Neutral Citation No. [2005] NIQB 42 | *Ref:* **HIGF5295**

Judgment: approved by the Court for handing down | *Delivered:* **20/05/2005**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

NORMAN RICHARD HAYWOOD

Plaintiff;

-and-

HUGH RITCHIE, KEVIN RITCHIE, COLIN RITCHIE AND HAL RITCHIE t/a as H RITCHIE & SONS

Defendant.

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HIGGINS J

[1] This is an appeal from an order of Master Wilson whereby he refused the defendant's application for an order staying this action pursuant to the inherent jurisdiction of the court. On 22 June 2004 the plaintiff issued a writ of summons against the defendant claiming damages for personal injuries, loss and damage sustained by reason of the negligence of the defendant in and about the employment of the plaintiff. A statement of claim was served on 19 July 2004. This alleges that the plaintiff was employed by the defendant as an oil tanker driver and that he was injured at his place of work on or about 1 August 2003. It is alleged that he sustained injury when a metal shutter, used to secure the defendant's office at the weekend, was pulled down by

another employee, thereby striking the plaintiff on his right shoulder. The particulars of personal injuries allege –

> "Shock, Musculo ligamentous sprain of the cervico-thoracic region, and some of the muscles of the shoulder girdle on the right side. The plaintiff takes pain killers every day. The plaintiff's pain has spread to the back and front of his shoulder, his upper arm and the front of his chest. The plaintiff is never pain free. The plaintiff's symptoms resulted in the development of depression. Reduced movements of the cervical flexion, extension, rotation and lateral flexion."

[2] In addition the plaintiff claims loss of earnings from 20 February 2004 and any future loss of earnings. The defence served on 6 September denies that the plaintiff was employed by the defendant, denies the incident and injuries alleged and pleads contributory negligence.

[3] On 24 June 2004, at the request of his solicitor, the plaintiff was examined by Mr M G McAlinden FRCS, a Consultant Surgeon in Trauma and Orthopaedic Surgery. The Consultant Surgeon recorded a short history from the plaintiff as to the circumstances in which he was injured. This report was made available to the defendant's solicitor in accordance with the provisions of Order 25 of the Rules of the Supreme Court Of Northern Ireland. Following consideration of this report the defendant's solicitor decided it was necessary for the proper preparation, presentation and conduct of this action that the defendant should have the plaintiff medically examined. Arrangements were made for Mr X FRCS, described as a Consultant General Surgeon, to examine the plaintiff at the Ulster Independent Clinic on 8 October 2004. The plaintiff's solicitor was notified about these arrangements by letter dated 6 September 2004. On 27 September 2004 the defendant's solicitor received an undated letter from the plaintiff's solicitor which stated –

> "We refer to yours of 6th inst and regret to inform you the plaintiff will not be attending any examination by Mr X FRCS.
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> Mr X has been dismissive of every plaintiff that he has ever examined from this office and has in every case required access to the entirety of the Plaintiff's GP's notes and records, notwithstanding the fact that several High Court decisions have confirmed that he is not entitled to these. We therefore are not prepared to advise our client that he should submit to the inevitable belittling of his claim and the intrusive

> request for personal and private information. We are prepared to advise our client to attend for a medical examination by any Consultant Orthopaedic Surgeon in Northern Ireland. We consider this appropriate given that the plaintiff's medical evidence served in support of his claim is prepared by a Consultant Orthopaedic Surgeon and Mr X does not hold that qualification. We assume if you wish your medical evidence to carry the same weight as our own that you can see the sense of this proposal."

[4] On 30 September 2004 the defendant's solicitor issued a summons for an order pursuant to the inherent jurisdiction of the High Court "staying this action unless or until the plaintiff:-

(a) submits herself (sic) for medical examination by Mr X FRCS, and

(b) pays any costs thrown away incurred (sic) by the defendant by reason of the plaintiff's non-attendance with Mr X. "

[5] This summons was supported by an affidavit sworn by the defendant's solicitor and dated 28 September 2004. In that affidavit he avers "it would be unjust to permit the plaintiff to prosecute this action towards a trial without giving the defendant the opportunity to have the plaintiff examined by a medical examiner of its choice".

