



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

BETWEEN

AA

Plaintiff

-and-

BB

Applicant/Defendant

-and-

C

First Third Party

-and-

D

Second Thirty Party

-and-

E

(Personal representative of the estate of F (Deceased))

Third Third Party

-and-

G

Fourth Third Party

-and-

H

Fifth Third Party

IN CHAMBERS

Appearances: Mr. Colm Flanagan and Ms. Amanda Minto of Nelsons for the Plaintiff
Mr. Guy Dilliway-Parry and Ms. Nikue Assarpour of Priestleys for the Applicant/Defendant
Mr. Rupert Wheeler, KSG for the 3rd and 5th Interested Parties

Before: Hon. Justice Marlene I Carter, Actg.

Heard: 25 May 2023

Draft Judgment circulated: 12 June 2023

Judgment Delivered: 21 June 2023

HEADNOTE

Civil Law – personal injury - application for instruction of a further expert – good reason

JUDGMENT**Background**

1. This is a personal injury claim arising from a workplace incident which occurred on 1 May 2014. The plaintiff was injured at her place of work when she was struck in the head by a falling plank. The plaintiff claims substantial damages for injuries caused by the incident. The issue of quantum remains to be dealt with. Several expert witnesses have been engaged by both parties in the areas of neurology, neuropsychology, neurosurgery, dentistry, ophthalmology, and occupational therapy/care.

The application before the court.

2. The Defendant by summons dated 8th March 2023 seeks the following:

“1. That the Defendant be at liberty to call the following additional expert witnesses in the following areas of practice:

- (a) a further neuropsychologist and*
- (b) a neuropsychiatrist.*

2. That the Plaintiff pay the Defendant’s costs of and incidental to this summons.

3. *Any further order that the Court deems appropriate.”*

3. The plaintiff has been examined by experts for the defendant. In early 2023, various reports of these experts were shared with the plaintiff. Among the reports were those of Dr. Mallen dated 4th December 2022 and an addendum report dated 29 December 2022. The defendant does not intend to rely on these reports. The Second Affirmation of Nikue Assarpour sets out the matters which led to the filing of the summons.

4. Paragraph of the affidavit states:

“36. *Dr Macfarlane opines at paragraphs 26 and 27 [p.113-114 of NA-2] of his supplementary report as follows:*

‘26.. In my opinion, left unchallenged, Dr Mallen’s opinion risks giving rise to a severe disservice to the Claimant. If her symptoms are indeed secondary to organic brain injury (ie DAI, on Dr Mallen’s analysis) then [the plaintiff] is beyond the prospect of neurological recovery. However if, as I believe is the case, her symptoms have a psychological and not an organic origin then (a) she has the capacity to make a full recovery, (b) treating her as brain-injured removes for her the hope / expectation that, with appropriate treatment, her previous life can be restored to normal and (c) Dr Mallen’s diagnostic label, which I believe is erroneous, confines her to a life of underachievement with the explanation that she is “brain-injured.”’

27. I strongly support the view that a second opinion is required from a second neuropsychologist. The results of neuropsychology assessment must be based on a full analysis of the facts and, in particular, an understanding of the mechanism of injury, knowledge that ophthalmological symptoms are not the result of organic brain injury and confirmation that the results of assessment represent a true reflection of the Claimant’s ability.’

37. *He goes on further at paragraph 28 [p.114 of NA-2] to recommend as follows:*

‘My recommendation to the Court is to obtain a further neuropsychology opinion before she is assessed by a neuropsychiatrist. The latter will be informed by neuropsychological opinion as to whether there is any objective evidence for [the plaintiff’s] ongoing symptoms.’

38. *Professor Schapira echoes the recommendations of Mr Macfarlane in his report at paragraphs 129 and 131, at paragraph 129 [p.155 of NA-2] he states,*

‘For future management, I would recommend referral to a neuropsychiatrist to help management of her anxiety, with or without depression as this will improve her background tension headaches.’

39. *And at paragraph 131 [p.155 of NA-2] goes on to recommend further neuropsychological assessment,
‘I recommend further neuropsychological assessment, to include effort and validity testing.’”*

5. Based on these recommendations the defendant seeks the court’s leave to have the plaintiff submit to further assessment by another neuropsychologist and an assessment by a neuropsychiatrist. The defendant submits:

“It is evident from the reports of Professor Schapira and Mr. Macfarlane that the Plaintiff could benefit from further expert input which could offer the Plaintiff both a definitive diagnosis and a potential treatment plan which would significantly improve her quality of life and future prognosis.

