

AUSTRALIA / JUDGMENT

Moss v Coghill [2021] NSWSC 1083

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Supreme Court

New South Wales

Medium Neutral Citation: Moss v Coghill [2021] NSWSC 1083

Hearing dates: 18 August 2021

Date of orders: 26 August 2021

Decision date: 26 August 2021

Jurisdiction: Common Law

Before: Harrison AsJ

Decision: The Court orders:

- (1) Leave is granted to the plaintiff to serve the medical report of Dr Negus by 8 July 2021.
- (2) Leave is granted to the plaintiff to serve the reports of Drs Downes-Brydon dated 3 February 2021 and 28 May 2021 and a report of Dr Waldron by 21 June 2021.
- (3) Costs be costs in the cause unless the parties wish to make submissions on this topic within 7 days.
- (4) The defendant is to file and serve his evidentiary statement by 29 October 2021.

Catchwords: CIVIL PROCEDURE – Time – Extension of time to serve documents – Leave granted

Legislation Cited: Civil Liability Act 2002 (NSW), s 50

Uniform Civil Procedure Rules 2005 (NSW), 1.12 31.28

Cases Cited: Addison v BHP Billiton Iron Ore P/L[2019] NSWSC 1433

Dickson v State of NSW [2021] NSWSC 234

McAteer v Stoodley [2018] NSWSC 710

Sandra Battersby v Allan; Darrel Battersby v Allan [2017] NSWSC 1724

Warragamba Winery Pty Ltd v New South Wales [2011] NSWSC 1118

Williams v Coles Supermarkets Australia Pty Limited [2017] NSWSC 1326

Yacoub v Pilkington (Australia) [2007] NSWCA 290

Category: Procedural rulings

Parties: Tara Moss (First Plaintiff)

Tara Moss Enterprises Pty Ltd (Second Plaintiff)

Chris Coghill (Defendant)

Representation: Counsel:

Richard Cheney SC with Hilbert Chiu (Plaintiffs)

Jacqueline Sandford (Defendant)

Solicitors:

Slater & Gordon Lawyers (Plaintiffs)

HWL Ebsworth Lawyers (Defendant)

File Number(s): 2019/275366

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Judgment

1. HER HONOUR: By notice of motion filed 29 June 2021 the plaintiff now seeks leave to extend the time to serve the reports of Dr Downes-Brydon dated 3 February 2021 and 28 May 2021 and a report of Dr Walden, anaesthetist, dated 4 May 2021 which were served on 21 June 2021. The defendant objects to these orders. The parties relied upon a joint court book.
2. The plaintiff is Tara Moss. The second plaintiff is Tara Moss Enterprises Pty Ltd. The defendant is Chris Coghill. The second plaintiff is a service company operated by Ms Moss, through which she derived business earnings as an author, model, public speaker and in other public appearances. For convenience I shall refer to the first plaintiff as the plaintiff.

Background

1. The plaintiff now resides in Canada having moved there in September 2018. At the time of the events with which the proceedings are concerned the plaintiff lived in Blackheath New South Wales. The defendant is a general practitioner based at the Upper Mountains Medical Centre at Blackheath (the medical practice). The plaintiff attended that medical practice from 2015 to 2017, during which time she saw several doctors there including the defendant.

