted such approach in my own cases in the past few months, I find the following proposed "standard" directions for appointing SJE to be useful and workable:-

> "1. Within 7/14 days from today, the parties shall jointly report to the Court the name of the Single Joint Expert ("SJE") agreed by the parties. In the event that the parties fail to agree on such joint appointment, both parties shall within 3 days thereafter submit to the Court (i) the names; (ii) the *curriculum vitae*; and (iii) the earliest available date for the examination of 2 SJE each that they would be prepared to instruct;
>
> 2. The Court will appoint a SJE from the list of nominations identified by the parties within 7/14 days thereafter and upon the Court's appointment, the parties shall compose a joint letter of instruction ("the Joint Letter of Instruction") and ensure that the Joint Letter of Instruction shall be sent to the appointed SJE within 14/21 days from the Court's appointment;
>
> 3. In the event that the parties cannot agree on who should be appointed as a SJE, the court may direct that the expert witness be selected in such a manner as the court may direct;
>
> 4. Should the parties fail to agree on the contents of the Joint Letter of Instruction, a joint request accompanied by their respective proposals should be made to the Court within 3 days thereafter;
>
> 5. The Court will approve the contents of the Joint Letter of Instruction within 7/14 days in such terms the Court deems fit and the Joint letter of Instruction shall be sent to the appointed SJE within 3 days of its approval;
>
> 6. The SJE shall examine the Plaintiff within 42/56 days from the date of the Joint Letter of Instruction and such examination should not be postponed without prior written leave of the Court;

7. The parties' solicitors shall ensure the SJE, having regard to paragraphs 86- 87 of PD18.l, to compile the SJE report accompanied by its statement of truth, within 56/63 days from the date of the examination. The Plaintiff's solicitors shall file the SJE within 7/14 days after it is ready;

8. In the event pre-existing condition is involved, parties shall ensure that the SJE would specifically comment on (a) which of the 3 categories the case falls into: (i) the Plaintiff would have gone through life unaffected by the pre-existing conditions; (ii) there is a strong possibility that some other event or natural progression of the condition would have brought about the present condition; and (iii) this would have certainly occurred at some stage in any event; and (b) In the latter 2 cases, when this would have occurred and how would the SJE apportions the impact of the pre-existing condition and of the accident complained of on his present condition. The SJE report shall be accompanied by its statement of truth;

9. No further or additional expert medical reports shall be obtained or adduced without leave of the PI Master/PI Judge or the Trial Judge hearing the trial or assessment of damages."

118. I would like to stress that the above proposed directions are designed for the use of PI cases in the District Court only. They may not be suitable for cases in the High Court which often involve more complex medical issues and certainly where more compensation is at stake.

119. Further, like any other proposed directions given by the court, I recognize that there is always room for improvement and it will take time for it to be perfected. Also, there will be a transitional period where the practitioners will learn to change its mindset and their habits of doing things. In the long run, it may require an update or even overhaul of the PI practice direction when this issue, together with other issues, will have to be looked at holistically and studied carefully afresh in view of the ever changing practice environment. But that will be for a future day and for

others to undertake. For now, my view is that if the court does not exercise its case management power more vigorously in the appointment of SJE, we will forever stay in the present stalemate of having polarized expert opinions in PI litigation in Hong Kong. I dare say that it was not the intent of the drafters of the CJR and certainly not what O 38, r 4A has envisaged. It certainly is not good for the long term development of PI practice in Hong Kong.

120. Thus, in all PI cases in the District Court, before the parties proceed to arrange a joint examination and ask the JME to prepare a JMR, I am of the view that the parties should try to agree on the appointment of a SJE. If they cannot agree on the identity of the SJE, then direction should be sought from the PI master as soon as possible and certainly should be done not later than the first check list review hearing. As stated in §70 of PD 18.1, a party who appoints an expert before obtaining leave, other than from a SJE or pursuant to joint examination and JMR 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. The court will also not accept any *fait accompli* of the parties in appointing their own expert(s), whether they are SJE or JME, without leave of the court. Any such reports will not be admitted into evidence and will be expunged from the court files/trial bundle with likely consequence that the lawyer who has obtained such report will be responsible to bear any wasted costs personally and on an indemnity basis: See *Pies v Siu Shiu Keung* [2022] 3 HKC 710.

121. In cases where the parties might have already obtained a JMR in a related employees' compensation ("EC") proceedings, directions should be sought from the PI master in the common law claim as soon as

possible as to whether it is appropriate to adopt the existing report (with the possibility of seeking directions for an update or supplemental report from the same JME) or to appoint a new SJE. In each case, the underlying objectives of the CJR should be firmly borne in mind and the "circumstances" set out in O38, r 4A(5) should be taken into consideration. What the parties must not do in my view is to assume that the court will accept the already existed JMR obtained in the EC proceedings will be used in the common law proceedings, least any direction to adopt an updated or supplemental reports from the same JME will be given, if they are obtained without leave of the court.

122. My hope is that by adopting the above "standard" proposed directions in appointing a SJE, it will help the court and the profession to better achieve the underlying objectives of the CJR in PI litigation, at least for those cases in the District Court.

(Andrew SY Li)
District Judge

Mr John William Ross Massie, of Massie & Clement, assigned by the Director of Legal Aid, for the plaintiff

The 1st defendant was not represented and did not appear

Mr Tony Ho Hin Chow, instructed by PC Woo & Co, for the 2nd defendant