DISTRICT COURT OF QUEENSLAND

CITATION:	*White v Ducks in a Row Pty Ltd* [2016] QDC 212
PARTIES:	**PAUL MICHAEL WHITE** (plaintiff/respondent) **v** **DUCKS IN A ROW PTY LTD** (defendant/applicant)
FILE NO/S:	Mackay 51/2016
DIVISION:	Civil Application
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	22 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2016
JUDGE:	Butler SC, DCJ

ORDER:

1. **That the respondent submit to an independent medical examination and assessment by an orthopaedic consultant to be selected by the respondent from the panel of the three orthopaedic consultants previously nominated by the applicant.**

2. **The applicant pay the cost of the independent medical examination by the orthopaedic consultant.**

3. **The respondent is at liberty to obtain his own orthopaedic examination and assessment if he deems it necessary.**

4. **The respondent pay the applicant's costs of this application to be assessed on the standard basis if not agreed.**

CATCHWORDS: NEGLIGENCE – PERSONAL INJURIES – MEDICAL EXAMINATION – where application brought for plaintiff to undergo medical examination – whether examination or assessment would be unreasonable or unnecessarily repetitious

COUNSEL:	P B Rashleigh for the plaintiff/respondent N Jarrow for the defendant/applicant
SOLICITORS:	McGinness Wilson Lawyers for the plaintiff/respondent HWL Ebsworth Lawyers for the defendant/applicant

[1] The applicant seeks an order under r 366 of the *Uniform Civil Procedure Rules* ("the *UCPR*") for the respondent to undergo a medical examination by one of three nominated orthopaedic medical specialists, at the applicant's expense. The respondent does not oppose an examination limited to his hip and knee conditions but opposes an unrestricted orthopaedic examination on the basis that the request is unreasonable and unnecessarily repetitious.

The provisions

[2] The applicant seeks to rely upon r 366 of the *UCPR* as a source of power for the Court to make the direction sought. Rule 366 provides as follows:

> "**Application for directions**
>
> (1) ….;
>
> (2) the Court may give directions about the conduct of a proceeding at any time;
>
> (3) a party may apply to the Court for directions at any time."

This application is brought in respect of a claim under the *Personal Injuries Proceedings Act* 2002 (the "*PIPA*"). The pleadings in the matter closed on 1 February 2016 following a compulsory conference which failed to reach a resolution. Mandatory final offers have been exchanged. The respondent submits that in the exercise of its discretion the Court should apply the test set out in s 25 of *PIPA*. That section relevantly reads:

> "(2) The claimant must comply with a request by the respondent to undergo, at the respondent's expense either or both of the following –
>
> (a) a medical examination by a doctor to be selected by the claimant from a panel of at least three doctors with appropriate qualifications and experience in the relevant field nominated by the respondent in the request;
>
> …
>
> (3) However, a claimant is not obliged to undergo an examination or assessment under this section if it is unreasonable or unnecessarily repetitious."

[3] The applicant does not accept that s 25 of *PIPA* applies at this point in the proceedings but conceded in his written submission that guidance can be derived from that section. It is unnecessary that I determine whether the section has application at this point as I am satisfied that in the exercise of my discretion I should not require the respondent to undergo an examination or assessment should I form the view that it would be unreasonable or unnecessarily repetitious for that to happen. Accordingly I will proceed on that basis.

Relevant history

[4] The plaintiff was injured on 26 December 2010 in a boating accident when his spine was severely jolted in rough weather. Two specialists have assessed the existence of

spinal injury and it is uncontroversial that the respondent suffered a crush fracture to the L1 vertebrae.

[5] It was originally asserted by the respondent that he was suffering from a resulting neurological condition and accordingly an initial assessment was undertaken at the request of his solicitors by Dr Don Todman, a neurologist. Dr Todman provided two reports dated 21 May 2014 and 17 June 2014 in which he described a fracture of the L1 vertebrae and opined that the plaintiff had suffered a 13 per cent whole person impairment with respect to that fracture. Dr Todman made reference to chronic pars defects at L5/S1 with anterolisthesis. He made no reference to any other conditions.

[6] The respondent was examined at the request of the applicant by Dr Michael Weidmann, neurosurgeon, who reported on 31 March 2015. He observed a crush fracture of the L1 vertebral body and also noted spondylolisthesis at the L5/S1. The plaintiff advised Dr Weidmann of a previous left leg fracture and a recent left hip replacement. Dr Weidmann dismissed those conditions as not relevant to his current symptoms. He assessed a 12 per cent whole person impairment, all due to the injury with no pre-existing impairment.