In addition, unless permission is given, the Defendant will be significantly prejudiced. The Defendant has obtained reports from an eminent neurosurgeon and neurologist, both of whom take the view that the accident did not and could not have caused a brain injury. Both of the experts strongly disagree with the evidence of Dr Mallen and recommend a further assessment by a different neuropsychologist. It would be prejudicial to the Defendant if the court were only to hear from one neuropsychologist given the views of the other experts.”¹

6. The third parties support the Defendant’s application. The plaintiff opposes the application.

The Defendant’s submissions:

7. Counsel for the defendant submitted that the court should allow the further expert evidence sought as:

“Such evidence is reasonably required in order to 1) investigate the cause of the P’s ongoing complaints; 2) ensure that P is properly compensated for the consequences of the accident and no more; and 3) replace the evidence of Dr Mallen, Clinical Neuropsychologist, which is flawed. The introduction of such evidence 1) is proportional given P’s claim is in excess of C\$2.7 million; and 2) will not lead to any delay or adjournment of a trial date.”

8. The Plaintiff was interviewed and assessed by Dr. Mallen on 20 January 2022. His diagnosis is that the plaintiff has suffered diffuse axonal injury because of the accident, and he concluded that

¹ The defendant’s skeleton submissions at paragraphs 44-45
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the Plaintiff's *'neuropsychological profile was completely interpretable and consistent with a traumatic brain injury (TBI)'*

9. The Defendant's complaints with Dr. Mallen's findings are based on various factors surrounding this diagnosis:

- (i) After identifying various discrepancies in the results of the formal testing including surprisingly low verbal abilities, extremely variable intellectual functioning, discrepancies in verbal fluency; unexpectedly low scores in the tests of academic attainment despite having obtained a business degree and exceptional problems in cognitive processing speed, Dr. Mallen sought to explain these discrepancies by reference to the plaintiff's visual difficulties. Counsel for the defendant pointed to the fact that the consultant ophthalmologist had, however, recorded the plaintiff's visual acuity at 96% of normal and further that the plaintiff was able to read at 6/7.5. He noted that the ophthalmologist, Dr. Moloney had concluded that: *"Her eyes are essentially normal with satisfactory visual acuity."*
- (ii) Counsel for the defendant also submitted that it was *"wrong and illogical"* for Dr. Mallen to equate the Plaintiff's head injury with impacts sustained by players of American football which he seemed to do when he noted:

"The mechanism of [the plaintiff's] head injury, blunt trauma to the top of the head, would closely resemble the injury sustained by football league players who can suffer an on-field concussion from head impact. This can result in head injuries involving the white matter in the corpus callosum, fornix and medial temporal lobe regions, the structures that exhibited the greatest movement from their normal resting configuration. These are the candidate areas of greatest likelihood of injury in mild TBI, with a clear pathological focus on white matter (Bigler & Maxwell, 2012)."

- (iii) It was submitted further that Dr. Mallen did not carry out any effort testing on the Plaintiff, tests designed to assess whether the patient is applying appropriate effort and concentration when carrying out the neuropsychological testing. When questioned about the lack of effort testing, the defendant submits that Dr. Mallen's response was *"defensive"* and that the reasons ascribed by Dr. Mallen for his decision not to do such testing did not relate to the plaintiff's condition.

10. The defendant referred to the views of the consultant neurosurgeon, Dr. Macfarlane referred to above at paragraph 4, and those of Professor Schapira, the consultant neurologist, whose diagnosis of the Plaintiff was that she had suffered a minor head injury. Dr Schapira noted as follows:

“It is my opinion that any cognitive dysfunction identified, in the absence of any significant traumatic brain injury, is most likely to be a result of psychogenic factors rather than the head injury. I consider it highly unlikely that in the index accident [the plaintiff] suffered any diffuse axonal injury. Mr Macfarlane and I agree on this. I recommend further neuropsychological assessment, to include effort and validity testing.”

11. As also noted above, both Dr. Macfarlane and Dr. Schapira recommend that the plaintiff undergo further neuropsychological and neuropsychiatry assessment.
12. Counsel for the defendant submitted that the court should be guided by the authorities of *Beck v MoD*² and *Edwards-Tubb v JD Wetherspoon PLC*³
13. In *Beck* the court noted:

“33. I do not consider that the court should order a second examination or stay proceedings pending a second examination by a new expert if this is a possibility. So to order would be to permit the possibility of expert shopping which is undesirable. In this case, on the evidence of the defendants’ solicitor, it is not said that Mr Goodhead’s conclusions are unfavourable to the defendants, but that the form or manner in which those conclusions have been expressed in the report that he has prepared are so unsatisfactory as to have resulted in a loss of confidence in him as an expert.

