

HONG KONG / JUDGMENT

ANSAR MOHAMMAD v. GLOBAL LEGEND TRANSPORTATION LTD

COURT

District Court

DECIDED

8 May 2007

CASE / FILE NUMBER

DCEC1090/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj DCEC1090/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION EMPLOYEES COMPENSATION CASE NO. 1090 OF 2006

BETWEEN ANSAR MOHAMMAD Applicant and GLOBAL LEGEND TRANSPORTATION LIMITED
Respondent

Coram: H H Judge Marlene Ng in Chambers (open to the public) Date of Hearing: 27th April, 2007
Date of Handing Down Decision: 8th May, 2007

DECISION

I. Introduction The Applicant claimed that at about 3:30pm on/about 2nd June 2005 he and his co-worker had just finished stacking cartons of goods onto a wooden pallet placed on the ground and were proceeding to cover the cartons with a tarpaulin. The stacked cartons were about 8 feet in height. In order to cover the cartons with a tarpaulin, each of the Applicant and his co-worker had to pick up a corner of the tarpaulin, walk to opposite sides of the pallet parallel to each other, and then jump up in the air with their arms outstretched to flip the tarpaulin over the cartons. The Applicant claimed that as he jumped up, he slipped and fell to the ground, which was full of debris and miscellaneous materials, and thereby suffered personal injuries. On 11th August 2006, the Applicant through his former solicitors issued the Application in the present proceedings claiming for employees compensation. On 20th September 2006, the Respondent through its solicitors filed an Answer admitting that the Applicant was an employee employed by the Respondent, but denied the claim. On 18th October 2006, the Applicant through his former solicitors filed an appeal under section 18 of the Employees Compensation Ordinance Cap.282

(Ordinance) against the assessments in a Form 9 issued by the Employees Compensation (Ordinary Assessment) Board (Board) on 15th August 2006 (Applicant s Appeal). On 12th January 2007, the Applicant s present solicitors filed Notice of Change of Solicitors. On 1st March 2007, the Respondent s solicitors filed a notice of appeal similar to the Applicant s Appeal. Such intended appeal was out of time, but the Applicant had no objection to its lateness. In the circumstances, at the hearing on 27th April 2007 (Hearing), I granted leave to the Respondent to appeal under section 18 of the Ordinance against the assessments in the Form 9 out of time. I also gave the following directions at the Hearing : the parties were to file/serve all witness statements as to fact within 48 days from the date thereof; the medical expert evidence be limited to one orthopaedic expert for each party; costs of the Hearing be costs in the cause; the Applicant s own costs be taxed in accordance with Legal Aid Regulations; the order made by me need not be drawn up. At the Hearing, I heard arguments on the issue of whether directions should be given for the parties respective orthopaedic experts to (a) conduct joint medical examination of the Applicant and render joint expert report as suggested by the Applicant or (b) conduct separate medical examinations and render separate expert reports as suggested by the Respondent (Issue). I informed Mr Carey, solicitor for the Applicant, and Ms Leung, solicitor for the Respondent, that I would hand down (i) my ruling on the Issue and (ii) consequent to such ruling fix the adjourned hearing date of the Application, which I now do. II. Relevant background The Applicant was assessed by the Board in respect of his alleged injuries suffered as a result of the Accident. Consequently, a Form 7 was issued on 30th May 2006. Pursuant to the assessments in the Form 7, the Commissioner of Labour issued a Form 5 on 6th June 2006. Subsequently but prior to the issuance of the Application in the present proceedings, the Respondent s solicitors made arrangements for the Applicant to be medically examined by the Respondent s orthopaedic expert Dr Lam Kwong Chin (Dr Lam) on 26th July 2006 (1st Appointment). However, the Applicant defaulted attending the 1st Appointment. The Board issued the Form 9 on 15th August 2006. On 4th September 2006, the Respondent s solicitors wrote to the Applicant s solicitors to complain of the Applicant s failure to keep the 1st Appointment and to demand him to attend medical examination by Dr Lam. The Respondent s solicitors invited the Applicant to engage his own expert for conducting a joint medical examination before fixing a new appointment date. On the same day, the Applicant s former solicitors replied by letter saying they had no objection to appointing a medical expert to conduct a joint medical examination with Dr Lam. But since the Applicant had applied for and was awaiting approval of legal aid, they asked the Respondent s solicitors to withhold the joint medical examination pending the outcome of the Applicant s legal aid application. On 15th September 2006, the Applicant s former solicitors wrote to inform the Respondent s solicitors that the Applicant had been granted legal aid. They further advised they had instructions to instruct the Applicant s medical expert Dr Wong Kwok Shing Patrick (Dr Wong) to conduct a joint medical examination and to prepare a joint expert report with Dr Lam. They added that they had informed Dr Wong to liaise with Dr Lam and would advise the Respondent s solicitors of the date of assessment when known to them. By a further letter on the same day to the Respondent s solicitors, the Applicant s former solicitors confirmed that the joint medical examination was fixed to be held on 1st December 2006 (2nd Appointment) at the office of Dr David Cheng (Dr Cheng), who was to be the Respondent s orthopaedic expert. The