2. These proceedings arise from alleged negligence of the defendant for failing to investigate and diagnose Ms Moss as suffering from a musculoskeletal injury in her right hip, namely a labral tear, during patient consultations in 2016 and 2017. The labral tear was subsequently diagnosed by another general practitioner in March 2018 and treated by surgery. The plaintiff alleges that the delay in diagnosing and treating the labral tear led to permanent damage, including the onset of Complex Regional Pain Syndrome (CRPS).
3. Both parties agree this is a complex medical case.
4. The critical issues on liability in these proceedings are:
 1. Potential inconsistencies between the plaintiff's version of events as to what occurred and what was said at her consultations with the defendant, and the clinical notes the defendant took of those consultations. The defendant has not yet served an evidentiary statement but will be ordered to do so. But as the plaintiffs understand it, the defendant's case is that his clinical notes are an accurate and complete record of those consultations, and should be preferred over the evidence of the plaintiff as set out in her evidentiary statement.
 2. Whether a general practitioner in the defendant's position, exercising reasonable skill and care in accordance with accepted peer professional practice, would when faced with Ms Moss' presenting symptoms and complaints have suspected and investigated a potential musculoskeletal injury in the hip. As the plaintiffs understand it, the defendant's case is that it was reasonable and sufficient for him to investigate and rule out a gynaecological cause – see s 50 Civil Liability Act 2002 (NSW).
 3. Whether earlier discovery and treatment of a labral tear would have avoided some or all of the disabilities Ms Moss has suffered since 2016. As the plaintiffs understand it, the defendant's case is that there is doubt as to whether Ms Moss even had a labral tear in her right hip in early 2016, and in any event her various disabilities since then are not attributable either to a labral tear or to any delay in treating a labral tear.
1. Issue (b) is complicated by the fact that the opinions advanced by the various expert general practitioners in the case are based on differing assumptions of fact as to the symptoms reported at the time of each consultation in question. The reports of Dr Downs-Brydon and report of Dr Waldron go to this issue. The reason there are two reports from Dr Downs Brydon is that he was asked to prepare an initial 'blind' report relying only on Dr Coghill's clinical notes. He was then provided with the plaintiff's evidentiary statement and asked to prepare a supplementary report on the assumption that her evidence is accepted.
2. Issue (c) is medically complex and has been addressed in the expert evidence of both sides, by multiple experts from different medical specialities, including general practitioners, neurologists, orthopaedic surgeons, physiotherapists, pain medicine physicians, rehabilitation/sports physicians, and psychiatrists. The second report of Dr Downs-Brydon, and the report of Dr Walden go to this issue from the perspective of different medical specialities.

Procedural History

1. The plaintiff relied upon Mr Bagrin's, her solicitor's, affidavit dated 9 July 2021. It sets out a detailed procedural history. For the purposes of this motion, the salient points are as follows.
2. On 4 September 2019, these proceedings were commenced. In October 2019, the plaintiffs served expert reports on both liability and damages. At that time, the plaintiffs' case on breach relied on a single expert report of Dr James Lynch, general practitioner. The plaintiff's case on causation focused on the orthopaedic consequences of delayed treatment of a labral tear, as advanced predominantly through the reports of Dr Jonathan Negus (orthopaedic surgeon) and Mr Michael Ryan (physiotherapist).
3. In the first half of 2020, the defendant sought several extensions for the service of his expert evidence in response. On 9 June 2020, the defendant served two reports of A/Prof Vincent Roche on liability.
4. On 30 October 2020, the defendant served a number of damages reports, from Dr Dalton (sports physician), Dr Zicat (orthopaedic surgeon), Dr Simon (neurologist), Dr Lyons (orthopaedic surgeon) and Dr Lisa Brown (psychiatrist). These reports mostly addressed issues of causation and damages. However, Dr Lyons' report also addressed liability. Meanwhile, on 6 October 2020, the defendant also served a report from a second expert general practitioner, A/Prof David Garne, on liability.
5. On 6 November 2020 the subsequent directions hearing before Harrison J, the plaintiffs did not press their objection to a retrospective extension of time for service of A/Prof Garne's report. The plaintiffs were directed to serve any supplementary reports responding to the evidence served by the defendant by 18 December 2020. The expert reports of Drs Downes-Brydon and Walden, the subject of this hearing, were served about 6 months out of time and thus require an extension of time to serve them.
6. On 18 December 2020, the defendant served supplementary reports of Drs Dalton and Brown, apparently without any direction from the Court permitting him to do so. The letter of instructions to Dr Brown, dated 7 days after the directions hearing before Harrison J, specifically asked Dr Brown to address causation.
7. The proceedings have not yet gone to mediation.
8. Conclaves of medical experts have not yet taken place. No joint report has been written.
9. No hearing date has been allocated.
10. Due to an oversight, the plaintiff's solicitor overlooked serving the report of Dr Negus dated 19 March 2019. The defendant does not object to the plaintiff being granted leave to serve that report. It was served on 8 July 2021. I make an order that leave is granted to serve the report of Dr Negus up until and including 8 July 2021.