.....

- 35. The answer in this case, and in any case where a similar situation arises is that the permission to instruct a new expert should be on terms that the report of the previous expert be disclosed. Such a course should both prevent the practice of expert shopping and provide a claimant in the position of Mr Beck with the reassurance that the process of the court is not being abused. In this way justice will be seen to be done.”*

14. In *Edward-Tubb* it was noted:

“30 Authority apart, it seems to me that the imposition or a condition of disclosure is as justified in pre-issue as in post-issue cases. I certainly do accept that there

² [2015] 1 WLR 2206

³ [2011] EWCA Civ 136

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may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reasons the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence. But that is quite different from the question whether expert A's contribution should be denied to the other party by the fact of who instructed him...."

15. Apart from the defendant's concerns regarding Dr. Mallen's methods and reasoning the defendant also asserts the following:

- "b. Second, P's case is very substantial with a Schedule of Loss claiming over C\$2.7 million in damages against D. It is therefore proportional for a second opinion to be obtained in circumstances where D is facing a large claim and the issues at stake are significant.*
- c. Third, if permission is given to D to obtain a second expert, there will not be any undue delay in the trial of this matter.*
- d. Fourth, if permission is granted to D to obtain a second expert, P will suffer no prejudice. P will be entitled to rely on Dr Mallen's report and Dr Jansen's report. On the other hand, D will be left without a report in an important area of expertise, namely, neuropsychology.*
- e. Fifth, the court can be satisfied that D has not engaged in expert shopping since it has, voluntarily disclosed, the substance of Dr Mallen's reports."*⁴

16. Regarding the instruction of a neuropsychiatrist the defendants submits that given the assessment by the neurologist Dr. Schapira that the plaintiff's headaches resulting from the head injury are a combination of stress and anxiety with or without depression that result in the muscle contraction type headache, the recommendation of Dr Schapira for a neuropsychiatrist to help the plaintiff manage her anxiety, lie at the heart of this aspect of the application. The application is therefore made on the basis that this report is required to reasonably resolve the issues raised in the proceedings.

⁴ Defendant's skeleton submissions at paragraph 55
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17. Counsel pointed to a number of indicators of the plaintiff's psychiatric condition to further support the application. These include, letters from two psychologists at Behavioural Health Associated Cayman dated 31 July 2014 which noted: "*significant anxiety and distress*" and a "*diagnosis of post-traumatic stress disorder*"; as noted by psychologists at the Behavioural Health Associated Cayman review from 9 May 2016: "... *consistent with post-traumatic stress disorder....sleep difficulties, hypervigilance and heightened anxiety, difficulty concentrating*"; and from a review at the surgery on 28 April 2020 – "*anxiety, generalised poor sleep, broken, anergia, anhedonia, poor concentration*"
18. In summary, D submits that permission for a neuropsychiatrist should be given since:
- a. *P has been diagnosed with a psychiatric condition (PTSD) and suffers from psychiatric symptoms – i.e. anxiety, stress, fatigue etc.*
 - b. *The instruction of such an expert is recommended by Professor Schapira and [he] is of the view that P's psychological condition would explain her poor test results.*
 - c. *Mr Macfarlane recommends the instruction of a neuropsychiatrist (albeit after the instruction of a new neuropsychologist [HB/tab 3/pp. 130/para.28]).*
 - d. *P's claim for damages is significant (see above) and it is therefore proportional to permit such expert evidence.*
 - e. *The instruction of a neuropsychiatrist might help diagnose P's condition, the cause of her ongoing complaints and recommend treatment for the same.*"

The Plaintiff's position.

19. The Plaintiff objects to the application. In her fifth affidavit sworn in these proceedings, the plaintiff states that the process of being examined by the defendant's experts has not been easy for her. She had had to travel from Ireland to various places in England for appointments. The plaintiff is also concerned with the impact of travel on her health and wellbeing for the reasons outlined in paragraph 11 of her affidavit. The plaintiff also raised concerns relating to the impact of the delay that a further consultation and report may have on the proceedings.
20. The plaintiff noted the findings of Dr Jansen and Dr. Mallen and stated as follows:

“19. Given that both my and the Defendant’s neuropsychologist expert draw similar conclusions I am unclear why I should have to submit to yet a further assessment. This appears to me as though the Defendant is simply unhappy that their chosen expert has reached a conclusion that is supportive of my claim. I should not have to keep submitting to medical examinations until the Defendant finds an expert who agrees with them.”

