BBN (by her next friend B) *v* Low Eu Hong (trading as EH Low Baby N' Child Clinic) [2012] SGHCR 7

Case Number	: Suit No 234 of 2011, Summons No 782 of 2012
Decision Date	: 28 June 2012
Tribunal/Court	: High Court
Coram	: Yeong Zee Kin SAR
Counsel Name(s)	: Mr Niru Pillai for the plaintiff; Mr Edric Pan with Ms Rebecca Heng defendant.
Parties	: BBN (by her next friend B) — Low Eu Hong (trading as EH Low Baby N' Child Clinic)

Civil Procedure – Discovery of documents – Disclosure of medical reports

Civil Procedure – Power to order medical examination

Civil Procedure – Privileges – Litigation privilege

Professions – Medical profession and practice – Role of independent medical examiner

Professions – Medical profession and practice – Medical confidentiality between independent medical examiner and examinee

28 June 2012

Yeong Zee Kin, Senior Assistant Registrar:

Summary of facts

1 The plaintiff is a 12 year old child who was born prematurely at home with an extremely low birth weight. She was brought to East Shore Hospital and warded in its neonatal intensive care unit. The plaintiff developed Retinopathy of Prematurity (ROP), an eye disease that commonly affects premature babies, in both her eyes. Currently, she has no useful vision in her left eye.

2 The plaintiff's case is that at all material times during her stay at East Shore Hospital and subsequent to her discharge, she was under the care and treatment of the defendant paediatrician. The plaintiff claims that the defendant had been negligent in his management, care and treatment of her, in particular for failing to conduct any eye screenings and for failing to detect that she had developed ROP.

3 In the interest of arriving at an early resolution of this action, parties consented to an order under Order 36, rule 2 that there be an assessment of damages without any trial on or admission of liability. After the order was recorded, the plaintiff submitted to medical examinations by medical experts appointed by the defendant.

4 On 2 November 2011, the plaintiff was examined by Dr Quah Boon Long, a paediatric ophthalmologist. After Dr Quah had examined the plaintiff's eyes, he spoke with her father and requested that both parents subject themselves to eye examinations as they could have been suffering from hereditary eye defects which in turn affected the plaintiff's eyes. The plaintiff's father

declined the request.

5 On 10 November 2011, the plaintiff was examined by Associate Professor Lourdes Mary Daniel, a neonatologist and developmental paediatrician. Following her examination of the plaintiff, A/Prof Daniel requested that the plaintiff be examined by a psychologist and an ENT specialist in order to assist in the preparation of her expert opinion on the plaintiff's overall medical and functional condition. This request was conveyed by the defendant's solicitors to the plaintiff solicitors via two letters dated 10 and 11 November 2011.

6 At this point, the defendant alleges that the plaintiff went back on her agreement to subject herself to all medical examinations by the defendant's appointed medical examiners. On 18 November 2011, the plaintiff's solicitors wrote and informed the defendant's solicitors that further medical examinations will be subject to the following conditions:

(a) The defendant providing a complete list of the areas and issues for which medical examinations are to be conducted;

(b) That further medical examinations are not to address the issue of liability; and

(c) Disclosure of all medical reports and medical records that arise from the medical examinations.

7 Between 23 November 2011 and 26 January 2012, solicitors exchanged numerous letters. The ensuing correspondence between solicitors may be briefly summarised. The defendant did not agree to the conditions that the plaintiff sought to impose, in particular the disclosure of medical reports and records. The defendant's solicitors did provide a brief explanation of the necessity of the further medical examinations via their letter dated 23 November 2011:

> … the requirement for the medical assessments of the Plaintiff by our medical experts is only that the assessments to be conducted are "reasonable". There is no need for us to provide a "detailed list" as such.
>
> That said, we can briefly outline what our experts have been asked to do. Dr Quah Boon Leong is a paediatric ophthalmologist who will give his input, inter alia, on the nature of the patient's eye condition which developed during her infancy. (Your client has already been examined by Dr Quan on 2 November 2011.) With regard to the scope of Associate Professor Lourdes Mary Daniel ("A/Prof Daniel")'s assessment, we have already replied in a previous query from Gurdaib, Cheong and Partners by our letter dated 1 November 2011. As for the psychological assessment, this was requested for by both A/Prof Daniel and Dr Pratibha Agrawal (who does not need to examine the Plaintiff physically) in order for them to provide their opinion as to how the Plaintiff's medical condition has materially affected her mental and overall developmental health. The ENT assessment required by A/Prof Daniel is to assist in her overall assessment of the Plaintiff's developmental health as well. (Your client has already been examined by A/Prof Daniel on 10 November 2011.)

8 Further details of the necessity of these medical examinations were contained in an electronic mail between the defendant's solicitors and A/Prof Daniel's department of neonatology dated 17 February 2012, disclosed in an affidavit filed by the defendant in support of this application.