[6] On 3 December 2004 Master Wilson refused the application. The defendant now appeals against that order. Further affidavits have been lodged by both parties without objection. These include a further affidavit from the defendant's solicitor, affidavits from two solicitors (Mrs Mercer and Miss Wylie) in the same office, an affidavit from Mr X, as well as an affidavit from the plaintiff's solicitor.

[7] The further affidavit of the defendant's solicitor suggests that "the examinations undertaken by Mr X do not involve intrusive requests for personal and private information". He exhibited five reports from Mr X to illustrate his submission. This provoked in response the affidavit from the plaintiff's solicitor, to which he exhibited three reports in order to illustrate his objection to a medical examination by Mr X. In that affidavit he referred to the five medical reports from Mr X. exhibited by the defendant's solicitor and commented that, in four of them, Mr X recorded previous medical history of the plaintiffs examined and that the previous medical history had no relevance to the injuries of which the plaintiff in that action complained. In addition, in four of the reports, Mr X professed himself unable to properly provide an opinion, without access to either each plaintiff's entire medical notes and records in unedited form or such notes and records covering a

number of years. In the fifth report the GP's notes and records had already been provided to that defendant's solicitor. In the fifth report Mr X recorded several entries from the GP notes and records relating to that plaintiff. It is said these entries are irrelevant to the injuries of which complaint was made.

[8] The plaintiff's solicitor averred that in that fifth report Mr X was dismissive of the nature and duration of that plaintiff's injuries. The plaintiff's solicitor also averred that in the three reports exhibited in his affidavit Mr X recorded irrelevant medical history and declined to express an opinion without unfettered access to each plaintiff's medical notes and records. In paragraph 4 of his affidavit the plaintiff's solicitor averred that he had in the past received complaints from female plaintiffs, following examination by Mr X, regarding the intrusive nature of the medical questioning by him. In paragraph 5 he asserts that he does not believe it to be right and proper for Mr X to seek personal information of no relevance to the plaintiff's claim or to request sight of the plaintiff's entire personal medical records and notes. In paragraph 6 he asserts that he is entirely justified in refusing to permit examination by Mr X.

[9] The defendant's solicitor responded with two affidavits from solicitors in his office exhibiting further reports, together with an affidavit from Mr X himself. In his affidavit Mr X outlined his experience as a Consultant General Surgeon including the treatment of patients with traumatic injuries, some of whom had suffered the more common fractures. He does not profess to be a Consultant Orthopaedic Surgeon. Mr X then detailed his reasons for requesting sight of the GP notes and records in the three cases referred to in the affidavit sworn by the plaintiff's solicitor. No reference was made by him to the other matters alleged by the plaintiff's solicitor in his affidavit.

[10] Mr Ringland QC who appeared on behalf of the defendant, submitted that the grave allegations made by the plaintiff's solicitor were not borne out by an examination of the various reports. On the contrary, he submitted, it is clear that in the past the plaintiff's solicitor has not taken objection to Mr X's request for medical notes and records. Mr Neeson, on behalf of the plaintiff, disputed this pointing out that in the case referred to in Mrs Mercer's affidavit, a court order was necessary before the notes and records were produced and in Miss Wylie's case, only edited records were provided. Mr Neeson went on to say that this appeal was adjourned for four weeks to enable Mr X to swear an affidavit. He submitted that it was significant that no reference was made in the affidavit sworn by Mr X to the plaintiff's solicitor's averment in paragraph 4 of his affidavit, to which I have earlier referred.

[11] Mr Ringland QC argued that to permit the plaintiff's solicitor to refuse a medical examination by the doctor nominated by the defendant would be an unjustified restriction on the defendant's right to choose his own medical

adviser and would also severely restrict this medical adviser in his right to provide, for an appropriate fee, medical advice to those instructing him.

[12] Mr Ringland QC relied on the decision in Starr v NCB 1977 1WLR 63 and in particular to the judgment of Scarman LJ (as he then was). Applying the principles set out he submitted that a stay of this action was appropriate.

[13] Mr Neeson relied on the same authority. He accepted that the court has discretion to grant a stay in exercise of its inherent jurisdiction. However he submitted that a medical examination is an invasion of personal liberty and a plaintiff should only be impelled to undergo such, if justice requires it. Equally he accepted that a defendant can only be compelled to forgo the doctor of his choice, if justice requires it.