21. Counsel for the plaintiff submitted that there is a simple and pragmatic solution to the issues raised in the application. He referred to the fact that there was, up to this point, no meeting of the experts as envisaged by the directions order in this case and that the instant application, sought prior to any such meeting, was “*premature, disproportionate and unnecessary.*” Counsel submitted that the findings of Dr. Mallen were consistent with those of the plaintiff’s neuropsychology expert, Dr. Jansen. He also drew to the court’s attention that the plaintiff’s neurologist Dr. O’Sullivan also differed in opinion from Mr. Macfarlane. Counsel submitted that: “*There is a clear conflict in the evidence which cannot be reasoned away by an accusation that Dr. Mallen’s report is flawed and must therefore be set aside due to a loss of confidence in him. The conflict of evidence is a matter for trial.*”
22. Counsel did not agree that the authorities cited by the defendant were useful on this application. Counsel instead referred the court to *AB v C*,⁵ a case concerned with the instruction of a second expert. Counsel noted that in that case the application was made after the meeting of experts had taken place and a joint statement produced.
23. Counsel invited the court to consider the following:
- a. *Dr Mallen has provided an opinion which is aligned with the neuropsychologist evidence obtained by P;*
 - b. *Questions were put to Dr Mallen where he further explained the reasoning for his conclusions;*
 - c. *The respective opinions of the Neurosurgeon and Neurologist relied upon by D in support of the ‘reasonableness’ of further expert report is not supported by P’s Neurologist, Dr O’Sullivan;*

⁵ Unreported, 13 September 2021 and 18 January 2022
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- d. *It is plain that the application is predicated on the fact that D is dissatisfied with Dr Mallen’s conclusions, which is not a good reason for the introduction of another expert; and*
- e. *The application, if it ought ever to be made, is premature given that the directed meeting of experts has not yet taken place.*
- d. *It is submitted that the overriding objective must also be considered and the impact on the proceedings generally. It is less clear whether D suggests that the second expert ought to be instructed to report before the further expert, referred to below, can be instructed. If that is D’s position, this builds significant delay into the proceedings;⁶”*

24. Referring to the matters raised in the plaintiff’s affidavit and referred to at paragraph 19 above, counsel for the plaintiff noted the following from *Lane v Willis*⁷:

“An order for a medical examination of any party to an action has been well said to be an ‘invasion of personal liberty’. Accordingly, it should only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says it is unreasonable.”

25. Counsel argued further that the relevant considerations for the admission of further expert evidence were those to be gleaned from *T v Imperial college Healthcare NHS Trust*⁸ and *Heismer v The Islamic Republic of Iran & Anor*.⁹
26. It was submitted that the instruction of a further expert neuropsychiatrist, particularly in addition to a second neuropsychologist would cause significant delay in the proceedings although a trial date had not yet been set, that the instruction of such further expert was not supported by some of the instructed experts and that it was not reasonable for the Plaintiff to have to attend yet another expert medical examination particularly given the travel involved from her home to London.
27. While counsel for the Third Parties did not make any submissions to the court, he did offer that the Third Parties generally agreed with and adopted the position of the defendant. Counsel submitted

⁶ From the Plaintiff’s skeleton at paragraph 25

⁷ [1972] 1 WLR 326

⁸ [2020] EWHC 1147

⁹ [2019]. EWHC 2073

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that this was not a case of a defendant simply not liking an expert's report, but rather that there are real concerns as to the conclusions reached in Dr.Mallen's report. Regarding the plaintiff's suggestion of the experts in the case meeting, counsel suggested that it unlikely that if the experts meet that this will result in a resolution but that such would only result in delay if a further application had to be made on this issue. He raised the issue of cost implications even in organizing a meeting of the experts and suggested that the Plaintiff's suggestion was an inefficient way of dealing with this issue of the need for a replacement neuropsychologist.

The authorities considered.