(a) On the necessity for an examination by an ENT specialist, A/Prof Daniel's explanation was:

> Extremely low birth weight infants are at risk of hearing impairment, which is unrelated to the ROP. This will also affect her functional ability. There will definitely be 1 – 2 doctor's visit and 1 audiological assessment.

(b) On the necessity for a psychological examination, her explanation was:

> I have been asked to provide my opinion of her current functional and academic abilites [*sic*]. This will require a full cognitive assessment, achievement testing, literacy skills and adaptive skills. This will require at least 2 visits of 2 hours each.

9 These explanations were paraphrased and set out in the affidavit filed in support of this application by the defendant's solicitors dated 17 February 2012, at [34] – [35]:

> 34. I understand from A/Prof Daniel that the nature and scope of the further examinations and/or assessments on the Plaintiff to be conducted by the psychologist, the otolaryngologist and the language assessor are set out below:
>
> (a) As for the psychology examination by Dr Catherine Cox, this would involve a cognitive assessment, achievement testing, tests as to literacy skills and adaptive skills, which would require at least two visits lasting 2 hours each;
>
> (b) As for the ENT assessment by A/Prof Henry Tan, this would involve an audiological assessment and tests relating to the Plaintiff's functional hearing ability, requiring 1 to 2 visits; and
>
> (c) As for the language assessment, 2 visits would be required.
>
> 35. I understand from A/Prof Daniel that further examinations are necessary in order to determine the Plaintiff's functional hearing ability, which is a risk that faces extremely low birth weight infants, and to determine the Plaintiff's current functional and academic abilities as to reading, writing, use of language and other adaptive skills. …

10 Apart from this affidavit filed by the defendant's solicitors in support of the application, none of the medical examiners identified, and in particular A/Prof Daniel who ordered the further medical examinations, filed any affidavits providing more detailed explanations of what the further medical examinations entailed or how they were relevant to the determination of the quantum of damages to be awarded for the ROP.

11 As parties were not able to come to an agreement on the terms for future medical examination, the defendant applied for a stay of these proceedings until the psychological examination, ENT examination and language assessments on the plaintiff are completed.

Summary of issues

12 The issues raised in the application before me may be summarised as follows. First, in a case where medical examination is necessary and the patient is unwilling to subject herself to medical examination, either unconditionally or on terms that parties agree, whether the court should stay the action or direct that the patient subject herself to medical examination. Second, whether the medical examinations requested by the defendant are reasonable and whether sufficient explanation of their

nature, scope and necessity has been provided. Third, whether the plaintiff had acted unreasonably by seeking to impose a condition that she be supplied with copies of the medical reports that are prepared by the medical examiners for the defendant arising from the medical examinations.

Whether a stay of proceedings or an order for medical examination is the appropriate measure

13 In the application before me, the defendant prays that there be a stay of proceedings until completion of all reasonable medical examinations that are reasonably required, or alternatively, completion of a psychological examination, an ENT examination and 2 language assessments. During submissions, I had queried counsel as to whether an application for a stay is appropriate in light of the First Schedule to the Supreme Court of Judicature Act (SCJA), which specifically provides that the High Court has *inter alia* the power to order medical examination:

> **Ordering medical examination**
>
> 19. Power to order medical examination of a person who is a party to any proceedings where the physical or mental condition of the person is relevant to any matter in question in the proceedings.

14 It was common ground between parties that the court could order the plaintiff to undergo medical examination if it was reasonable to do so. Counsel for the defendant cited the UK Court of Appeal decision in *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67 and paragraph 40A/1/3 of the Singapore Civil Procedure (2007 Ed) as precedents that a stay of proceedings was the traditional prayer under English law. The recent decision in *Li Siu Lun v Looi Kok Poh* [2012] SGHCR 4 was also cited as having adopted this approach. However, counsel for the defendant stated that he did not necessarily adopt the reasoning in the *Li Siu Lun* case as part of his arguments. His submission was that the court can make an order for medical examination and need not order a stay of proceedings.

15 In the *Li Siu Lun* case, the Assistant Registrar had considered whether she had the power to order a medical examination and concluded that she had the power to do so: see *Li Siu Lun v Looi Kok Poh*, at [14] – [19]. I agree with and adopt her reasoning.

16 The Assistant Registrar proceeded to consider the competing interests between the plaintiff's right to personal liberty and the defendant's right to defend himself in litigation, before concluding that an order for direct examination may not be appropriate as the defendant's right to defend himself is sufficiently protected by an order for a stay of proceedings, at [24]:

> I am thus of the view that the court's power to order a medical examination only comprises the power to order a Stay and not a Direct Order.

17 I find that I am unable to agree with this latter conclusion. The court's power to order a medical examination is clearly stated in paragraph 19 of the First Schedule to the SCJA. Paragraph 9 of the same Schedule deals with the court's power to order a stay of proceedings:

> **Stay of proceedings**
>
> 9. Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where by reason of multiplicity of proceedings in any court or courts or by reason of a court in Singapore not being the appropriate forum the proceedings ought not to be continued.