Applicant's former solicitors further confirmed that the Applicant and his medical expert Dr Wong would attend the 2nd Appointment accordingly. On 29th November 2006, the Applicant's former solicitors wrote to inform the Respondent's solicitors that the Applicant had appointed his present solicitors to act for him, and that as instructed by the Applicant the 2nd Appointment for the joint medical examination had to be cancelled. The Applicant's former solicitors had informed Dr Wong of such cancellation and asked the Respondent's solicitors to tell Dr Cheng. On 12th January 2007, the Applicant's solicitors wrote to the Respondent's solicitors (a) advising they had received instructions to engage Professor Kumta (Prof Kumta) of Prince of Wales Hospital to prepare an expert medical report and (b) requesting the Respondent's solicitors to state when its medical expert would be available to conduct a joint examination. The Applicant's solicitors indicated that subject to compliance of certain conditions (which were irrelevant to the Issue) they had no objection to the Applicant being examined by the Respondent's medical expert. By a letter to the Respondent's solicitors dated 17th January 2007, the Applicant's solicitors enquired whether Dr Lam had conducted a medical examination of the Applicant at the 1st Appointment and (if so) why the Applicant had to undergo a second medical examination by a different orthopaedic doctor. They also requested for a copy of the report (if any) by Dr Lam. The Respondent's solicitors explained in their letter of 27th February 2007 that the Applicant failed to attend the 1st Appointment, so he had not been examined by any medical expert engaged by the Respondent. Since you will not agree to a joint examination, please ask your client to attend the examination by our [Dr Cheng] We shall forward the MRI films to you after reviewing by our [Dr Cheng] . On 1st March 2007, the Respondent's solicitors advised by letter they had requested Dr Cheng to liaise with Prof Kumta for conducting a joint medical examination, but Dr Cheng refused to have a joint examination with Prof Kumta. The Respondent's solicitors explained they had also requested Dr Chun Siu Yeung (Dr Chun) to liaise with Prof Kumta for such purpose, but Dr Chun refused. The Respondent's solicitors agreed with the Applicant's solicitors that progress of the present proceedings should not be delayed and suggested that the Applicant be separately examined by the parties respective experts. No doubt if your client kept his instructions to engage [Dr Wong], your client could have had already been examined by the respective experts of the parties. The rest of the Respondent's solicitors letter dealt with fixing the appointment with Dr Cheng and accessing the MRI films. On 2nd March 2007, the Applicant's solicitors wrote to the Respondent's solicitors as follows : It is your duty, to ascertain the reason why, [Dr Cheng] and as you now allege for the very first time [Dr Chun] refuse to conduct a joint medical examination with [Prof Kumta]. As you are aware, it is the practice of the courts now days to direct that a joint medical examination take place, something which you have on more than one occasion point out. With respect, medical experts, should not be in a position to disrupt the practice of the court, on what appears to be nothing more than a whim. We are aware that a number of doctors who are regularly instructed by insurance companies are refusing to carry out joint medical examinations with certain doctors who are not part of the usual select insurance clique. As we have advised you, we have applied to restore the matter before the Court for direction in relation to the issue of a joint medical examination. It is our view, that we should wait until we have directions from the court before proceeding to obtain medical reports. The Applicant's solicitors also responded on the fixing of the appointment for medical examination, the conditions to be