[14] In Starr v National Coal Board supra, the plaintiff who was a miner claimed damages against the defendants, his employers, for personal injuries. It was alleged that he suffered ulnar nerve compression. The defendants wished to have the plaintiff examined by a consultant neurologist for the purpose of preparing their defence. The plaintiff conceded that it was necessary for the defendants to have the plaintiff examined, but objected to the doctor nominated by the defence, but did so without stating any reasons. The defendants applied to stay all further proceedings until the plaintiff submitted to a medical examination by the nominated doctor. The district registrar refused the application. On appeal Mais J made an order staying the proceedings. On appeal to the Court of Appeal the appeal was dismissed.

[15] Two conflicting authorities of the Court of Appeal were considered. In Pickett v Bristol Aeroplane Co Ltd. [unreported] Willmer and Donovan LJJ decided that a plaintiff was entitled to refuse to be medically examined by a particular doctor without having to give reasons for so refusing. In Murphy v Ford Motor Co [unreported] the Court considered a stay of proceedings should be imposed on the ground that the particular objection put forward by the plaintiff was an unreasonable one. Lord Denning MR said:

> "It is now clearly established that , if the defendants in a personal injury case make a reasonable request for the plaintiff to be medically examined by a doctor whom the defendants have chosen, then the plaintiff should accede to such a request unless he has reasonable ground for objecting to that particular doctor."

[16] In Starr all three members of the court considered that Pickett was wrongly decided and that Murphy should followed.

[17] Scarman LJ gave the leading judgment at the invitation of Cairns LJ. Having reviewed the various authorities he summarised the principles to be derived from them at page 70:

> "So what is the principle of the matter to be gleaned from those cases? In my judgment the court can order a stay if, in the words of Lord Denning MR in Edmeades' case ([1969] 2 All ER 127 at 129, [1969] 2 QB 67 at 71), 'the conduct of the plaintiff in refusing a reasonable request [for medical examination] is such as to prevent the just determination of the cause'. I think that those words contain the principle of the matter. We are, of course, in the realm of discretion. It is a matter for the discretion of the judge, exercised judicially on the facts of the case, whether or not a stay should be ordered. For myself, I find talk about 'onus of proof' in such a case inappropriate. There is, I think, clearly a general rule that he who seeks a stay of an action must satisfy the court that justice requires the imposition of a stay.
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> 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.
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> 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 yields?

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.

And so in every case, as I see it, the particular facts of the case on which the discretion has to be exercised are all-important. The discretion cannot be exercised unless each party does expose the reasons for his action. I have already indicated that I do not regard this as a question of onus of proof. There is, in my judgment, a duty on each party in such a situation to provide the court with the necessary material known to him, so that the court, fully informed, can exercise its discretion properly. However, I would add this comment: that at the end of the day it must be for him who seeks the stay to show that, in the discretion of the court, it should be imposed.

Applying those principles, I think that the first question, as one turns to he facts of the case, which one has to ask is: was the defendants' request for the examination of the plaintiff by Dr X a reasonable request? I have no doubt that it was. Dr X is a distinguished consultant neurologist. The opinion of a consultant neurologist was needed in order that the

> defendants might properly prepare their case. Sometimes, of course, one would not have to go further, and one could, as, for instance, in Edmeades v Thames Board Mills Ltd, impose a stay merely because the reasonable request had been refused. But sometimes one has to go further and to consider the plaintiff's reasons for refusing the request; and the present case is, in my judgment, such a one.
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> Therefore the second question is: granted the reasonableness of the defendants' request, was the plaintiff's refusal of it unreasonable?
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> The test here must be related to the necessity, so far as the court can assist, of ensuring a 'just determination of the cause."

[18] Geoffrey Lane LJ giving the second judgment of the court considered the same authorities and concluded at page 75 –

> "One has to do one's best to extract from the decisions such principles as seem best to accord with reason and with practice and with fairness. The court clearly has inherent jurisdiction to order a stay when the justice of the case demands such a stay. There are not infrequent occasions when justice demands that the plaintiff should undergo medical examination by a doctor appointed on behalf of the defendants. There are circumstances in which refusal by the plaintiff to undergo such examination should in justice be met by the imposition of a stay. In order to determine what those circumstances are, it is necessary to bear in mind the competing considerations. On the one hand, any medical examination carried out on him on behalf of the defendants is, as has rightly been said, an invasion of the plaintiff's privacy and is not lightly to be enforced, even indirectly, by a stay of the action. On the other hand, the defendants are not lightly to be deprived of the right to have the medical examination carried out by the doctor who, they are advised, would be the best doctor in the circumstances to carry out that examination.
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> Few problems arise if the plaintiff flatly declines to be examined by anybody. The real difficulty is when, as here, the defendants put forward the name of an