18 On a plain reading of the Schedule, it is clear that the legislative draftsman was aware of the distinction between an order for stay of proceedings and an order for medical examination, and had used clear language in different provisions to express which of these powers the court was intended to wield.

19 As noted by the Assistant Registrar, "in English law, there is no statutory power enabling the court to order a medical examination": *Li Siu Lun v Looi Kok Poh*, at [14]. I am therefore reluctant to place the same level of reliance on English authorities and in so doing, restrict myself solely to the common law solution of a stay of proceedings when I have available to me specific powers to order medical examination under the SCJA.

20 Any concerns that an order for medical examination may be intrusive and offends the plaintiff's right to personal liberty may be addressed by considering the reasonableness of the medical examination that is sought. Much will depend on the issues in the case, eg the nature of the disease or injury, and the procedures that patient is required to undergo during the medical examination. A helpful classification of the range of possible medical examinations may be found in *Prescott v Bulldog Tools Ltd* [1981] 3 All ER 869, at 874:

> For my part I would only distinguish between the following examinations: first, an examination which does not involve any serious technical assault, but involving only invasion of privacy; second, an examination involving some technical assault, such as a palpation; third, an examination involving a substantial assault but without involving discomfort and risk; fourth, the same, that is to say a substantial assault, but involving discomfort and risk; and fifth, an examination involving risk of injury or to health.

21 To the classifications above, I propose to add a sixth, medical examinations that go beyond assaults and require the provision of blood or tissue samples by the patient. The reasonableness of each medical examination has to be assessed within the factual matrix of the case. This will ensure that the plaintiff's right to personal liberty is properly balanced against the defendant's right to defend the claim. "I can see no reason in principle why one right should be regarded as more important than another." *Per* Webster J in *Prescott v Bulldog Tools Ltd*, at p 857C.

22 Further, it is the plaintiff who has chosen to commence the action against the defendant. It would be unfair to the defendant if the plaintiff, unwilling to submit herself to medical examination, is not compelled to do so but the action is merely stayed. The situation would be wholly unsatisfactory for the defendant. The plaintiff may change his mind and continue with the action at anytime. The defendant has to live with the uncertainty of a suit hanging overhead like the sword of Damocles and the stigma of a suit commenced against him but without a final determination.

23 Additionally, a stay is also an unsatisfactory measure from the perspective of the court's management of its cases. Where possible, cases should be shepherded towards a determination on the merits and parties are handed a final and conclusive outcome. A stay of proceedings is a temporary measure that neither touches the merits nor provides parties with a determinative resolution of their dispute. An order for medical examination would, on the other hand, usher the case towards a determination on the merits.

24 However, this is not to say that a stay of proceedings can never be ordered. A stay is the common law's solution and it should remain available to the courts in an appropriate case, where the interests of justice are best served by a stay of proceedings. Hence, my conclusion is that the courts may order a party to undergo medical examination; and should do so where the medical examination is reasonable and will enable the action to proceed towards a determination on the merits. The common

law solution of a stay of proceedings is not the only course available to the courts nor should it be the course of first resort.

Whether an order for medical examination should be made

25 Having come to the conclusion that a medical examination may be ordered, I turn to consider whether it is reasonable to order medical examination in this case. In considering this issue, I adopt the following approach: First, whether there is a binding agreement between parties that the plaintiff will submit herself to all medical examinations that the defendant requests. In the absence of such binding agreement, whether the defendant has shown that the medical examinations he has requested are reasonable. If the medical examinations are reasonable, whether there are any countervailing interests (eg protecting the patient's right to medical confidentiality or right to medical records) that renders the plaintiff's imposition of the condition – that she be supplied with copies of the medical reports arising from the medical examinations – reasonable in the circumstances.

Whether there is a binding agreement for the plaintiff to submit herself to all medical examinations requested by the defendant

26 The defendant pitches its case for the application thus: that the parties had agreed for the plaintiff to undergo all medical examinations by the defendant's appointed experts, but the plaintiff is now seeking to impose *ex post facto* conditions before proceeding with further medical examinations. The plaintiff denies that there was such an agreement and argues that the medical examinations now sought by the defendants are unreasonable.

27 There has not been produced before me any evidence that documents an agreement of the nature asserted by the defendant. The order of court dated 18 August 2011 that records the parties' consent to proceed with assessment of damages without any finding of liability does not contain any order that the plaintiff is to undergo all medical examinations requested by the defendant. From the papers before me, I am able to identify two letters from the plaintiff's solicitors that, to my mind, amount to two separate agreements for the plaintiff to be examined by Dr Quah and A/Prof Daniel. The plaintiff did in fact attend at the clinics of Dr Quah and A/Prof Daniel for medical examinations on 2 and 10 November 2011 respectively. It was after the medical examination on 10 November 2011, when the defendant requested the present set of further medical examinations, that the plaintiff attempted to impose conditions before subjecting herself to further medical examination.