imposed for such medical examination and the provision of the MRI films. On 6th March 2007, the Applicant's solicitors chased for a reply as to why Dr Cheng refused to conduct a joint medical examination with Prof Kumta, failing which they proposed to write to Dr Cheng to ascertain the reason for the same. On the following day, the Respondent's solicitors informed the Applicant's solicitors by letter that they had made enquiries with Dr Lam who also refused to conduct joint examination with Prof Kumta. In summary, they had contacted Dr Cheng, Dr Chun and Dr Lam, all of whom refused to have a joint examination with Prof Kumta. We have no objection that you make direct enquiries with these doctors for their reasons and please let us know the results. On 9th March 2007, the Applicant's solicitors wrote to Dr Lam, Dr Cheng and Dr Chun respectively to seek their reason(s) for refusing to carry out a joint medical examination with Prof Kumta, who was said to be an esteemed fellow orthopaedic consultant.

III. Preliminary observations

Several observations can be made from the above background matters and from the submissions made by Mr Carey and Ms Leung at the Hearing : Both parties agreed that orthopaedic expert evidence was necessary, relevant and of probative value in the present case, and each party would instruct his/its own orthopaedic expert. There was no dispute that Dr Wong, Prof Kumta, Dr Lam, Dr Cheng and Dr Chun were all orthopaedic specialists. Despite Mr Carey's allusion to the usual select insurance clique of doctors (see paragraph 19 above and paragraph 26 below), the names of the orthopaedic specialists put forward by the Respondent (ie Dr Lam, Dr Cheng and Dr Chun) appeared to be unobjectionable on their face. There is insufficient material before me to raise any criticism whatsoever in relation to their integrity or competence (see paragraph 27 below). I am of the view that unless there is cogent evidence to the contrary, the courts, the parties and their legal representatives must give highly qualified and experienced medical professionals credit for going about medical examinations in a fair and proper manner and for not sabotaging such medical examinations by unfair interrogation of the person to be examined and/or by misleading the court with inaccurate records of such examinations. To suggest otherwise without cogent evidence is insulting to the reputation of such medical men. The Applicant agreed to attend a joint medical examination. His stance was that the parties' respective orthopaedic experts should render a joint expert report following such examination (see paragraph 7 above and paragraphs 25-28 below). The Respondent did not object to such joint medical examination and joint expert report per se. It was willing so long as its nominated orthopaedic expert was willing. Indeed, it was the Respondent's solicitors who took the initiative to suggest a joint medical examination as early as in September 2006. In my view, it could not be reasonably suggested that the Respondent (not the doctors) dragged its feet or was obstructive over obtaining expert orthopaedic evidence. Indeed, I find its conduct proactive, reasonable and accommodating in that the Respondent's solicitors took the initiative to arrange the 1st Appointment in July 2006, invited joint medical examination in September 2006, deferred such examination to accommodate the Applicant's application for legal aid, arranged the 2nd Appointment in December 2006, and acquiesced in the cancellation of the 2nd Appointment to accommodate the Applicant's change of solicitors. I am further of the view that no criticism could be levelled against the Respondent for nominating Dr Cheng in place of Dr Lam for the 2nd Appointment since half a year had lapsed after the Applicant's default in attending the 1st Appointment which event was followed by deferral of the joint medical examination due to his