> experienced and well-qualified doctor who on the face of it appears to be unobjectionable but to whom the plaintiff and his advisers nevertheless object. Is it sufficient for the plaintiff to say: 'There are other experts available in this field of medicine and accordingly there is no necessity for me to be examined by this nominated doctor of yours. You can find someone else; and I decline to give you reasons for my objection'? I for my part think not. Providing the doctor is property qualified, the defendants are entitled to insist that he shall carry out the examination, unless it can be shown that such a course would in all the circumstances be unfair or unreasonable from the point of view of the plaintiff. What is unfair or unreasonable in the way of objection will, of course, depend necessarily on the facts of each individual case.
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> It is a very serious matter to say of any properly qualified and experienced doctor that it would not be reasonable for him to carry out a medical examination, unless the ground of objection is personal to the particular plaintiff. If, on the other hand, the objection is to the doctor's skill or his probity or his anticipated behaviour at the examination, then a finding adverse to him might constitute in effect a bar to his examining any other person for the purpose of litigation. That sort of possibility would act as a serious disincentive to any doctor minded to undertake this sort of work, and would militate against the candour and forthrightness in reporting which are so valuable to any judge who has the difficult task of evaluating medical evidence at the hearing. Such allegations should be approached with great care."

[19] In Starr's case the objection to the defendants' doctor was that he was likely to produce a misleading report (Scarman and Geoffrey Lane LJJ) and that the doctor was a hostile examiner of patients, that his manner was inimical to them and that in a prior case he had taken unusual steps to detect and apparently catch out two possible malingerers (Geoffrey Lane LJ). Several reports by the particular doctor in earlier cases were placed before the court. Scarman LJ concluded that there was nothing in the reports to undermine confidence in the impartiality or professional expertise of the doctor nor was there any indication in the matters adduced to the court that justice to the plaintiff was liable to be imperilled if the doctor examined the plaintiff,

produced a report and gave evidence in the case. Geoffrey Lane LJ concluded in relation to the suggestion that the doctor might write a misleading report that it had not been shown that the doctor was unsuitable or that it would be unfair, unjust or unreasonable that he should be the doctor who examined the plaintiff on behalf of the defendants. In relation to the suggestion that he was hostile to plaintiffs he found this to be a slender foundation on which to erect the charge that in future he could not be trusted to carry out an examination without undue, improper or unprofessional hostility to plaintiffs and that this ground had not been made out. Cairns LJ said that at first sight he thought that the behaviour of the doctor in prior cases might well justify the forming of the type of opinion formed by the plaintiff's advisers. But after careful examination of the previous cases he was satisfied that "it would be wrong, unfair to that doctor and unfair to the defendants to find that that was so."

[20] Several principles can be deduced from the judgments in Starr. Firstly, the court has an inherent jurisdiction to stay proceedings for compensation for personal injuries if a plaintiff refuses to submit to a medical examination where the justice of the case requires it. Secondly, that the decision whether to grant or refuse a stay of such proceedings is a matter for the discretion of the Judge exercised judicially. Thirdly, that in the exercise of that discretion two fundamental rights require to be recognised; on the one hand the plaintiff's right to privacy and on the other hand the defendant's right to defend himself in the proceedings including the right to engage experts of his own choosing. Fourthly, that each party should disclose reasons, on the one hand for the request for examination by a particular doctor and on the other hand for the refusal to submit to examination by that doctor. Fifthly, that the right of a defendant to require the plaintiff to submit to examination by a particular doctor is not an unqualified right.