Note by Dr Steadman

[7] The applicant invited Associate Professor Peter Steadman, orthopaedic surgeon, to provide an opinion on the most appropriate medical expert to examine the plaintiff for an expert medical opinion in relation to the plaintiff's orthopaedic conditions. Dr Steadman provided a response on 22 July 2016. Having seen correspondence by specialists Dr O'Sullivan and Dr Goden of the North Sydney Orthapedic and Sports Medicine Centre he noted that the respondent had received a total hip replacement and also suffered from left knee arthritis as a result of a long-standing skiing injury. He said it appeared from that material that in future the respondent's left knee will trouble him and require replacement. Dr Steadman expressed the following opinions:

> "Methodology of AMA 5 would have it that the left hip replacement would normally have a 20 to 30% whole person impairment attached to it, depending upon the function of the patient which is done through assessment of a specific hip replacement table attached to Table 17.33 and 17.34 of AMA 5. This is similar for a knee if and when it is done although both would allow pursuit of a sedentary occupation if successful.
>
> For an example of the AMA combining process – he has left hip replacement and this would likely approximate 20-30% whole person impairment as a result of the two surgeries combined. This would also mean that the spinal impairment is reduced to become the so-called 'agreed value' (X) of the whole person not at X% of a 100%, but (Y = 100-40 or 45% in that is it) or the new value of Y% combined (table on page 604) because of the hip replacement surgery. The main issue would therefore appear to be that he would have reduced whole person impairment from the spinal fracture, not by its absolute value, but by the relative combined value with the hip replacements.
>
> Only an orthopaedic surgeon could assess hip replacement in terms of scope of speciality as opposed to neurosurgeons or neurologists,

> however orthopaedic surgeons and neurosurgeons both treat and assess spinal conditions."

The hip and knee conditions

[8] The parties do not agree on when knowledge of the hip and knee complaints was brought to the applicant's attention.

[9] The hip replacement was mentioned by the defendant to Dr Wiedmann who apparently considered it irrelevant to his assessment of the whole person impairment. Dr Todman made no reference to the hip replacement.

[10] Dr Steadman's review of the medical records provided to him caused him to comment on both the hip replacement and left knee arthritis disclosed in those reports. He had been provided with correspondence of Dr O'Sullivan and Dr Goden of the North Sydney Orthopaedic and Sports Medicine Centre which identified the nature and extent of the hip problems prior to surgery and the existence of a knee injury. The affidavit of Tina Ibraheem of McGinness Wilson Lawyers, solicitors for the respondent, filed on 20 July 2016 states at paragraph 8 that the records of North Sydney Orthopaedic and Sports Medicine Centre were forwarded to the applicant on 19 August 2015. This post-dated Dr Weidmann's report.

[11] The respondent asserts that records listed in Dr Weidmann's report, as having been referred to by him, included those now pointed to by the applicant as demonstrating hip and knee problems. However, Dr Weidmann's listing of medical records does not mention any medical records from North Sydney Orthopaedic and Sports Medicine Centre. The respondent identified five groups of records provided to the applicant which it said disclosed a medical history of osteoarthritis in the respondent's hip.[1] Only one of those five groups of records were forwarded prior to Dr Weidmann's examination and report. On the material before me I am unable to determine to what extent the first group from Peninsula Medical Centre would have disclosed the nature and extent of the respondent's hip and knee conditions. It is clear, however, that a significant number of relevant medical records were only received after 11 March 2015.[2] The applicant submits that "it is now apparent from review of those documents that the plaintiff is suffering from unrelated degenerative conditions that the current experts are neither fully briefed about the extent of, nor are they the most appropriate discipline of expert to comment upon."[3]

Lumbar spine condition

[12] The respondent's treating orthopaedic specialist, Dr Ian Farey, in a letter dated 11 January 2011 said:

> "I also noted on his plain X-ray that he had a grade 1 isthmic spondylolisthesis at the L5-S1 level with pas interarticularis defects at L5. The disc height is well maintained. This is a longstanding anomaly and usually develops in childhood years. In the long-term patients can develop back pain related to this or even L5 radicular pain due to foraminal stenosis and I have discussed this with him."

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1 Affidavit T Ibraheem at [8].
2 Affidavit K Donaldson, Exhibit KLD-5 at [29].
3 Affidavit K Donaldson, Exhibit KLD-5 at [30].

Both Dr Todman and Dr Weidmann were aware of this condition and did not consider that it affected their assessment of the subject injury. Dr Steadman also considered it and provided the following opinion:

> "Dr Farey raises the issue of pre-existing condition of lumbar spine which includes a pars defect and a low grade spondylolisthesis. In my opinion, given his age, the spinal condition is unlikely to cause further problems. Pars defect and spondylolisthesis appear to have survived asymptomatically for 61 years and as the patient ages the spine becomes progressively more stable as a result of degeneration i.e. I do not think pre-existing elements are significant as a consideration in regard to deduction for a significant L1 fracture."

