

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2019/CLE/gen/01817

B E T W E E N

PATRICIA EDGECOMBE

Claimant

AND

SUPER VALUE FOOD STORES LIMITED

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: D. Halson Moultrie for the Claimant
Roberta Quant with Lesley Brown for the Defendant

Hearing Date(s) 26 March 2025

RULING

WINDER, CJ

This is the Defendant's application for a stay of these proceeding unless the Claimant agrees to undergo a medical examination by Dr A, the physician of the Defendant's choice, and for the release of her medical records to him.

[1.] The action was commenced by the Claimant seeking damages for alleged personal injury to her lower back and knee arising from a slip and fall accident at the Defendant's premises in the Prince Charles Shopping Center on 25 May 2017.

[2.] On 10 April 2024 the Defendant's attorneys wrote to the Claimant's attorneys seeking agreement for the Claimant to be examined by Dr. A. The Defendant, who had earlier agreed to be examined by an independent neurosurgeon in Florida, objected to being examined by Dr X.

[3.] The Defendant has applied by Notice of Application for, inter alia, *an Order pursuant to Rule 26.1(q) and (v) of the Supreme Court Civil Procedure Rules (SCCPR) 2022 and/or under the inherent jurisdiction of the Court that, the Court shall stay all further proceedings in this action unless the Claimant agrees to be examined by Dr X, Neurosurgeon, and to undergo any additional testing require by the Defendant's Physicians and to sign a medical release form to allow Dr X to review her medical records.*

[4.] The application is supported by the Affidavit of Rushea Stuart, filed on 21 June 2024, citing that the Claimant relies on a neurologist, Dr Clyde Munnings to prove its claim and that it will not be able to properly respond to the claim in the absence of her being examined by the neurologist of their choice.

[5.] The Claimant opposes the application.

[6.] The Claimant's case is supported by her affidavit citing that she does not wish to be examined by Dr X. She says that Dr X had examined her for an unrelated lower back injury in 2013. She was not satisfied with his report and diagnosis in 2013 that she return to work, on light duties, following the injury. She also complains that the Defendant's orthopedic surgeon, Dr Barnett, refers to the report of that 2013 examination in his report. Dr X's report, the Claimant says, is refuted by her neurosurgeon. She also says that she believes that any further involvement by Dr X would be prejudicial to her. Finally, she says that she is afraid of him and wants nothing to do with him and believes that he is very likely to defend his previous position. She says she wants to be examined by a physician in Florida.

[7.] The English Court of Appeal decision in **Starr v The National Coal Board [1977]** 1 All ER 243 provides an extremely useful guide to resolving this application. In October 1974 Starr brought an action against the defendants for damages for personal injuries which he asserted had been suffered during the course of his employment with the defendants. The statement of claim alleged that he had not been provided with any support equipment when using a machine and as a result his arms and elbows had come under severe strain. In March 1975 a specialist examined Starr on behalf of the defendants but found it impossible after the lapse of time since the accident to make an exact judgment of whether or not Starr's ulnar nerves were damaged and, if so, what was the cause of the damage. In view of that report the defendants thought it necessary to obtain a neurologist's opinion. They nominated Dr X, a distinguished consultant neurologist, to examine Starr. Starr conceded that his examination on behalf of the defendants by a neurologist was necessary in the interests of justice, but refused to be examined by Dr X. Starr made no attack on Dr X's professional competence or personal integrity but asserted that he was apprehensive that Dr X would produce a misleading report because, so Starr alleged, Dr X had been unprofessional in his conduct in examining and reporting on other plaintiffs in the past; Starr also suggested that Dr X was a hostile examiner of plaintiffs. Starr stated that he was willing to be examined by any consultant neurologist other than Dr X. The defendants applied for a stay of all further proceedings in the action unless and until Starr submitted to medical examination by Dr X.

[8.] In imposing the stay unless and until Starr submitted to the medical examination, **Scarman LJ** stated at page 49:

In the exercise of the discretion in this class of case, where a plaintiff has refused a medical examination, I think the court does have to recognise (and here I think Pickett's case is helpful) that in the balance there are, amongst many other factors, two fundamental rights which are cherished by the common law and to which attention has to be directed by the court. First, as mentioned in Pickett's case by Willmer and Donovan LJJ, and by Sachs LJ in Lane's case, there is the plaintiff's right to personal liberty. But on the other side there is an equally fundamental right—the defendant's right to defend himself in the litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the witnesses that he will call. It is particularly important that a defendant should be able to choose his own expert witnesses, if the case be one in which expert testimony is significant.

With the initial approach in Pickett's case I find I have considerable sympathy; and I do not think it is an approach that has been discarded by these courts. A plaintiff is not to be regarded as acting unreasonably merely because he does not wish, or his advisers do not wish him, to be examined by a doctor chosen by the defendant. But, if a defendant insists on examination of the plaintiff by the doctor he, the defendant, has nominated, then the problem does arise: in what circumstances will the court order a stay unless the plaintiff yield?