[21] The ultimate decision depends on the reasons put forward by the plaintiff for refusing to submit to the examination. How to approach those reasons was not the subject of unanimity in the Court of Appeal in Starr's case. Scarman LJ expressed the opinion that no onus of proof was involved as the matter was one for the discretion of the Judge. He went on to say that the plaintiff does not have to prove to the satisfaction of the court that the doctor erred in the past in the way suggested. All he has to prove is that he and his advisers entertained a reasonable apprehension that the doctor had erred in the past and that those reasonable apprehensions, if realised, might make a just determination of the case more difficult than if another doctor conducted the examination. Ultimately he concluded in that case that the matters relating to the doctor adduced to the court did not indicate that justice to the plaintiff was liable to be imperilled if the doctor examined the plaintiff, produced a report and gave evidence in the case. Geoffrey Lane LJ adopted a more robust approach. He said that provided the doctor was properly qualified the defendant could insist that the nominated doctor should carry out the

examination, unless it could be shown that an examination by the nominated doctor would in all the circumstances be unfair or unreasonable from the plaintiff's point of view. He concluded that it had not been shown that the doctor was unsuitable or that it would be unfair, unjust or unreasonable that the nominated doctor should examine the plaintiff. This appears to cast an onus on the plaintiff to prove that the doctor was unsuitable or that it would be unfair, unjust or unreasonable for that doctor to carry out the examination.

[22] Cairns LJ approached the conclusion from yet another different perspective. He concluded that it would be wrong, unfair to the doctor and unfair to the defendants to find that the behaviour of the doctor in prior cases might justify the forming of the opinion formed by the plaintiff's advisers

[23] In this appeal the plaintiff objects to examination by Mr X for several reasons. These are that Mr X is dismissive of plaintiffs, that in every case he requires access to the plaintiff's complete GP notes and records, and that he asks irrelevant questions and makes intrusive requests for personal and private information. The plaintiff offers himself for examination by any consultant orthopaedic surgeon in Northern Ireland, at the same time pointing out that his medical expert is such a consultant, which Mr X is not.

[24] It is clear that a plaintiff cannot refuse per se to submit to a medical examination by a medical expert engaged on behalf of the defendant, if such an examination is necessary for the defendant to defend the claim against him. If he gives reasons for his refusal those reasons require to be examined to determine whether there is any substance to them and, if so, whether the court should grant or refuse the stay of proceedings that is sought. Where such reasons as these are put forward, they require to be examined with great care. As Geoffrey Lane LJ observed in Starr it is a serious matter to say of a properly qualified doctor that it would be unreasonable for him to carry out a medical examination. Furthermore, where the objection relates to alleged anticipated behaviour at examination, failure to grant a stay may affect future engagement of that doctor for medico - legal examinations.

[25] Order 25 of the Rules of the Supreme Court makes provision for medical evidence in personal injury cases. These Rules came into effect on 1 September 1986 but have been amended from time to time since. Rule 2 requires a plaintiff to serve, with his statement of claim, medical evidence substantiating all the personal injuries alleged in the statement of claim. Rule 3 provides that any party who has been afforded medical examination of another party shall disclose to the other party a report of such examination. Rule 7 provides that any party shall furnish to any other party on demand the name and address of any medical practitioner from whom or hospital at which a party received any medical or surgical treatment material to the action. Under Rule 8 failure to comply with these rules may lead to a stay of the action or a strike out of a defence. Several observations should be made

about the Rules. They do not require a party to submit to medical examination by a medical expert engaged on behalf of the other party and the use of the word 'afford' in Rule 3 underlines the voluntary nature of a submission to a medical examination, which is an invasion of personal liberty. The medical evidence to be served by the plaintiff must substantiate the personal injuries alleged. Therefore the relevant injuries are those alleged in the statement of claim. This is reinforced by Rule 7 which confines the medical or surgical treatment to that which is material to the action.

[26] The approach recommended by Scarman LJ suggests that the first question that arises is whether the defendant's request for a medical examination by Mr X is a reasonable one. I conclude in this instance that it is a reasonable request by the defendant to have the plaintiff medically examined and Mr Neeson does not dispute that. The defendant is entitled to the opinion of a medical expert in order that he might properly prepare his defence to this action.

[27] The next question that arises is whether the plaintiff's refusal of the defendant's reasonable request is unreasonable. Scarman LJ concluded that " the test here must be related to the necessity, so far as the court can assess it, of ensuring a just determination of the cause". The party refusing must show good reason associated with a just determination of the cause.