28 From my perusal of the correspondence, I am of the view that there is no evidence of the existence of an agreement of the broad nature that the defendant asserts. The conduct of parties leads me to conclude that any agreement to undergo medical examination is reached as each request is made. For the present set of medical examinations, it is clear to me that parties had not reached any agreement.

Whether the further medical examinations requested by the defendant are reasonable

29 Since parties have not reached any form of agreement for the present set of medical examinations, I turn to consider whether these medical examinations are reasonable.

30 Parties do not dispute that the medical examinations requested by the defendant should be ordered only if they are reasonable. The test of reasonableness has been adopted by the UK Court of Appeal since *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67 – *per* Lord Denning MR, at p 71: "The question in this case is simply whether the request was reasonable or not." – and *Lane v Willis* [1972] 1 WLR 326, *per* Sachs LF, at p 333:

> The principles upon which a court should, in aid of obtaining a medical examination of one of the parties to an action, act ... are by now clear ... it should only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says it is unreasonable and who applies for the order to show ... that he is unable properly to prepare his claim (or defence) without that examination.

31 The approach that ought to be taken was laid down in *Starr v National Coal Board* [1977] 1 WLR 63 by Scarman LJ, at pp 70–71: An order for a stay of proceedings – or in our context, an order for medical examination – involves the exercise of judicial discretion. In exercising its discretion, the court has to ensure that the plaintiff's right to personal liberty is properly balanced against the defendant's right to defend the claim. The court should first consider the reasonableness of the defendant's request. Next, the court should examine the reasonableness of the plaintiff's refusal. Reasonableness of parties' conduct has to be assessed with regard to the facts and circumstances of each case.

32 As I have concluded above, there was no broad agreement that the plaintiff will submit herself to all medical examinations requested by the defendant. Leaving aside the two prior agreements for the plaintiff to be examined by Dr Quah and A/Prof Daniel, as well as Dr Quah's request made to the plaintiff's father during the medical examination on 2 November 2011, the request for this set of further medical examinations was raised by letters dated 10 and 11 November 2011. A perusal of these letters discloses no reasons for the nature, scope or necessity for these further medical examinations, save that they were asserted to be necessary as part of A/Prof Daniel's overall assessment of the plaintiff. The plaintiff sought to impose conditions by letter dated 18 November 2011, thereby putting the reasonableness of the further medical examination in issue and seeking *inter alia* disclosure of the areas and issues to be covered by the further medical examinations, and to restrict any further medical examination that touches on liability.

33 At this juncture, I make the observation that the defendant had not provided sufficient information to enable the plaintiff to give her consent to the further medical examination. If matters proceeded no further, I would not have any reservations in holding that the defendant's request was unreasonable. However, some explanation of the necessity for the further medical examinations was provided by letter dated 23 November 2011. The necessity for the psychological assessment is to show how the plaintiff's ROP had materially affected her mental and overall developmental health. The ENT assessment is to assist A/Prof Daniel's overall assessment of the plaintiff's developmental health.

34 Although parties corresponded and were able to achieve compromises on two of the conditions – as documented by letter from the plaintiff's counsel dated 28 November 2011 and letter from the defendant's counsel dated 6 January 2012 – no agreement was reached on the plaintiff's condition that she be supplied with copies of the medical reports arising from the further medical examinations. It was only in the affidavit filed by the defendant's solicitors in support of this application that further explanations were provided as to the necessity of the further medical examinations:

(a) An ENT examination is necessary as "extremely low birth weight infants are at risk of hearing impairment, *which is unrelated to the ROP*." (Emphasis mine.)

(b) The psychological examination involves "a full cognitive assessment, achievement testing, literacy skills and adaptive skills." The defendant asserts that this is necessary to enable A/Prof Daniel to provide an opinion of the plaintiff's current functional and academic abilities.

35 No explanation was provided for the necessity for the language assessment except that 2 visits

would be required. No affidavits were filed by any of the medical examiners to provide more detailed explanations of the nature, scope and necessity for the further medical examinations. During submissions, counsel for the defendant submitted that these further examinations were necessary to establish what he referred to as a baseline. As I understand the submission, the defendant seeks to establish the disabilities – if one may be permitted to use this word – that are attributable to the plaintiff's premature birth with an extremely low birth weight. In essence, the defendant is seeking to show that some of the plaintiff's disabilities are due to the ROP and some due to her premature birth.

36 Counsel for the plaintiff was quick to point out that this re-opens the issues relating to liability in contravention of the spirit of the consent order entered under Order 36, rule 2. He further argues that his client had acted reasonably by consenting to and proceeding with the initial medical examinations by Dr Quah and A/Prof Daniel. The request by Dr Quah to examine the plaintiff's parents for hereditary eye defects and these further medical examinations – which are not immediately obvious as relevant to the ROP and for which no or insufficient explanation had been provided – caused the plaintiff to suspect that they were re-opening liability issues.