[13] Given the opinions of the three specialists it now seems clear that the lumbar spine condition is of no relevance to the medical assessment of the accident injury and therefore is not an issue on this application. Any further examination of the respondent has no likelihood of raising the lumbar spine condition as something which would contribute to a reduction in an assessment of whole person impairment or otherwise affect an award of damages. It need not feature further in my consideration of this application or in the formulation of the order.

The issue

[14] The respondent resists an order for unrestricted examination of him by an orthopaedic specialist. He submits that the pleadings do not allege any pre-existing unrelated conditions of the hips, knee or spine. Notwithstanding that submission the respondent does not oppose an examination limited to his hip and knee conditions. The respondent's written submissions state:

> "Despite the deficiency in the pleadings, the plaintiff accepts that the defendant would have an interest in having the plaintiff's hip and knee conditions assessed."

[15] Given this concession, the issue for decision in this application is not whether an order for examination should be made but whether the order should confine the specialist by limiting the nature and extent of any examination and assessment.

[16] The respondent seeks an order to the following effect:

> "The defendant limit the selected orthopaedic surgeon's opinion and report solely to the plaintiff's hip [and left knee] condition[s] and such evidence will not include any comments or opinions in relation to the plaintiff's spine."

Consideration

[17] The respondent seeks to limit the specialist's examination and to prevent the specialist expressing an opinion on the whole person impairment arising from a combination of the spine, hip and knee conditions.

[18] The statement of claim seeks damages "on a dominant injury under Item 91 'serious thoracic or lumbar spine injury' with an ISV of 35 to take account of the plaintiff's multiple injuries pursuant to the *Civil Liability Act* and *Civil Liability Regulations*."[4]

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4 Statement of Claim at [10].

[19] Under s 61 of the *Civil Liability Act* 2003 the Court in awarding general damages is required to assess an injury scale value (ISV) under the rules provided by regulation. Matters a court must and may have regard to in assessing an ISV are stated in ss 8-10 of the *Civil Liability Regulation* 2014. The effects of a pre-existing condition of the person is one matter the Court may have regard to.[5] Whole person impairment is an important consideration[6] in assessing an ISV. A court must give greater weight to a medical assessment of a whole person impairment percentage based on criteria under AMA 5 than to other medical assessments.[7]

[20] Dr Steadman expressed an opinion that hip replacement would likely proximate 20 to 50% whole person impairment in accordance with AMA 5 methodology and that assessment of spinal impairment would be reduced because of the hip condition. He saw this to be the main issue.

[21] Whether reduction of whole person impairment by reference to a pre-existing condition, as proposed by Dr Steadman, is a legally correct approach in the circumstances of this case may depend on the trial judge's assessment of the evidence at trial. The existence of a pre-existing condition and its relevance to the harm caused by the defendant is essentially a question of fact for the trial judge: *Wilson v Peisley* (1975) 50 ALJR 207. A pre-existing condition is also potentially relevant where, as here, the plaintiff is seeking damages for future economic loss and loss of earning capacity.

[22] Before me it was not submitted that Dr Steadman was wrong to conclude that whole person impairment may be assessed at a lower level upon a consideration of the combined effect of the subject injury and pre-existing orthopaedic conditions. It is not for me to resolve on this application what might be the ultimate outcome in this regard; but once it is accepted, consistent with the respondent's concession, that it is relevant to have regard to the hip and knee conditions, presumably because such a consideration may affect the assessment of overall damages, it is right to conclude that further examination and assessment addressing the combined impact on the respondent is justified. Taking those matters into account, in my view it will not be unreasonable for the orthopaedic surgeon assessing the respondent's hip and knee conditions, to also have regard to his spinal injury in expressing an opinion on the combined effect of those conditions on his whole person impairment and earning capacity. I conclude that it will not be unreasonable or unnecessarily repetitious to order the examination and assessment sought. Costs should follow the event.

The orders

[23] The orders of the Court will be as follows:

1. That the respondent submit to an independent medical examination and assessment by an orthopaedic consultant to be selected by the respondent from the panel of the three orthopaedic consultants previously nominated by the applicant.

2. The applicant pay the cost of the independent medical examination by the orthopaedic consultant.

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5 *Civil Liability Regulation* 2014, s 9.
6 Section 10.
7 Section 12(2).

3. The respondent is at liberty to obtain his own orthopaedic examination and assessment if he deems it necessary.

4. The respondent pay the applicant's costs of this application to be assessed on the standard basis if not agreed.