application for legal aid. At the Hearing, Mr Carey informed me it was upon his advice that the Applicant changed his orthopaedic expert from Dr Wong to Prof Kumta. But Mr Carey declined to give any substantive reason since he had no wish to expand on his experience of Dr Wong's professionalism as medical expert. Whilst the Applicant was undoubtedly entitled to maintain legal professional and/or litigation privilege in respect of legal advice from his solicitors, the fact remained that no substantive explanation was placed before the court for the Applicant's change of orthopaedic expert when a joint medical appointment had already been arranged, a fact that could not be ignored in light of the criticisms Mr Carey levelled against the failure by Dr Lam, Dr Cheng and Dr Chun to offer any reason for refusing to have a joint medical examination with Prof Kumta. It should also be remembered that it was not the Respondent but Dr Lam, Dr Cheng and Dr Chun who refused to have a joint medical examination with Prof Kumta, and that the Respondent was not in a position to give an explanation when the relevant doctors failed to offer any reason. But when Dr Cheng told the Respondent's solicitors he would not have a joint medical examination with Prof Kumta, the Respondent's solicitors took the initiative to liaise with Dr Lam and Dr Chun to see if they were willing to have a joint medical examination with Prof Kumta, but such doctors refused. The Respondent was also openly prepared to let the Applicant's solicitors liaise with Dr Lam, Dr Cheng and Dr Chun to ascertain their reason(s) for refusing a joint medical examination. The Respondent was receptive to having a joint medical examination and only suggested separate medical examinations as a result of the refusal by Dr Lam, Dr Cheng and Dr Chun to have the joint medical examination with Prof Kumta in order not to delay the present proceedings. I do not regard the Respondent's approaches to Dr Lam and Dr Chun to be attempts to change experts. Rather, the Respondent was trying to ascertain whether upon Dr Cheng's refusal there were other orthopaedic specialists (whom it was prepared to appoint as expert) who were willing to have a joint medical examination with Prof Kumta. It was suggested in the letter of the Applicant's solicitors dated 2nd March 2007 that the Respondent or its solicitors had a duty to ascertain why Dr Cheng and Dr Chun (and presumably Dr Lam as well) refused to have a joint medical examination with Prof Kumta. I am of the view that there was no duty as such for the simple reason that such doctors were at liberty to decline instructions from the Respondent or its solicitors to act as medical expert without giving any reason, and the Respondent had no power to compel them to give reasons (if any) for refusing to have a joint medical examination with Prof Kumta. But the failure by Dr Lam, Dr Cheng and Dr Chun to give any reason, a fact similar to the absence of any substantive reason from the Applicant for changing his orthopaedic expert from Dr Wong to Prof Kumta, was nevertheless part of the circumstances to be taken into account in considering the Issue. IV. Applicant's case on the Issue

At the Hearing, Mr Carey submitted that nowadays in employees compensation cases it was the practice of the court to direct parties to arrange for their medical experts to have a joint medical examination, which practice should not be disrupted by medical experts who would not give reason(s) to justify their refusal to have a joint medical examination. Mr Carey contended that such refusal by Dr Lam, Dr Cheng and Dr Chun to have a joint medical examination with Prof Kumta, an esteemed orthopaedic consultant, was unacceptable, and that the court's practice of requiring joint medical examination should not be held to ransom on nothing more than what appeared to be the whims of such doctors. But Mr Carey agreed that whilst the court had