The plaintiff's submissions

1. The plaintiff wishes to draw the Court's attention to what she says are two important considerations arising from the procedural history of this case.
2. The first consideration is that the plaintiffs are not alone in serving expert evidence in default of previous directions of the Court. The defendant has effectively taken most of 2020 to prepare his expert evidence on both liability and damages, which has been served in tranches in June, October and December. The plaintiffs originally objected to the defendant's late service of additional expert evidence on liability, from two new experts – A/ Prof Garne and Dr Lyons, in October 2020 (i.e. delay of about four months). However, the plaintiffs ultimately did not press that objection and consented to the extension granted by Harrison J at the directions hearing on 6 November 2020.
3. The plaintiffs also did not object to the defendant's late service of still more expert evidence on causation and damages in December 2020, despite the defendant not even raising this prospect before the Court on 6 November 2020. The plaintiffs have not taken issue with the defendant's delays because this is a complicated case on the Medicine, and preparation of comprehensive and cohesive expert evidence is not a simple matter for either side. The plaintiffs do however seek to serve expert liability evidence from additional experts just as the defendant has, namely the service of the reports from Drs Waldron Downs-Brydon.
4. The second consideration is that the defendant's extensive expert evidence on causation and damages prompted a close review of those aspects of the plaintiffs' case. Originally, the plaintiffs' case relied solely on Dr Negus' opinion (partly supported by physiotherapist Mr Ryan) that delayed treatment of the labral tear led to the development of hip and gait abnormalities which, in turn led to prolonged trochanteric bursitis, chronic pain, gait problems and referred pain in the inguinal region by way of obturator neuropathy. That causative link was the subject of extensive rebuttal in the expert evidence of Drs Dalton, Zicat, Simon and Lyons.
5. An issue raised by Dr Simon in his report, was whether the plaintiff's deteriorating chronic pain syndrome, including the appearance of allodynia, might indicate a central mechanism of pain propagation. This in turn raised the question of whether Ms Moss' various symptoms might be better explained by Complex Regional Pain Syndrome (CRPS) rather than an orthopaedic or local nerve problem.

The reports

1. In Dr Neil Simon's, neurologist and neurophysiologist, report dated 1 April 2020, Dr Simon stated that he disagreed with Dr Mellick and explained:

"Referred pain is not usually neuropathic in nature, that is causing burning, tingling or electrical components. Referred pain does not result in hyperpathia (heightened intensity of painful stimuli on the skin) or allodynia (the perception of pain from non-noxious cutaneous stimuli). These features are consistent with neuropathic pain such as may be seen in a chronic central pain syndrome."

1. He also opined that the pain syndrome is evolving consistent with a central pain syndrome and it is simplistic to suggest that the labral tear caused the pain described.
2. Prompted by Dr Simon's observations, the plaintiffs' legal team considered whether CRPS might be the unifying theory that explains, in response to the central thrust of the defendant's attack, how delayed treatment of a labral tear could (i) gradually lead over several years to Ms Moss' worsening pain, well beyond the original affected nerves around the tear, and (ii) lead to widespread loss of function of the hip and lower limbs described in the plaintiff's evidentiary statement. The reports of Dr Wiseman, Mr Ryan, Dr Walden, and the second report of Dr Downs-Brydon are all directed to supporting this unifying CRPS theory of causation.
3. It took time to speak to multiple experts of disciplines about CRPS, come up with this theory, and then to obtain this expert evidence. The reports were served as and when they were obtained, between February and June 2021. The plaintiff's do not object to the defendant having an appropriate amount of time to obtain expert evidence to respond to it.
4. In Dr Downs-Brydon's, general practitioner, supplementary report dated 28 May 2021 she was asked some questions based on new supplementary material supplied to her. She answered the following questions including:

"Do you consider Dr Coghill should have requested Ms Moss present to his rooms for a physical review following the call from her husband on 7 March 2016?"

...

Based on your review of the additional materials, please comment on whether any additional elements of Ms Moss' history and presenting symptoms are of significance in diagnosis or different diagnosis of a potential hip problems?

In answering this question, please specifically address Ms Moss' difficulties with weight-bearing, and her eventual reliance on a cane to ambulate.

...

Does the information provided to you in the additional materials alter any of the opinions in your previous report, to the effect that an ordinary General Practitioner in Dr Coghill's position in March 2016, exercising reasonable care and skill

...

Would you please describe how delayed diagnosis and treatment of a labral tear can lead to permanent injury and disability, even if that labral tear is subsequently diagnosed and treated?

...

Based on your review of the additional materials, do you consider that Ms Moss has suffered from pain central sensitisation (PCS)?

...

Based on your review of the additional materials, do you consider that Ms Moss has suffered from complex regional pain (CRPS)?"