37 The authorities require that I examine the reasonableness of the defendant's request for further medical examination. I can dispose of the requests for language assessments quickly. No explanations have been provided and the relevance of language abilities to disabilities associated with the ROP – which is a disease of the eye – is not immediately obvious. I am therefore of the view that insufficient information has been provided for the necessity of the language assessment and do find that the request to be unreasonable.

38 Next, I turn to the ENT examination. As quoted from A/Prof Daniel's e-mail, hearing impairment is a risk associated with premature birth at extremely low birth weight. This is unrelated to the ROP. A/Prof Daniel states in his email that the ENT examination is necessary to assist his determination of the plaintiff's current functional abilities. As for the psychological examination, A/Prof Daniel also states that this is necessary to assist his determination of the plaintiff's current functional and academic abilities. Based on these brief statements, I can imagine that an assessment of the plaintiff's current functional abilities is necessary in order to establish her level of disabilities and the damages that she ought to recover.

39 However, submissions from counsel for the defendant were that the further medical examinations were intended to help establish a baseline. As I understand the functions of baselines, they are for the purpose of establishing a basis for comparison. What is unclear to me is whether the approach is to establish a baseline of the plaintiff for the purpose of comparing with a future assessment, or for the purpose of comparing with other children of similar age but not afflicted by ROP. I am unable to understand how a baseline established now can be used to distinguish between disabilities attributable to ROP and those attributable to premature birth with extremely low birth weight. A detailed explanation of the purpose of establishing a baseline was not provided through expert affidavit; and A/Prof Daniel's e-mail provided no assistance in this regard.

40 The onus ought to be on the defendant to show that the nature and scope of the further medical examinations are reasonable by demonstrating how they are necessary to assist the court's determination of the measure of damages. Apart from an e-mail from A/Prof Daniel, no affidavits from any of the appointed medical examiners have been filed. There mere assertion that the further medical examinations are reasonable in the affidavit filed by the defendant's solicitors in support of this application is insufficient. Without further explanations of the nature, scope and necessity for the ENT and psychological examination, I am of the view that the defendant has not shown that his request was reasonably made.

Whether the plaintiff's imposition of condition that she be supplied with copies of medical

Whether the plaintiff's imposition of condition that she be supplied with copies of medical reports arising from the medical examinations is reasonable

41 In the event that I am wrong in my earlier conclusion that there was no broad agreement that the plaintiff will subject herself to all medical examinations by the defendant's appointed medical examiners or my conclusion that the defendant's request for further medical examinations was not reasonably made, I turn now to consider whether the plaintiff's imposition of the condition that she be supplied with copies of the medical reports prepared by the appointed medical examiners for the defendant is reasonable.

42 The main arguments raised in support of this condition are that the plaintiff has a right to know, first, on the basis that she is the patient and second, for the purpose of enabling her to engage her own medical experts for a second opinion if necessary. Counsel for the plaintiff's submissions on this point are that the plaintiff, as a patient, has a right to medical confidentiality to prevent his physician from disclosing the details of his diagnosis to a third party. He is therefore entitled to impose a condition to be supplied with a copy of the medical report that is prepared by his physician for the defendant before submitting to further medical examination. She had undergone two earlier medical examinations without imposing any conditions and had consented to releasing the medical report to the defendant. Those were obvious to her to be necessary for the assessment of damages. However, she no longer so consents for the further medical examinations, as these do not appear to her to be necessary for the assessment of damages, nor has their necessity been sufficiently explained to her. Further, she had been advised that these appear to re-open the issue of liability, contrary to the intent of the consent order under Order 36, rule 2 that parties had entered.

43 The plaintiff relies on the following passage by Lord Denning MR in *Clarke v Martlew* [1973] 1 QB 58 to support her submission that it is reasonable for her to require that copies of the medical reports arising from the further medical examinations be supplied to her as a condition for undergoing them:

> This is the first case in which a defendant who seeks a medical examination of the plaintiff has claimed to be able to keep the medical report secret, or, at any rate, to have it in his option whether to show it to the plaintiff or not. He says it is like the proof of a witness. It is privileged from disclosure unless the privilege is waived. I think this argument is unsound. It is the defendant who seeks a privilege – he seeks to have a medical examination of the plaintiff – and I do not think he should have this privilege unless he is prepared to act fairly by it. Fairness requires that he should show it to the plaintiff. In all the cases where the courts have allowed the defendant to have a medical examination of the plaintiff – and ordered a stay until it is given – it has been assumed that the defendant will show the report to the plaintiff.

44 Her further submissions are that disclosure of the medical reports is necessary to enable her to discover the purpose of these further medical examinations as she had not been informed of their nature, scope or necessity. She may then engage her own medical expert for a second opinion. This was all rendered necessary by reason of the defendant's failure to provide sufficient explanation of the nature, scope and necessity of these further medical examinations.