jurisdiction over the parties to the present proceedings, it could not directly compel Dr Lam, Dr Cheng and Dr Chun to have a joint medical examination with Prof Kumta. Mr Carey's submissions went further. He suggested that the usual select insurance clique of doctors had developed a consistent practice of refusing to carry out joint medical examination with certain doctors. But, in my view, there was no evidence before me that Dr Lam, Dr Cheng and/or Dr Chun only received instructions to act exclusively as medical experts for defendants/respondents/insurers. From his own past experience, Mr Carey also questioned the professionalism of Dr Cheng by recalling an occasion when Dr Cheng was embarrassed by his own medical opinion (which was made without calling for review of MRI films) that was contradicted by findings upon a subsequent review of the MRI films. Mr Carey was careful to qualify the above submission to be his own personal opinion (which others might disagree). Further, there was no primary information or material placed before the court to support such contentions. At the Hearing, I indicated to Mr Carey (and he acknowledged) that I could hardly take judicial notice of his personal experience and opinions from the Bar table. In the course of his submissions, Mr Carey made clear it was not the Applicant's intention to effectively deprive the Respondent of his right to adduce expert orthopaedic evidence through want of any willing expert to have a joint medical examination with Prof Kumta. Should the court find favour with the Applicant's stance on the Issue, Mr Carey had no objection for the court to grant the Respondent liberty to apply in case the Respondent could not reasonably find a willing expert to have a joint medical examination with Prof Kumta. V. Respondent's case on the Issue Ms Leung had no quarrel with a joint medical examination if it were feasible. She pointed out that the present impasse was not due to any fault on the part of the Respondent since it had approached not one but three orthopaedic specialists to ascertain their willingness to have a joint medical examination with Prof Kumta. Their refusals were their own personal decisions, and not that of the Respondent. Ms Leung submitted it would be unfair to compel the Respondent to appoint an orthopaedic expert not of its own choice to have a joint medical examination with Prof Kumta (even if there were any such willing expert), which was tantamount to unjust interference with the Respondent's freedom to choose its own nominated expert(s), particularly as the Applicant himself changed his orthopaedic expert from Dr Wong to Prof Kumta without giving any substantive reason. Had the Applicant maintained his original choice of expert (ie Dr Wong), the joint medical examination and the joint expert report would have been completed before now. Ms Leung submitted that since a joint medical examination that recognised the Respondent's choice of expert was not feasible, in order not to delay the present proceedings, the sensible way forward was to have separate medical examinations. She also reminded that the Respondent had as early as in July 2006 (ie more than 9 months ago) expressed its intention to medically examine the Applicant. IV. General considerations In employees compensation cases, there is no inflexible rule or practice as to how expert medical evidence is to be obtained/presented. Sometimes the parties' respective medical experts have a joint medical examination and render a joint expert report. At other times, they have separate medical examinations and render separate expert reports. The parties may also agree to have a joint medical examination but prepare separate expert reports, and more rarely they may agree to appoint a single joint medical expert to prepare a single expert report. In most cases, the parties reach sensible consensus on how the medical examinations and expert reports

are to be done. Normally, if the medical experts are satisfied they can properly perform their task by a joint medical examination, there can be little objection to such course of action. In the present case, the parties have been unable to reach agreement on whether there should be joint or separate medical examinations by their respective orthopaedic experts. I do not criticise them for their different stance because they were plainly motivated by strong considerations of what they regarded as fair and proper conduct of the present proceedings. But Mr Carey and Ms Leung did not refer to any authorities from which guidance may be extracted, so it is necessary to consider what factors that accord with reason, practice and fairness should generally be taken into account.

- (a) Is expert medical evidence required? The starting point is to ask whether expert medical evidence is required at all. Expert medical evidence should be restricted to what is reasonably required to resolve the issues in the litigation. To put it in another way, the guiding criteria are necessity, relevance and probative value (see *Chan Kwok Ming v Hitachi Service Co Ltd HCPI322/2002* referred to in *Arfan Muhammad v MPS Engineering Limited & ors HCPI457/2003*, Deputy High Court Judge Muttrie (unreported, 30th June 2005)).
- (b) Function of the medical expert Once it is shown that expert medical evidence is reasonably required on particular subject matter(s), adversarial ideology (which is premised on the belief that a proper adjudication will result from inter alia vigorous pursuit by each party of his own case) suggests that each party should be entitled to select and call medical expert(s) of his own choice (a) provided that the expert report(s) is/are disclosed in advance and (b) subject to the court's powers to determine admissibility of the expert medical opinion intended to be adduced and to limit the number of experts to be called. Whilst a party may wish to adduce expert medical evidence for the purpose of supporting or advancing his case (ie helping him to win), from the perspective of the judge the medical expert is to educate and inform on issues arising within his specific area of medical expertise. The true function of such medical expert is (as succinctly summarised by Cresswell J in *Ikarian Reefer* [1993] 2 Lloyd's Rep 68) to provide independent, unbiased and impartial opinion on matters within his specific area of medical expertise uninfluenced by the pressure of litigation, and he should not assume the role of an advocate for the party instructing him. To achieve such laudable objectives, the manner for obtaining/presenting expert medical evidence that brings clarity to the schools of thought on the issues and that is helpful the judge in his adjudication takes on importance.
- (c) Adversarial model If the adversarial system is given free rein, a party's right to conduct his case effectively in his own way should not be restrained, which means he has the freedom to choose his own lay and expert witnesses and to present such lay and expert evidence in the manner as he sees fit. But in relation to expert medical evidence, such approach carries the risk of inappropriate or excessive use of experts that may result in unnecessary expense/delay, increased complexity and drawn-out trials. Additionally there is a risk that conscious or unconscious pressure (no matter how subtle) arising from partisan selection and instructions may cause the medical expert to become a hired gun who gives partisan