28. In *Beck v Ministry of Defence*¹⁰, a personal injury action, the parties were limited to one psychiatrist per party. The defendant was granted permission to change its expert after he had examined the claimant and prepared a report. On appeal by the claimant, the issue as stated by Simon Brown LJ was as follows: *"whether it can ever be appropriate to allow a party to substitute one expert for another without, at some stage at least, being required to disclose the first expert's report."*
29. This case was concerned with the different considerations that arise *"depending on whether disclosure is said to be required (a) before the decision is taken either to allow or to refuse the application to change experts; or (b) as a condition of granting such an application."*
30. The court went on to hold that the disclosure of the original report as a condition of being allowed to instruct a fresh expert was properly to be attached to the order permitting the defendant to instruct a fresh psychiatrist. The court did not consider what factors should be taken into account in allowing the instruction of a fresh psychiatrist. That was not the issue before the court.
31. Instead, while agreeing with the conclusions of Simon Brown LJ, Lord Phillips of Worth Matravers MR noted that a claimant *"could reasonably object to having to be examined again if this is, or may be, because the conclusions reached by the first expert have proved more favourable to him than the defendants had anticipated."* The court should not *"order a second examination or stay proceedings pending a second examination by a new expert if this is a possibility. So to order would be to permit the possibility of expert shopping which is undesirable."*

¹⁰ [2015] 1 WLR 2206
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32. In considering the submissions of the defendants in that case that the form and manner in which their expert had reached his conclusions were so unsatisfactory as to have resulted in a loss of confidence in him, the MR stated at paragraph 34 of the report: “*I do not consider that a claimant should be required to take such an assertion on trust.*” It is for this reason that the MR agreed with Simon Brown LJ that permission to instruct a new expert should be on terms that the report of the previous expert be disclosed.
33. I agree with counsel for the defendant that in the instant case disclosure of the expert report is not a condition of the grant of a second expert that the court need impose since the plaintiff has already had sight of Dr. Mallen’s report. *Beck* is not a case which speaks to the principles to be applied upon a court considering whether to grant such permission at all.
34. *Edwards-Tubb v JD Wetherspoon plc* was a case concerned with “*the question of principle...whether the power to impose a condition on the grant of permission to rely on expert B can properly be employed to require the disclosure of the privileged report of expert A, and if so when.*” The court recognized that the effect of such an order would be to curtail the operation of privilege by making waiver the price of being able to continue in reliance on expert B. The court concluded that it was within its “*general power*” “*to grant relief by way of case management directions which are subject to conditions.*”
35. This case is distinguishable for not being concerned with the principles for the grant but with whether and what conditions could be imposed upon the grant of permission to instruct a further expert.
36. Such was also the issue in *In the Matter of Nord Anglia Education, Incorporated*¹¹. In that case the main issue revolved around a determination of the fair value of dissenting shareholders’ shares pursuant to s. 238 of the Companies Act. An initial summons for directions was issued to identify the expert instructed in the case by the dissenters, the parties having previously been granted leave to instruct one expert witness each. There was a perceived conflict of interest with the expert instructed by the dissenters. By the time that the summons was heard, as Kawaley J noted, what he had before him was: “*...in substance an application by all of the dissenters to replace the expert they had previously identified as their joint expert with another expert. The company did not*

¹¹ [2018 (2) CILR 148]
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oppose the application altogether. Rather, it submitted the court should grant leave subject to conditions designed to ensure that the dissenters were not engaged in “expert shopping”.”

37. This led the learned Judge to review the cases cited by the defendant in the instant case¹², which as I have related above, concern this latter issue. The underlying principle was repeated: *“To ensure that a litigant who wishes to replace an expert initially retained was not simply seeking another expert who would provide a more favorable opinion, the court, when exercising its discretion to grant leave, might require the applicant to disclose any previous opinion given by the first expert. Any privilege which existed in a prior report would fall away once the court decided to grant leave to adduce fresh expert evidence. The court might also impose other necessary conditions designed to allay concerns about “expert shopping.”*”
38. There is a clear distinction to be made between the attaching of a condition to discourage expert shopping – the requirement for disclosure of a previous expert’s report – and the exercise of the court’s discretion to permit a party to instruct a second expert at all, particularly an expert in the same field. For the latter the test remains whether good reason can be shown for a change of expert.
39. In *Stallwood v David*¹³, the court referred to several relevant factors to be considered on an application for the court to exercise its discretion to allow for the instruction of a second expert on the same subject by the same party. The relevant factors are:
- a. *The mere fact that an expert had changed or modified his opinion following an experts’ meeting could not by itself be a reason for permitting a party who was disappointed thereby to adduce evidence from another expert.*
 - b. *However, under Part 35.12(5) a party was not bound by the experts’ agreement and, if a dissatisfied party could show that his expert had modified his opinion which could not properly or fairly support his revised opinion, Part 35 did not rule out granting permission to call a further expert, though such a case would be rare.*
 - c. *The court should consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, further evidence was “reasonably required to resolve the proceedings.”*