45 The defendant's main argument is that the medical reports are prepared for the dominant purpose of litigation and therefore subject to litigation privilege. The imposition of a condition that amounts to a deprivation of the right to litigation privilege is unreasonable. The defendant relies on Hodgkinson & James, *Expert Evidence: Law and Practice* (3rd Ed), at [22-005] to support his submissions:

> The examinee may agree to be medically examined, but on some condition, … The courts have

> steadfastedly refused to countenance such a manipulation of the litigation process. … [I]n *Hookham v Wiggins Teape Fine Papers Limited* the Court of Appeal stayed a claim where the claimant agreed to submit to a medical examination by the defendant's expert only on condition that the resultant medical report was disclosed to the claimant or his legal advisers. …
>
> …
>
> It may be added that, in general, the imposition of such a condition would also unreasonably infringe the defendant's right to claim privilege over the report …

46 Further, the defendant submits that the line of cases starting from *Clarke v Martlew* is no longer good law insofar as they relate to the reciprocal disclosure of medical reports. As held by the UK Court of Appeal in *Megarity v DJ Ryan & Sons Ltd* [1980] 1 WLR 1237, these cases were decided before the UK Rules of Court were amended to require that expert reports be exchanged. These cases were therefore best understood as the court's attempt to ensure fairness and reciprocity by compelling the disclosure and exchange of expert reports; *per* Bean J in *McGinley v Burke* [1973] 1 WLR 990, at p 993F:

> … the plaintiff must at least offer reciprocity. If his advisers require to see a copy of the defendant's medical reports as a condition of a particular examination, they must be prepared to offer an exchange of their own equivalent report upon which they propose to rely.

47 With the modernisation of the UK Rules of Court to compel the exchange of expert reports that parties intend to rely on at the trial, there is no longer any need to "engraft a qualification upon the doctrine of privilege" *per* Roskill LJ in *Causton v Mann Egerton Ltd* [1974] 1 WLR 162, at p 170D.

48 Having considered the submissions of counsel, I accept the arguments put forth by counsel for the defendant. Order 40A of our Rules of Court installs a similar regime for the disclosure of expert reports that parties intend to rely on at trial; other reports are subject to litigation privilege and need not be disclosed. As noted by Roskill LJ in *Causton v Mann Egerton Ltd*, at p170D, "[m]edical reports are in no different category from other expert reports".

49 The more recent authorities from *Megarity v DJ Ryans & Sons Ltd* onwards consider that, with the procedures in place to compel disclosure of medical reports that parties intend to rely on at the trial, the onus is on the plaintiff who seeks the benefits of litigation to act reasonably. The imposition of a condition that subtracts from the defendant his right to claim privilege over the medical reports is considered to be unreasonable.

50 I find myself in agreement with the defendant's counsel – viz that *Clarke v Martlew* and the cases that followed are no longer good law insofar as they relate to the reciprocal disclosure of medical reports – since the principle of fairness and reciprocity that these cases sought to enforce are now properly safeguarded by the procedural rules established to govern the role of experts and disclosure of their expert reports. I think that the weight of the authorities are now in favour of allowing the defendant to assert privilege over the medical reports, save that should he decide to use them in the trial, he has to disclose them. I am therefore of the view that the condition sought to be imposed by the plaintiff is unreasonable.

51 Before I leave this point, I deal briefly with the plaintiff's condition for disclosure of the examining doctor's medical notes. This condition was set out in the plaintiff's letter dated 18 November 2011 and in written submissions, but was not pursued seriously during oral submissions. I need only note that it is trite law that medical records and notes belong to the examining doctor, and

the defendant has no legal right to them unless the terms of appointment confer a contractual right, viz the examining doctor's medical records and notes are not within the defendant's power. If the plaintiff wishes to have them, then the proper mode for compelling disclosure would be third party discovery against the examining doctor.

Whether the plaintiff is entitled to the medical reports arising from the medical examinations

52 During the course of submissions, counsel for the plaintiff pressed the argument vigorously that it was open for me to adopt the approach of the *Clarke v Martlew* line of cases that emphasised fairness and reciprocity to compel disclosure of the medical reports. The arguments may be summarised thus. First, the defendant obtains a privilege when the plaintiff subjects himself to medical examination. Hence, in fairness to the plaintiff, he should be supplied with a copy of the medical report. Second, modern litigation, and in particular personal injury claims, are fought with all cards on the table. It is therefore unfair that the plaintiff is not supplied with a copy of the medical report, or that the defendant is entitled to withhold it. This leads on to the third point: that the examining doctor and the plaintiff have a physician-patient relationship and the patient is entitled to know what the medical conclusions of the examining doctor are. Hence, the plaintiff ought to be supplied with a copy of the medical report.