1. Similarly, Dr Marc Waldon, a senior pain medicine anaesthetist physician was asked:

"What is complex regional pain syndrome (CRPS)?

...

In the field of pain medicine, what is meant by "central sensitisation" or centralised contribution to pain?

...

In your opinion, what is Ms Moss' current diagnosis in relation to pain?

...

Please explain how Ms Moss' current diagnosis affects her mobility and functional capacity."

...

What is Ms Moss' prognosis in terms of CRPS, pain and functional disability?

...

Please explain how a person can come to have CRPS as a result of sensitisation from persistent pain?

...

Please explain the biological process by which delayed treatment of a labral tear can ultimately lead to CRPS and the kind of problems Ms Moss has had since 2018.

...

Does the reduced use of a limb, such as from delayed treatment of a joint problem like a labral tear, increase the risk of CRPS? If so, please explain why.

...

Having regard to Ms Moss' medical records, in your opinion what is the likely mechanism by which she came to have CRPS?

...

Having regard to the nature of Ms Moss' symptoms in about March 2016, was it more likely than not that she had a labral tear at the time?

...

If Ms Moss' labral tear had been diagnosed in about March or April 2016, and she had undergone treatment for it in the months following by way of physiotherapy and/ or surgery:

- a) What would have been the likely impact of that treatment on her pain and use of her lower limbs?

...

- b) In turn, would she more likely than not have avoided chronic pain syndrome, and ultimately CRPS?"

The law

1. The relevant Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") are 1.12 and 31.28. They read:

1.12 Extension and abridgment of time

- (1) Subject to these rules, the court may, by order, extend or abridge any time fixed by these rules or by any judgment or order of the court.
- (2) The court may extend time under this rule, either before or after the time expires, and may do so after the time expires even if an application for extension is made after the time expires.

31.28 Disclosure of experts' reports and hospital reports

- (1) Each party must serve experts' reports and hospital reports on each other active party—
 - (a) in accordance with any order of the court, or
 - (b) if no such order is in force, in accordance with any relevant practice note, or
 - (c) if no such order or practice note is in force, not later than 28 days before the date of the hearing at which the report is to be used.

...

- (3) Except by leave of the court, or by consent of the parties—
 - (a) an expert's report or hospital report is not admissible unless it has been served in accordance with this rule, and

- (b) without limiting paragraph (a), an expert's report or hospital report, when tendered under section 63, 64 or 69 of the Evidence Act 1995, is not admissible unless it has been served in accordance with this rule, and
- (c) the oral expert evidence in chief of any expert is not admissible unless an expert's report or hospital report served in accordance with this rule contains the substance of the matters sought to be adduced in evidence.

...

- (4) Leave is not to be given as referred to in subrule (3) unless the court is satisfied--
 - (a) that there are exceptional circumstances that warrant the granting of leave, or
 - (b) that the report concerned merely updates an earlier version of a report that has been served in accordance with subrule (1).

1. In *Yacoub v Pilkington* (Australia) [2007] NSWCA 290 at [66], Tobias JA, Campbell JA and Handley AJA considered the meaning of exceptional circumstances as follows:

"[66] Another question of construction concerned "exceptional circumstances" in rule 31.18(4). In *San v Rumble* (No 2) (2007) NSWCA 259 at [59]-[69], I gave consideration to the expression "exceptional circumstances" in a different statutory context to the present. Without repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of rule 31.18(4).

- (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly* (Edward) [2000] 1 QB 198 (at 208).
- (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912-913).
- (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee* No 295 [2007] FCA 388 (at [26]).
- (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912-913).
- (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

1. The relevant provisions from Practice Note SC CL 7 are paragraphs 32, 33 and 34(a). They read:

"Expert witnesses

32. Where it is considered that an unnecessary expert has been qualified or is sought to be called to give evidence, the court may:

- i) reject the tender of the expert's report;
- ii) refuse to allow the expert to be called; and
- iii) disallow any costs incurred in qualifying, in having the expert's report prepared or in calling the expert to give evidence.

33. The Court recognises that the liability aspects of medical negligence claims often involve complex issues as to breach and causation. This may require more than one expert from a party to give evidence on a particular issue or issues. However, where there is more than one expert to give evidence on an issue, the evidence will be given concurrently unless directed by the Court. Particular directions in relation to those issues will be given at an appropriate point in the Directions Hearing.