opinion that is unhelpful for achieving just and fair results and/or that may impair the quality of judicial findings. The problem may become accentuated if there is a continued relationship between the expert and the party who instructs him (eg the relevant legal representatives). Consequently, what have become known as plaintiff's experts and/or defendant's experts with polarised views occasionally emerge, and they are not restricted to the so-called usual select insurance clique of doctors referred to by Mr Carey. The above concerns in respect of the adversarial model are summarised in Civil Justice Reform Interim Report and Consultative Paper by the Chief Justice's Working Party on Civil Justice Reform paras.485-518 at pp.182-192.

- (d) **Case management** 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. 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. 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. 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.
- (e) **Matter of discretion** As for personal injuries litigation, I am of the view that directions on how expert medical evidence is to be obtained/presented in employees compensation cases are necessarily within the realm of discretion, which is to be exercised judicially on the facts of each particular case. It calls for a balancing exercise to resolve the tension between the unmitigated adversarial model and the court's case management powers for just and efficient resolution of cases.

- (f) Case management advantages of joint medical examination One useful case management measure which the courts sometimes adopt is to direct the parties respective medical experts to have a joint medical examination of the party to be examined and to prepare a joint expert report that sets out the matters on which they agree and/or disagree and the reasons for non-agreement. The purpose of such directions are many-fold, including inter alia the following : to prevent confusion and time-wasting when it is discovered at an advanced stage of the legal proceedings that the parties respective medical experts are proceeding on different medical background of the party to be examined, different complaints by such party, and/or different findings from the physical examination/other investigation; to identify at an early stage the medical issues, the relative merits of the claim and the areas in which the parties may reach agreement; to facilitate settlement or (if settlement cannot be achieved) facilitate preparation for trial that will be focused on the issues in dispute. In the context of personal injuries litigation, it is not unusual to find that the interests of justice, the objective of fair and expeditious determination of claims and the need to avoid proliferation of expert evidence lean towards joint medical examination, as reflected in the Guidance Note to Practice Direction 18.1 : Paragraph 2 Many practitioners obtain reports in every conceivable medical or quasi-medical discipline before they establish sensible contact with the insurance company concerned or their solicitors e.g. orthopaedic, neurological, urological and psychiatric reports, and reports from an occupational therapist, physiotherapist, rehabilitation consultant, surveyor etc. What they should be doing instead of this front-loading exercise on costs is to invite the Defendants to take part in a joint examination by respective experts, or in a joint instruction to an agreed expert. Failure to do so is likely to result in the Plaintiff's practitioners not recovering such costs from Defendants in the event of a settlement or a judgment against the Plaintiff. The Court will be alert to prevent, when it can, practitioners from recovering such costs from the Plaintiff or out of the Plaintiff's damages.
- (g) Countervailing considerations However, even the strong words above do not make it an invariable rule or practice to have joint medical examination. The Guidance Note should not be taken to suggest that it must be unreasonable to have separate medical examinations or that the court should never allow separate medical examinations in face of refusal by a party or his medical expert. There may be cases where directions for separate medical examinations and separate expert reports are justifiable. I need not explore all of the possibilities (which are not closed), but the following may give some flavour of the possible scenarios where a joint medical examination may not produce the advantages referred to above and where there may (not necessarily must) be ground for separate medical examinations : where the respective experts have known entrenched or inflexible views pertaining to particular schools of thought (which may not necessarily be biased but which may represent proper differences amongst the experts within a specific area of expertise); where the medical or scientific matter is cutting-edge and subject to strong debate; where the experts are personally or professionally hostile to each other, which hostility will undermine proper communication and cooperation; where it is shown that the party to be

examined is too nervous or otherwise unsuitable to undergo a joint examination attended by two or more experts at the same time; where there may be such difficulty in scheduling a joint examination that the prejudice caused by the delay outweighs the advantages of a joint examination. Further, even if directions have been given initially for the parties respective experts to have a joint medical examination and to prepare a joint expert report, there is always room for the parties or either of them to apply for alternative directions if the initial directions are subsequently shown to be truly unworkable (eg where a participating expert perceives the joint examination to be inaccurate or where the atmosphere is openly hostile). To insist on a joint examination in such circumstances may (not necessarily must) not produce expert evidence that serves the interests of justice and/or that is helpful to the court.