53 This touches on the issue of the true nature of the relationship between the plaintiff and the examining doctor, and whether the plaintiff has any expectation of medical confidentiality when she submits to medical examination. The defendant proffered the expert opinion of Dr Thirumoorthy Thamotharampillai, who is offered as an expert in the area of medical ethics, professionalism and health law. Dr Thirumoorthy draws a distinction between the role of a physician who is acting as an examining doctor from when he is acting as a treating doctor. As a treating doctor, the physician assumes a therapeutic role, employing his professional skills for diagnosis and treatment of the patient. The patient's medical welfare and interest is paramount. As an examining doctor, he has to balance the patient's welfare against the interest of the person instructing him for the examination. He has to be objective and fair to both:

> Before the examination, the consent obtained from the patient being examined must be informed and explicit, and preferably written/documented. The standard of consent has to be higher than that in the therapeutic relationship as it is not supported by medical beneficence – the medical report or expert opinion issued by a doctor in an examiner's role may or may not benefit the patient's health or his legal proceedings.

54 The examining doctor has to provide information on the nature of the examination and the purpose of the report in obtaining informed consent. He is, however, not expected to provide therapy or follow-up treatment. From his perspective as a medical practitioner, the traditional doctor-patient relationship does not exist between patient and examining doctor. However, if the examining doctor discovers anything of medical significance to the patient's health that the patient is unaware of, he has a duty to inform the patient.

55 On the matter of the medical report, Dr Thirumoorthy's view is that "[i]t would be appropriate to discuss whether the patient would receive a copy of the report." However, the examining doctor "is entitled to furnish his report directly to the third party who had commissioned it without also providing the patient a copy." I note that Dr Thirumoorthy does not say categorically that the patient is not entitled to a copy of the medical report.

56 The plaintiff did not proffer any contrary expert opinion and accepts the expert opinion of Dr Thirumoorthy on medical practice, but not his legal conclusion that medical confidentiality does not

feature in the relationship between patient and examining doctor. It appears to me, on the basis of Dr Thirumoorthy's expert opinion, that medical practitioners do not consider that any duty of medical confidentiality arises in the case of a patient attending before an examining doctor who has been instructed by a third party. The medical profession does not consider that a traditional doctor-patient relationship exists.

57 As no contrary medical expert opinion has been offered, I am bound to accept Dr Thirumoorthy's expert opinion on the medical practice. There is support for this conclusion in the following passage from Yeo Khee Quan, et al, *Essentials of Medical Law* (2004), at [7.193]:

> A traditional doctor-patient relationship is not created when, at the request of a third party, an independent medical examiner (IME) examines an individual he or she is not otherwise treating.

58 Similarly, the Medical Council of New Zealand's *Non-Treating Doctors Performing Medical Assessments of Patients for Third Parties* echoes a similar view, at [7]: "The basis of the relationship between the patient and assessing doctor is not the same as an established doctor-patient relationship …". Again, the College of Physicians and Surgeons of Ontario's Policy Statement #3-09, *Third Party Reports: Reports by Treating Physicians and Independent Medical Examiners*, at 6: "A treating relationship is not created when an independent medical examiner examines an examinee for the purposes of a third party report."

59 As the duty of medical confidentiality is the hall mark of the traditional physician-patient relationship, and medical practitioners do not consider that a traditional physician-patient relationship exists between a patient and the examining doctor, the legal conclusion ought to be that no duty of medical confidentiality arises. According to Dr Thirumoorthy, the physician's professional duty of medical beneficence underpins the traditional physician-patient relationship – viz that the physician's therapeutic role requires that he employs his professional skills for the medical welfare and interest of the patient. The duty of medical confidentiality is therefore necessary to ensure that the patient may disclose information in confidence to his treating physician, in order to permit the treating physician to discharge his professional duties.

60 Since the traditional physician-patient relationship does not arise between the plaintiff and the examining doctor, the plaintiff cannot assert medical confidentiality to prevent the disclosure of the medical report to the defendant. Flowing from this, the examining doctor may provide a medical report to the instructing third party without reference to or consent of the patient. Does it follow that the patient is therefore not entitled to a copy of the medical report? The weight of the authorities on this issue is clear: the patient cannot impose a condition that she be supplied a copy of the medical report before she submits to the medical examination.

61 However, this is not to say that she cannot make the request directly to the examining doctor to be provided with a medical report – not necessarily a copy of the medical report that was prepared for the instructing third party, but a medical report prepared by the examining doctor for the patient based on his examination of her. The rule that there is no property in witnesses applies to both factual and expert witnesses: *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380. To my mind, it is open to the plaintiff to do so, and the examining doctor may prepare and furnish a separate report based on his medical records and notes, so long as he does not disclose the privileged opinions he had provided to the plaintiff in his medical report to the defendant. But this is not what the plaintiff seeks.