34. In respect of the quantification of damages for death or personal injury, the following indications may be given:

- (a) As a guide, the number of expert witnesses giving evidence on behalf of a party shall be limited to:
 - (i) one medical expert in any speciality, unless there is a substantial issue as to ongoing disability, in which case the number shall be limited to two in any relevant speciality concerning that disability; and
 - (ii) two experts of any other kind.

1. In oral submissions, senior counsel for the plaintiff explained that a unique feature of the current Practice Note which was issued in June last year, is that it did not exist in its predecessor. That is the provision in clause 33 to the effect that the Court recognises that the liability aspects of medical negligence claims often involve complex issues as to breach in causation. This may require more than one expert from a party to give evidence on a particular issue or issues (T5.36-41).

The defendant's submissions

1. The plaintiff seeks to deploy the opinion of all three general practice experts as a result of a question posed in a letter dated 12 January 2021, issued to A/Professor Clyne, namely: "Would you please indicate whether you agree with the expert reports of Dr Lynch" (CB 416; PDF 421). It is not an insignificant consideration that aside from the two reports of Dr Downes-Brydon (and the served occupational therapy and accounting reports) the plaintiff

has to date deployed some 12 expert reports sourced from five different disciplines (general practice, neurology, physiotherapy, psychiatry and orthopaedic surgery) and the defendant some expert 10 expert reports, also sourced from five different disciplines (general practice, neurology, rehabilitation medicine, psychiatry and orthopaedic surgery). The sheer volume of the reports and associated documentation exchanged to date is demonstrated by the correspondingly voluminous Court Book. The attendant costs incurred to date, and likely to be incurred moving forward, are self-evident. It is noted that the defendant has also served two general practice expert reports.

2. The defendant says that, the resultant duplication of general practice opinion now marshalled by the plaintiff is not justified on the basis that the second report of Dr Downes-Brydon is "directed to supporting" what is contended to be "the unifying CRPS theory of causation". This is not least because (unsurprisingly) as a general practitioner, Dr Downes-Brydon expressly eschews expertise in the field of chronic pain disorders (CB 480; PDF 485). But in any event, even if it is supposed, which the defendant does not concede, that a general practitioner is likely to be possessed of the requisite specialised knowledge to express expert opinion on the matter of the causation of CRPS, no cogent or other reason is advanced to explain why such issues were not raised with Dr Lynch and/or with A/Professor Clyne.
3. The consideration that the issue of CRPS has, in point of fact, been on the table from the earliest days of this litigation. This is demonstrated by, among other things, the prominence accorded to this claim (as item 1 of 40 of claimed "continuing disabilities") in the statement of particulars filed on 28 February 2020 (CB 93; PDF 98), coupled with the opinion expressed by Dr Fisher (psychiatrist) under cover of report dated 22 May 2019, namely: "[The plaintiff] suffers from chronic regional pain syndrome Type 1, affecting her right hip and leg" (CB 44; PDF 49).
4. Considerations of proportionality of costs (s60 Civil Procedure Act) should be taken into account. A further introduction into the arena now, of new expert opinion would inevitably be productive of additional delay and expense and would operate not to further, but rather to undermine the achievement of the 'overriding purpose' (ss.56-58 Civil Procedure Act) and the related objects.

Case law

1. It is acknowledged that the authorities do not speak with one voice on the question whether the relief sought in the plaintiff's notice of motion ought to be dealt with under UCPR r 31.28 or alternatively, UCPR r 1.1.
2. The defendant referred to McAteer v Stoodley [2018] NSWSC 710 ("McAteer") and Sandra Battersby v Allan; Darrel Battersby v Allan [2017] NSWSC 1724 ("Battersby"). In McAteer at [7], which counsel says concerns broadly analogous circumstances (albeit involving two, rather than three experts in the same discipline) where Adamson J stated:

"[7] As the Practice Not SC CL 7 provides, it is undesirable to have a large number of experts qualified whose opinions may be overlapping and who may have the same or similar expertise. Furthermore, the duplication of experts within the same expertise tends to add to the time and cost of the hearing and also any conclave which may occur prior to the hearing. Such duplication has a tendency to subvert the interests of justice."