[28] Adopting the approach of Scarman LJ's judgment, Mr Neeson confined his submission to a reasonable apprehension on the part of the plaintiff's solicitor, that Mr X would request all the GP notes and records and possibly other records relating to the plaintiff and that he would ask irrelevant and intrusive questions of the plaintiff and that details of these matters would appear in a subsequent medical report that would be viewed by the court and by other persons. It was submitted that those apprehensions, if realised, provide reasonable grounds for the plaintiff's solicitor to refuse the examination sought. He also noted that the allegations of the plaintiff's solicitor in relation to asking personal questions had not been rebutted. These allegations are not supported by evidence from the alleged complainants so I have not considered them.

[29] I have read carefully the three medical reports exhibited by the plaintiff's solicitor and the affidavit of Mr X seeking to justify his requests for records. The contents of those reports raise matters of some concern. That concern is not lessened by the contents of the five reports exhibited by the defendant's solicitor. Each of them discloses a detailed investigation of the plaintiff and the plaintiff's claim in similar format, not just in relation to his personal injuries but also relating, in considerable detail, to the alleged facts upon which the claim for compensation is based. It is clear that each plaintiff was questioned closely, inter alia, about the details of their accident, their personal details, their past medical history, their past injuries or accidents,

illnesses or ailments, as well as their hobbies or pastimes. Mr X concluded in each case, with one exception, that he required the complete set of GP notes and records in order to finalise his report. In the one exception, Mr X had already been provided with 289 pages of GP notes and medical records. Twenty seven entries from those records are set out in the report. Most of those entries are irrelevant to the nature of the plaintiff's claim. Mr Ringland QC submitted that Mr X was being meticulous. But that is not the point. In none of the reports is there any or sufficient justification for the medical examiner to see all the GP notes and records of the plaintiffs. The injuries alleged in each case do not necessitate the disclosure of all the medical notes and records. The references to unrelated and irrelevant past medical problems appear to me to be wholly without good, legal or other reason.

[30] There is therefore some justification for the plaintiff's assertion that Mr X appears to seek all medical notes and records either prior or subsequent to an examination of a plaintiff and then to include extraneous material from those notes and records in his subsequent report, when all of the medical notes and records are not relevant or material to the claim before the court. Confidential information of a highly personal nature should never be placed before the court when it is not relevant or material to the issues to be determined. Mr Neeson asked what right the court, legal representatives or other doctors have to read about or to know such confidential information, unless it is relevant to an issue before the court. The answer must be that they have no such right. Medical notes and records are obtained in confidence and passed to the other party's legal representatives and medical expert in confidence. That confidence must be respected unless it is necessary to refer to them, for purposes relevant to the issues before the court.

[31] The court has a discretion to grant a stay or otherwise. Whether it does so in any particular case will depend on the facts of that case. I do not think, exceptional circumstances apart, a plaintiff can refuse outright to be examined by a doctor nominated by the defendant. He may put forward proper and reasonable conditions upon which the examination may take place. What conditions might be imposed will depend on the individual circumstances of the case. However, a plaintiff could not say he would submit to examination provided the defendant' s doctor did not ask for his GP's notes and records, if those notes and records are relevant to his injuries and complaints. If medical notes and records are sought prior to the examination or prior to the completion of a report and there is an issue as to their relevance or the relevance of parts of them, then the issue of relevance would require to be resolved at that time. Notes and records directly related to the injuries in issue are usually relevant and invariably disclosed without question. This practice is consistent with the obligations imposed on a party under Order 25 Rule 7. On the other hand it would be unusual, but not unknown, for all medical notes and records of a litigant, whether adult or child, to be relevant to the personal injuries in issue.

[32] In each case the plaintiff submitted to an examination which is permitted under Order 25. That examination is a medical examination, not an investigation into the entire claim made by the plaintiff. The venue for an investigation into the claim is the court in which the plaintiff has commenced the proceedings. The purpose of a medical report is to comment on current and relevant injuries and complaints related to those injuries arising from the cause of action. Those injuries will have been set out in the statement of claim. Other medical or factual issues are of no concern, unless they impinge on the injuries and complaints mentioned in the statement of claim.

[33] A fair reading of the eight reports suggests that each examinee (in particular Mr S) was questioned closely about the circumstances in which he/she claimed the injuries were sustained, as well as about his/her present medical complaints, some of which were not related to the claim. Where a party to an action submits to a medical examination he is entitled to expect that the examination, which is an invasion of his person, will be limited to what is in issue. A plaintiff would be entitled to decline to answer any questions should the examination go beyond what is in issue or indeed to withdraw from the examination altogether. Few examinees would realise when they might justifiably decline to answer or withdraw, and many would probably be too inhibited to do so.