- (h) Balancing exercise in each case Where a joint medical examination is opposed on the basis that a party's nominated medical expert refuses to participate in such examination, the court must recognise the crucial tension between the case management considerations referred to above and the party's right to choose his own expert. Although the exercise of such adversarial right to choose one's own expert should be proportionate to the weight of the claim, where expert medical evidence is of significance in the context of the legal proceedings, the court should ensure that justice will not be prejudiced or sacrificed for the sake of economy, efficiency and other procedural advantages. In the circumstances, the court should exercise care in giving directions as to the arrangements for adducing expert medical evidence to ensure that balance is achieved between important considerations of case management/costs and the need to allow a party fair opportunity to adduce the opinion evidence he wishes to rely. Any directions for joint medical examination imposed on a party whose own nominated expert refuses to participate and who is thereby constrained to retain another expert not of his own choice or to forgo presenting expert evidence altogether pose a risk that the party's ability to conduct his case effectively may be imperilled. His choice of expert should not be circumscribed unless it is outweighed by the advantages brought by compliance with the overall case management objectives in relation to issues in the litigation or unless it can be shown that his stance is not genuine but intended to frustrate effective case management. It is important to have regard to the interests of justice and to keep in mind a sense of perspective. It is clear from the above discussion that the position is left open in principle. Thus, the court should not be taken to say that it is reasonable or unreasonable as a matter of principle to impose a requirement of joint or separate medical examinations by the parties respective medical experts, but that in all the circumstances in each case it is reasonable or unreasonable to ask for joint or separate medical examinations. I am therefore at liberty to determine the Issue in the present proceedings on its merits and in doing so I have to exercise my discretion according to the standards of fairness and reasonableness by considering the relevant factors and strike a balance between the interests of both parties. VI. Issue I bear in mind the preliminary observations I have made in paragraphs 23-24 above. The issue in the present case was orthopaedic expert evidence. In employees compensation cases, such expert issue arises from substantially established if

not well-trodden area of knowledge. The parties here had completed discovery and no doubt already had access to the relevant medical records/reports from the Applicant's treating doctors/hospitals. There was no suggestion that the present case was other than a straightforward employees compensation claim that involved an ordinary accident and that required routine medical examination. Usually, the orthopaedic examiners rely not just on the answers they receive from the applicant in the course of taking his medical history and ascertaining his present complaints during the medical examination(s), but they will also consider his medical records/reports and seek objective physical symptoms from the examination(s) and other investigations/tests (eg x-ray and MRI). In such context, where there is a reasonable request for joint medical examination, separate medical examinations should generally be an exception for the good case management reasons discussed above. I also bear in mind that usually separate expert medical reports secured by each side have to be submitted to a party's own expert for comment and, where appropriate, for preparation of a supplemental report. This adds to time and costs. Further, for cases that do end up in trial, it is far more likely that the medical experts will be required to give viva voce evidence if they have not had any joint opportunity to discuss their areas of agreement and disagreement and to explore the basis of their non-agreement. Still further, the time that will be taken to examine and cross-examine such medical experts will be more than it will be if there have been joint medical examination and joint expert report that clearly outline the areas of agreement and non-agreement. Here, both Mr Carey and Ms Leung acknowledged that joint medical examination was objectively appropriate in the context of the present case. The Respondent's present suggestion of separate medical examinations was not a denunciation of the advantages of joint medical examination in the present case but a result of the refusal by its chosen medical expert(s) to have such joint medical examination with Prof Kumta. Whilst there might be other competent orthopaedic specialists who might be willing to conduct a joint medical examination with Prof Kumta (but there was no direct evidence on this before me), the court has to be satisfied that a restriction of the Respondent's choice of expert was justified in all the circumstances. In my view, the primary consideration in respect of directions for joint or separate medical examinations in the present case, like any other procedural directions, is that they must comply with the principles of justice. Although the courts are under pressure to deal with cases before them expeditiously and case management has become an integral part of civil litigation, the interests of justice still requires the court as far as practicable to administer justice fairly and even-handedly between the parties to enable them (within reason) to present their case in the best light. Whilst I do take note that no reason was offered by Dr Lam, Dr Cheng and Dr Chun for their refusal to have a joint medical examination with Prof Kumta, I bear in mind that at the very least Dr Cheng was not against the concept of joint medical examination for he was willing to have a joint medical examination with Dr Wong. These doctors have not disclosed their reason(s) for refusing a joint medical examination with Prof Kumta. Even so, I do not feel able to draw adverse inference from all the circumstances that such refusal is necessarily a tactical ploy by the usual select insurance clique of doctors born out of adversarial pressure or bias against a perceived plaintiff's