First, one has to look to the defendant's request and ask oneself the question: is it a reasonable request? The defendant is not to be regarded as making an unreasonable request merely because he wishes to have the plaintiff examined by a doctor unacceptable to the plaintiff. The decisive factor, therefore, becomes, as I think Lord Denning MR recognised in *Edmeades Thames Board Mills Ltd*, that of the interests of justice—of the 'just determination' of the particular case. I would add that it can only be the interests of justice that could require one or other of the parties to have to accept an infringement of a fundamental human right cherished by the common law. The plaintiff can only

be compelled, albeit indirectly, to an infringement of his personal liberty if justice requires it. Similarly, the defendant can only be compelled to forgo the expert witness of his choice if justice requires it.

...

Therefore the second question is: granted the reasonableness of the defendants' request, was the plaintiff's refusal of it unreasonable?

The test here must be related to the necessity, so far as the court can assist, of ensuring a 'just determination of the cause'. It was here that counsel for the plaintiff had to pass to his second submission. Unable, as he was in my judgment, to rely on the proposition that the plaintiff need give no reasons, he secondarily submitted that there was in this case good reason, associated with a just determination of the cause, for the plaintiff to refuse examination by this particular doctor. Both counsel recognised that an investigation into the reasons for the plaintiff's decision—or, more accurately, for the decision taken by him on his solicitors' advice—leads the court into difficult waters. In some cases it might not be at all difficult to reach a conclusion, without any criticism of the doctor, that the plaintiff was entitled to say: 'Not this doctor'. An obvious illustration of such a case would be a woman plaintiff who had an injury which she would prefer to have examined by a woman doctor. One can envisage other cases where objection of a very personal character, in no way reflecting on the competence or character of the doctor, might exist why the plaintiff should say: 'Not this doctor, but another.' But that is not this case. It is alleged in this case that the professional conduct of Dr X in examining and reporting on other plaintiffs in the past was such as to suggest that he might well not produce a report which was not misleading. Counsel for the plaintiff put it in this way: that the plaintiff's solicitors were not fully confident, based on their experience of his reports in the past, that he would prepare a report which was not misleading. Counsel for the plaintiff made it clear that there was no suggestion of lack of competence or of lack of honesty or of professional honour, but there were indications in earlier reports in other cases, which were produced for our examination, which would appear to suggest that this doctor was not always successful in making a full, complete, and not misleading report.

...

I have, therefore, come to the conclusion that the request for medical examination of the plaintiff by this particular consultant neurologist was a reasonable one; and I have come to the conclusion that, notwithstanding the matters that have been developed in argument, the plaintiff was unreasonable in refusing to submit himself to examination and that there is, in the matters that have been adduced to this court, no indication that justice to the plaintiff is liable to be imperilled if this doctor examines him, reports, and ultimately gives evidence.

(emphasis added)

[9.] In accordance with the test laid down in Starr, the Court must therefore ask two questions. Firstly, is it a reasonable request and secondly, granted the reasonableness of the defendant's request, was the plaintiff's refusal of it unreasonable? Having carefully considered the matter and the test to be applied, I am satisfied that the request of the Defendant for the Claimant to be examined by Dr X was a reasonable one and that the Claimant's refusal of it was unreasonable.

[10.] The Claimant herself relies on the report and evidence of her neurologist, Dr Clyde Munnings to prove her claims in the action. As she is prepared to be examined by a Neurologist in Florida she appears to accept that the request for her examination is a reasonable one. More, importantly, the Defendant will not be able to properly respond to the claim in the absence of the Claimant being examined by the neurologist of the Defendant's choice.

[11.] On the question of the reasonableness of the Claimant's refusal, she contends that Dr X's 2013 examination of her has been refuted by her neurosurgeon and she believe that any further involvement by Dr X would be prejudicial to her. Additionally, she says that she is afraid of him, wants nothing to do with him and believes that he is very likely to defend his previous position. She insists on being examined by a physician from Florida.

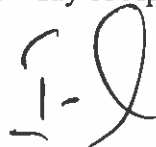
[12.] The parties accepted that neurology was a specialty of limited availability in the Bahamas. It must also be accepted that there is a heightened expense associated with having the Claimant examined in Florida. Having examined the Claimant in the past, and as the effect of any pre-existing injury may arise, there is some merit in the Defendant choosing Dr X as its physician of choice. I therefore accept the Defendant's submission that *"there is no evidence before the court that the Claimant would be prejudiced if Dr. X examines her and ultimately gives evidence relative to her purported injuries. Dr. X would obtain all the Claimant's medical records, review, compare those records, and clearly outline to the court the medical state of the Claimant prior to the alleged accident, identify which injuries were because of the alleged accident and identify which symptoms are as a result of the Claimant's pre-existing conditions."*

[13.] In my view the Claimants only real fear is that Dr X will not provide a favourable report having regard to her view of his previous report. Respectfully, this is not an adequate basis to refuse to be examined by Dr X. Any findings of Dr. X will have to be defended against the evidence of Dr. Clyde Munnings.

[14.] In striking the balance between the Claimant's right to personal liberty and the Defendant's right to defend itself in the litigation as they and their advisers think fit, I grant the application for the stay of proceedings unless and until the Claimant submits to the medical examination of Dr. X. The interest of justice in this case is best served with this result.

[15.] The Defendant shall have its costs of the application, such costs to be summarily assessed.

Dated the 3rd day of April 2025

A handwritten signature in black ink, appearing to read 'I. R. Winder', written in a cursive style.

Sir Ian R. Winder
Chief Justice