[34] McDowell v Strannix 1951 NIR 57 is a long standing authority in this jurisdiction relating to the medical examination of a plaintiff by a doctor instructed on behalf of the defendant. In that case the plaintiff brought an action for damages for personal injuries. He refused to submit to examination by the defendant's doctor, except on terms that the doctor's evidence at the trial would be confined to the question of damages and that no evidence of any statement made by the plaintiff relating to the issue of liability would be given. The defendant refused to agree to these terms and moved to stay the proceedings until the plaintiff should agree to an examination without the imposition of terms. In refusing to order a stay Sheil (C L) J stated:

> "In my opinion it is wrong in principle that a doctor should be entitled whether by examination, cross-examination or otherwise to elicit information as to how an accident happened, that is, as to a matter of liability, from a man who has been sent to him for medical examination as to his injuries, that is as to a matter of damages and that the information so obtained should be used in evidence against that man through the mouth of the surgeon to the tribunal of trial. A plaintiff – or it may now well be a defendant – might be an uneducated man unable to look after his own interests; he might be overawed or perhaps even

> confused by the surroundings of the surgery or even by the presence of the doctor himself."

[35] While that statement was made over fifty years ago it remains sound in principle and in logic, as well as in law. Sheil (C L) J held that the terms imposed by the plaintiff's solicitor were proper and reasonable. A medical examination of a plaintiff is not an open-ended matter.

[36] The medical examiner should be briefed by those instructing him about the nature of the claim, the extent of the alleged injuries and how it is supposed those injuries were sustained. If, exceptionally, the medical examiner requires to ask any questions relating to how the injuries were sustained this should be brief. In the reports exhibited each plaintiff was thoroughly investigated using the same sequence and format. It cannot be in the interests of justice that the plaintiff's claim be so investigated by a medical examiner, when the purpose of the examination relates solely to the alleged injuries and when the plaintiff has commenced his claim in court. It must be recognised that the plaintiff has consented to a medical examination, not an investigation of his claim and his medical or other background. Article 6 of the European Convention on Human Rights provides that everyone is entitled to a fair and public hearing of the determination of his civil rights. It is arguable that a plaintiff may be denied a fair trial of his civil rights if his claim is investigated in this way by a medical examiner engaged on behalf of his opponent in the absence and without the protection of his legal advisers.

[37] The reality in this case is that the plaintiff's solicitor objects to examination of the plaintiff by Mr X because he apprehends that Mr X will request the production of unnecessary medical notes and records and if provided, will include irrelevant personal and confidential material in his subsequent report. Furthermore he apprehends that Mr X will ask unnecessary, irrelevant and intrusive questions of the plaintiff. Scarman LJ set a low threshold – proof that the plaintiff's solicitor entertains a reasonable apprehension that this may be so. I am satisfied the plaintiff has passed that threshold in this case. Is it unreasonable for the plaintiff to refuse a medical examination by the nominated doctor in those circumstances? I do not think it is. If such an examination took place it may well be unfair and unreasonable to the plaintiff and imperil the plaintiff's right to a just determination of his claim. Equally, it would be unfair and unreasonable from the plaintiff's point of view for the defendant to insist, and for the Court to require, that the plaintiff submit to such an examination. The reasons put forward by the defence for an examination by Mr X to take place are not persuasive, when the plaintiff is willing to be examined by any consultant orthopaedic surgeon in Northern Ireland.

[38] The onus is on the party seeking a stay to prove that the other party's refusal to submit to a medical examination is unreasonable. The imposition of

a stay is a significant step in any action. In Ross v Tower Upholstery 1962 NI 3 Lord MacDermott LCJ said that the court should be slow to direct a stay of proceedings without some sound and compelling reason. I am not persuaded that a sound and compelling reason has been made out, to require this plaintiff to submit to medical examination by the defendants' nominated medical adviser. Therefore in the exercise of my discretion I decline to impose a stay of these proceedings.