expert . Nevertheless, the doctors unwillingness suggested that an atmosphere of poor cooperation would arise if any of them were forced to participate in a joint medical examination with Prof Kumta (even assuming the court had such power to so direct) or that the Respondent might be left without an expert of its own choice should they decline to be appointed in face of directions for joint medical examination. Whilst it could be argued that a joint medical examination (a) would cast upon the Respondent the burdensome duty of looking further for a willing expert and (b) might be ineffective given the uncertainty engendered by the refusal by at least three orthopaedic specialists with increased risk of delay and added costs of having to come back to court for further directions, there was, in my view, a particular development in the present case that plainly suggested that the court should favour the stance adopted by the Respondent. The constant theme in relation to expert medical evidence in employees compensation litigation is reciprocity, which is reflected in, say, the standard directions for service/exchange of the parties expert medical reports at the same time (although such directions do not prevent voluntary early disclosure by a party of expert medical evidence which he intends to rely at trial). In my view, the proposed constraint against the Respondent's freedom to engage Dr Lam, Dr Cheng or Dr Chun as its orthopaedic expert must be viewed in light of the Applicant's freedom to insist on having Prof Kumta replace Dr Wong (who was willing to have a joint medical examination with Dr Cheng) as his expert. To impose a constraint on the Respondent by insisting on a joint medical examination whilst letting the Applicant choose his own expert to present expert medical evidence in what the Applicant must believe to be the best light would inevitably cause the Respondent to feel a real sense of unfairness. Such approach would give rise to a sense of injustice or imbalance that might cause grievance. I also reiterate my observations in paragraphs 23(i) and 24 above. Therefore, I do not think it will be appropriate in the circumstances of the present case to direct joint medical examination. Some of the advantages of a joint medical examination might be preserved by requiring the separate medical examinations to take place and the expert reports to be filed/exchanged within specific time periods. I therefore direct that (a) the parties respective orthopaedic experts (ie Prof Kumta for the Applicant and Dr Cheng for the Respondent) do conduct separate medical examinations of the Applicant within 45 days from the date hereof, and (b) the parties do file and exchange their respective orthopaedic expert reports within 75 days from the date hereof. Consequently, the hearing of the Application is adjourned to be heard before the judge in charge of the employees compensation list at 11:30am on Friday, 24th August 2007. VII. Postscript The challenge for the courts is to keep an open mind and to develop responsive procedural approaches in relation to expert medical evidence in order to achieve more efficient and effective disposal of cases provided that justice remains a primary consideration. 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. Signed (Marlene Ng) District Court Judge Representation: Mr T Carey of Messrs Burke, Fung & Li for the Applicant. Ms W Leung of Messrs Winnie Leung & Co for the Respondent. PAGE - PAGE DCEC1090/2006/Decision DCE1090/2006/Decision A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V ~r~hrU &`#\$ <FQ! _ E0 <FQ! _ E0 @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=57021
CASE PAGE	https://chat.esheria.ai/case-law/hong-kong/ansar-mohammad-v-global-legend-transportation-ltd-2007

Prepared on 29 October 2026 · Esheria