¹² Beck v Ministry of Defence, Edwards-Tubb v JD Wetherspoon plc and also Vasilou v Hajigeorgiou [2005] 1 WLR

¹³ [2006] EWHC 2600 (QB), [2007] RTR 11. Also considered by the Court of Appeal in AB and C, CICA. (Civil) 1 of 2022

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- d. *The claimant, having made no inquiries of her expert about his changed opinion, was unable to show good reason for needing an additional expert.*¹⁴
40. As this court stated in *AB v C*, “*The court should approach the application with the following as guidelines: the granting of permission for the instruction of a second expert by the same party on the same subject is rare; the Plaintiff must demonstrate good reason for needing an additional expert. The court should look to determine whether the further evidence sought was “reasonably required to resolve the proceedings”.*¹⁵

Court’s considerations


41. On the premise that the granting of permission as sought is rare, the issue is whether the Defendant has demonstrated good reason for needing leave to instruct another expert neuropsychologist.
42. I am satisfied that this is a case in which the court should grant leave to instruct a second neuropsychologist. I find that the defendant has shown that there is good reason for such instruction.
43. The factors influencing this decision to allow the defendant’s application are as follows:
- i. A trial date has not yet been set. A second report will not cause undue delay. The defendants have identified an expert who has availability in June or July 2023 and who would be able to provide a report within 3-4 weeks after assessment.
 - ii. The defendant has identified the improbabilities and illogicity of conclusions reached by Dr. Mallen as well as deficiencies in the reasons given by the doctor for the approach that he adopted when he examined the plaintiff. The defendant has gone further to seek to clarify with Dr. Mallen the reasons for his approach and questioned why he did not carry out effort testing upon his examination of the plaintiff. The answers to the further inquiry of Dr. Mallen in this regard could be taken as support for the defendant’s position that they have lost confidence in his findings and conclusions.
 - iii. The defendant has sought to show that this is not a case of expert shopping by emphasizing that the submission that Dr. Mallen’s report and conclusions are not sound is supported by other experts, the consultant neurologist, Dr. Schapira and the neurosurgeon Mr. Macfarlane.
 - iv. These experts support the instruction of another neuropsychologist.

¹⁴ Per Teare J. at 17-21

¹⁵ At paragraph 13

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- v. The reports of Dr. Mallen are already available to the plaintiff, further allaying the court's concerns of whether the defendant is "*simply seeking another expert who would provide a more favorable opinion*,".
- vi. The fact that this is a high value case is a relevant consideration here.¹⁶
- vii. The issue of whether the plaintiff's symptoms are indeed secondary to organic brain injury or whether they have a psychological and not an organic origin is a relevant issue in this case as it impacts her treatment and prognosis for recovery, factors directly affecting the quantum claim.
44. Regarding the instruction of a neuropsychiatrist, the issue is whether a neuropsychiatrist is required in order to reasonably resolve the issues raised in these proceedings. I am mindful that at this stage the suggestion of a neuropsychiatrist does not come from either party's neuropsychologist or the Plaintiff's neurologist, only from the defendant's consultant neurologist and the defendant's neurosurgeon.
45. While the court is mindful of the defendant's submissions and that the need for a psychiatrist was previously raised, the court still considers that this application is "*late in the day*". The neuropsychiatrists thus far identified by the defendants as potentially being able to examine the plaintiff, if leave is granted, cannot assess her before August 2023 with a report to follow within 8-12 weeks of such examination. A report is therefore not to be expected before October 2023.
46. Issues now also arise as to the reasonableness of the Plaintiff having to attend another medical examination, especially in light of the matters identified in paragraph 11 of her affidavit.
47. In these circumstances, the application for the court's leave for the instruction of a neuropsychiatrist is denied.
48. The court's preliminary view is that the defendant be awarded 50% of costs of this application on the standard basis. Costs are however reserved to be dealt with at the conclusion of the substantive hearing.


Hon Justice Marlene I. Carter
Acting Judge of the Grand Court

¹⁶ See *Cosgrove v Pattinson* [2001] CP Rep 68
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