[39] Medical notes and records are confidential documents rarely, if ever, in the custody, power or possession of plaintiffs. Section 32 of the Administration of Justice Act 1970 empowered the High Court, on application by a party to proceedings in a claim in respect of personal injuries or death, to order disclosure or production of documents that are relevant to an issue arising out of that claim. Thus a defendant could seek disclosure or production of medical notes and records held by a third party, for example, a hospital or general medical practice, provided they were relevant to the claim. Order 25 Rule 7 provides that a party must disclose details of the hospital or medical practitioner from whom he received treatment material to the action. Prior to 1970 it was not possible for a defendant to obtain, directly, access to such notes or records. The practice was to request access to the notes or records and if access was refused, to seek a stay of the proceedings pending access to them. A strong case had to be made that it would be impossible or impracticable for the party seeking access to the documents to conduct his case without access to them, before a stay of the proceedings would be granted. For a history of this practice and the effect of Section 32 of the Administration of Justice Act 1970 see the judgment of Carswell J (as he then was) in O'Sullivan v Herdmans Ltd 1986 NI 214 at 226 (Northern Ireland Court of Appeal), which was affirmed on appeal to the House of Lords. In that case it was held that the tests applied in the pre-1970 cases, in which applications to stay the proceedings were brought in order to obtain medical notes and records, had no bearing on an application under Section 32. However a party seeking discovery of such notes and records under Section 32 requires to put forward a positive case that the respondent to the summons has in his possession custody or power, documents which are relevant to an issue arising out of the plaintiff's claim. In O'Sullivan v Herdmans Ltd Carswell J said at 227 E:

> "We are in agreement with the views expressed by the learned judge in McClelland v Clyde Fuel Systems Ltd. that discovery should not be ordered under section 32 as a matter of course, and we also share his opinion about the undesirability of fishing expeditions for documents. We further consider that a party seeking discovery should have to make out a positive case, based on sufficient evidence and not on unsupported averments, that the respondent to the

> summons is likely to or have had in his possession, custody power documents which are relevant to an issue arising out of the plaintiffs claim "

[40] Those comments have equal relevance to requests for all notes and records.

[41] The pre-1970 cases may be of limited significance today. However some of them do contain relevant comments about medical examinations.

[42] In Tate v Cyril Lord (Carpets) Limited 1969 NI 229 the plaintiff alleged he had sustained an eye injury. The defendants brought a motion for an order staying the proceedings until the plaintiff produced documents relating to the pre-accident and post-accident condition of his eyesight, the treatment he had received, details of operations undergone and the precise nature and the results of the injury alleged to have been sustained. An ophthalmic surgeon engaged on behalf of the defendants deposed it would be impossible to provide a meaningful report for the defendant without them. McGonigal J declined to exercise his discretion to stay the proceedings. He suggested there were other steps open to the defendants within the rules of procedure. Significantly at page 241 he said –

> "If such documents exist they may relate to many things, some relevant to the eye condition, some not, and unlike an application for discovery …the authority here sought is a blanket authority directed to a third party to produce all such documents however great or small their relevance and irrespective of what other information as to the plaintiff's health or other matter they may contain….I do not think a plaintiff should be asked to give such an authority. In my opinion it would be contrary to justice to do so."

[43] Unless a court is satisfied that it has been demonstrated that the notes and records are material to an issue in the proceedings or that it is just to do so, there would appear to be no justification for a court to order disclosure of such documents. The practice whereby notes and records are sought by medical examiners before they will comment finally or at all on the plaintiff's injuries avoids the type of inquiry contemplated by Section 32 and by the judgment in O'Sullivan v Herdmans Ltd. A plaintiff is entitled to obtain his medical notes and records and make them available to the defence medical expert if he so wishes. However where there is a dispute about the necessity of providing all or some of them, that dispute should be resolved by a consideration of their relevance or materiality to the issues in the plaintiff's claim.

[44] Mr Ringland QC submitted that if a plaintiff could refuse to submit to a medical examination by a particular doctor then the doctor concerned would be prevented from engaging in this important work on behalf of defendants. I do not think it follows from this ruling that plaintiffs can prevent Mr X from engaging in this form of medical advice. A plaintiff is entitled to impose reasonable conditions when he submits to a medical examination on behalf of a defendant in legal proceedings. Provided those reasonable conditions are met there is no reason why this doctor or any other doctor, should not be entitled to engage in this form of medical advice and in the course of it examine plaintiffs on behalf of defendants engaged in litigation. Therefore I dismiss the appeal and affirm the decision of the Master, albeit on evidence some of which was not before the Master.