62 Can the plaintiff nevertheless request for a copy of the medical report prepared by the examining doctor for the defendant? There is some basis to suggest that this is possible. The College

of Physicians and Surgeons of Ontario's Policy Statement #3-09, *Third Party Reports: Reports by Treating Physicians and Independent Medical Examiners*, at p 7, states the following with respect to third party reports:

> **ii) Access to Reports**
>
> Physicians should be aware that after the report has been submitted to the third party, patients or examinees may contact physicians directly to request a copy of the report or a copy of documents relied upon when preparing the report.
>
> Physicians must comply with any statutory obligations they may have to provide access to reports, documents or notes. …

63 The medical report, having been prepared for the dominant purpose of litigation, is subject to litigation privilege. However, this does not mean that the entire report is subject to privilege. As noted by Andrew Phang JA in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367, at [100]:

> [I]n situations where part of the document contains privileged material, and the remaining part is unprivileged, *and* where the *unprivileged part is separable from, and is not integral to*, the privileged part of the document, then redaction of the privileged parts may be carried out and the rest of the document revealed to the opposing party through the usual discovery process. … In short, parties should be slow to claim privilege for entire documents where there is only partial or even trifling reference to legal advice or communications leading to the giving or obtaining of legal advice, *and/or (and this is of particular importance) where the ostensibly non-privileged parts do not play an integral role in the context of the relevant legal analysis*.

64 Therefore, can it ever be said that the imposition of a condition for the disclosure of the non-privileged part of the medical report is permissible? Particularly in light of the plaintiff's submission that, given the lack of prior explanation of the nature, scope and necessity of the further medical examination, disclosure is necessary in order that she may be able to instruct her own medical experts. In other words, can an order be made that a redacted copy of the medical report be furnished to the plaintiff?

65 Such an order may be made based on the proposition of law in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*. However, this need not be the only solution to the present conundrum. To my mind, this is unnecessary in this case as the court can order that a list of issues for medical expert opinion be furnished by the defendant to enable the plaintiff to properly instruct his medical expert. This will also ensure that the medical experts' opinions cross swords. Further, an order may be made excluding expert opinion that has not been set out in the list of issues for medical expert opinion. This operates within the scheme for parties' experts as established by Order 40A. This will also be more effective a means of disclosure and limiting medical expert opinion evidence than furnishing a redacted version of the medical report.

66 In any event, I have made the observation that the plaintiff is at liberty to contact the defendant's appointed medical expert for the purpose of engaging him to provide a separate and independent medical report based on his examination of the plaintiff. This is possible as there is no property in witnesses and the notes of the examination belongs to the medical examiner, although professional courtesy and standard of conduct may require that the defendant be kept informed. In preparing his separate report for the plaintiff, the medical examiner should ensure that he does not disclose any privilege opinions that he has provided to the defendant.

Conclusion

67 I am grateful for the helpful submissions of counsel. I conclude by summarising that I do not find that there had been any broad agreement that the plaintiff submits to all medical examinations requested by the defendant. Agreement is reached on each request. Orders for medical examination are a matter for discretion to be exercised judicially. The defendant's request has to be reasonable. He must provide sufficient explanation of the nature, scope and necessity of the medical examination to the issues in dispute. In this case, no affidavit from the appointed medical examiners had been filed. There was no explanation of the relevance of the language assessments to the ROP; there was scant explanation of the relevance of the ENT and psychological examination, which were to establish the plaintiff's current functional and academic abilities. During submissions, it was explained that this was to establish a baseline; but the relevance and usefulness of this baseline to the court's task of assessing the quantum of damages to be awarded for the ROP is not immediately obvious nor was it sufficiently explained. I therefore came to the conclusion that these further medical examinations were not reasonable in the circumstances. Accordingly, I dismissed the defendant's application with costs.

68 In the event that I am wrong in my conclusion that there was no broad agreement, or that the defendant's request for further medical examination was reasonably made, I think that the weight of the authorities is thus: since the plaintiff has chosen to sue, she cannot act unreasonably by imposing a condition that she be supplied with copies of the medical reports arising from the medical examination. The medical reports are prepared for the dominant purpose of litigation and are protected by litigation privilege. The plaintiff is not entitled to a copy unless the defendant waives privilege or discloses a copy of the medical report if he intends to rely on it for the trial. The traditional physician-patient relationship does not arise between the plaintiff and the examining doctor and the plaintiff cannot assert medical confidentiality to prevent the disclosure of the medical report to the defendant. There being no property in witnesses, it may be open to her to make a separate request to the examining doctor to prepare a separate and independent report of the examination, provided that the defendant is kept informed and the medical examiner takes care not to disclose privileged opinion he had provided to the defendant. However, if the purpose is to ensure that the plaintiff is able to seek an independent medical expert opinion that will squarely address the areas covered by the examining doctor's medical report, then it may be preferable that the court directs that the areas of medical expert opinion be disclosed by the defendant or agreed between parties within the framework governing parties' experts established in Order 40A.