1. In Battersby at [57] Bellew J expressed "no doubt whatsoever" that UCPR r 31.28 governed the position and described the contrary submission as "an inherently circular one" that would lead to a "plainly absurd" result and "not one that could possibly have been intended". The defendant also referred to Gurein v Hillier; Netherwood v Hillier and Moore v Pell [2020] NSW SC 1322.
2. In Addison v BHP Billiton Iron Ore P/L[2019] NSWSC 1433, Cavanagh J stated at [15], [23] and [27]-[29]:

"[15] At the outset, I should say that if the plaintiff was merely seeking to rely on another expert with exactly the same discipline as Mr Byrnes, there would be different considerations. However, I consider that there is an arguable difference in expertise between the plaintiff's two experts, such that there may be, on the evidence before me, a good reason for the plaintiff to require the assistance of Mr Dohrmann.

...

- [23] The proper interpretation of r 31.28(4) has been the subject of some earlier consideration although in different circumstances and contexts. None of the decisions relied upon by either party necessarily determines the outcome. The defendant referred to Cummins Generator Technologies Germany GMBH v Johnson Controls Australia Pty Ltd [2015] NSWCA 264, in which r 31.28 of the UCPR is mentioned. However, that case is on a different point.

...

- [27] Mr Perla submits that sub-r (4) applies to the orders sought by the plaintiff today. Mr Lee submits that sub-r (4) applies only to the admissibility question referred to in sub-r (3). I agree with Mr Lee's submission. The purpose of r 31.28 is to require parties to serve expert and hospital reports on each other as directed by the Court or in accordance with the Practice Note to ensure that each party is aware of the relevant expert and hospital reports which will be relied on by the other party well before the hearing. It is hardly necessary to say more about why such a rule is necessary. However, r 31.28(3)(a)–(c) refers specifically to admissibility questions. Except by leave of the Court or by consent of the parties, an expert report or hospital report is not admissible unless it has been served in accordance with the rule.

- [28] The opening words of r 31.28(4) of the UCPR are:

"Leave is not to be given as referred to in subrule (3)..."

- [29] That is a reference back to the opening words of sub-r (3) which commence "Except by leave of the Court...". In my view sub-r (4) and the reference to exceptional circumstances applies to an application for leave under sub-r (3), not an application for leave to serve a report contrary to the orders of the Court or an application for an extension of time to serve a report after the Court has so ordered but before any hearing. It may be surprising if a party was required to demonstrate exceptional circumstances to obtain leave to serve an expert's report when the case has not even been listed for hearing. I thus do not consider that the plaintiff was required to demonstrate exceptional circumstances to obtain the leave of the Court for an extension of time to serve the report. It is not necessary for me to further consider whether there were exceptional circumstances."
1. This defendant says that is precisely what the plaintiff seeks to achieve by this application, in so far as it concerns the opinion of Dr Downes-Brydon.
 2. The defendant further submitted that the contention that the concept of a "central mechanism of pain propagation" was introduced by Dr Simon (a neurologist qualified by the defendant who examined the plaintiff on 1 April 2020) and that it was this that prompted the plaintiff's legal team to "come up with" the "unifying CRPS theory of causation" does not sit comfortably with the fact, evidenced by the treating records of the plaintiff's treating specialists in Vancouver, that this same concept was postulated by Dr Yong in March 2019, and by Dr Toth in November 2019. Email correspondence exchanged between the parties that followed upon the defendant's request (sent on 21 January 2020) for provision of records from the plaintiff's treating doctors in Canada, confirms that the plaintiff was in receipt of the records of Drs Toth and Wiseman no later than 25 May 2020.
 3. The defendant referred to the observations made by Schmidt J in *Williams v Coles Supermarkets Australia Pty Limited* [2017] NSWSC 1326 at [10]-[11], drawing on the remarks of Harrison J in *Warragamba Winery Pty Ltd v New South Wales* [2011] NSWSC 1118 where Her Honour says:

"[10] As discussed by Harrison J in *Warragamba Winery Pty Ltd v State of New South Wales* [2011] NSWSC 1118, there is no question that there may be times beyond which a party's case may not justly be further augmented by service of further reports, applying what was observed in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [112] - [113]:

"112. A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

- ¹¹³. In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings."
- [¹¹] The Court's discretions should not be exercised to punish parties for their failures to comply with the requirements imposed by the Rules, but it must be accepted that there are circumstances in which its discretions cannot justly be exercised in favour of a party, which has pursued a course of conduct designed to unfairly advantage itself in the proceedings, contrary to the requirements of the Rules. Pursuit of such a course may preclude the existence of the exceptional circumstances on which the grant of leave under the Rules depends being found."
1. The defendant says these views are apposite.
 2. I would add, in *Dickson v State of NSW* [2021] NSWSC 234 at [28] to [31] Lonegan J stated :
"[28] I am not satisfied that the defendant suffers any prejudice other than that there may be a need to obtain evidence in reply to the matters raised in the reports of A/Professor Raftos. In my view this is often part of the usual course in matters of this type.
- [²⁹] Whilst other decisions have dealt with the proper construction of r 31.28 of the UCPR which on one analysis suggests that leave should not be granted unless there are "special circumstances", Mr Kettle took the pragmatic approach that the Court has discretion to extend the time for compliance with obligations under the rules pursuant to UCPR r 1.12.
- [³⁰] I agree with and adopt that pragmatic approach. In any event, to the extent that I needed to conclude that there were special circumstances, in my view the special circumstances are first that the matter is still in the case management phase, the breach and causation aspects have some complexity to them and the reports obtained include relevant information that would assist the Court in understanding the issues and practicalities relevant to duty and breach and so those reports should be allowed to be deployed by the plaintiff in the proceedings.
- [³¹] To the extent that r 31.28 could be read as requiring something more, I agree with and adopt the comments of Cavanagh J in *Addison v BHP Billiton Iron Ore Pty Limited* [2019] NSWSC 1433 at [23] to [29]."

Resolution

1. It is trite law but each case depends on its facts. The plaintiff suffers from a multifaceted medical condition. I accept that both parties have already been served with a large number of medical expert reports. I also accept that it was only when the defendant served the reports, particularly that of Dr Simon (served on 30 October 2020), that the plaintiff's legal team considered whether CRPS might be the unifying theory ("the unifying theory") that

explains, in response to the central thrust of the defendant's attack, how delayed treatment of a labral tear could (i) gradually lead over several years to the plaintiff's worsening pain, well beyond the original affected nerves around the tear, and (ii) lead to widespread loss of function of the hip and lower limbs described in the plaintiff's evidentiary statement. On any view, the issue of causation is a difficult and complex one.

2. The defendant in his defence at [33] pleads s 50 Civil Liability Act, namely that he acted in a manner that in 2016 and 2017 was widely accepted in Australia by peer professional opinion as a competent professional practice.
3. It is my view that the reports of Drs Downes-Brydon and Waldron go to the real issue of causation which will be highly contended at trial. The defendant has had the benefit of the plaintiff being examined by A/prof Tillman Boesel who practices in the same medical speciality as Dr Waldron. The defendant has not served this report. I am not satisfied that the defendant suffers any prejudice other than that they may need to obtain further evidence as to the matters raised in the reports. The plaintiff agrees that the defendant should be given this opportunity to obtain further reports arising out of the issues raised by Drs Downes-Brydon and Waldron.
4. UCPR 31.28 applies specifically to the extension of time to serve experts and hospital reports. Hence I will address whether there are exceptional circumstances
5. As to whether there are special circumstances, the matter is still in the case management phase, the breach of duty of care and causation are complex issues. It was only after consideration of the report of Dr Simon, served by the defendant on 30 October 2020, that the plaintiff's legal team considered whether CRPS might be the unifying theory. The plaintiff's camp acted expeditiously in investigating, obtaining and serving the reports of Drs Downes-Brydon and Waldron. The information contained in these reports countered the views of the defendant's experts. It will assist the court in understanding the complicated issues in relation to causation. These in my view are exceptional circumstances. Leave to serve the reports should be granted pursuant to s 32(3). The time to serve the reports of Drs Downes-Brydon and Waldron is extended to 8 June 2021.

Costs

1. The defendant seeks an order that "all additional costs of procuring the attendance at a joint expert conference and to give concurrent evidence that may be incurred on account of his residence in the USA be borne by the plaintiff".
2. Dr Wiseman may be able to attend the joint expert conference and give concurrent evidence via videolink which will not result in any additional costs. On this basis I decline to make this order.
3. Costs of the motion.

4. Costs are discretionary. The plaintiff has been granted an indulgence by being granted leave to serve the medical reports of Drs Downes-Brydon and Waldron. The defendant was unsuccessful in arguing that leave of the Court should not be granted to extend time to serve those reports. In these circumstances it is my view that the appropriate order for costs is that costs be in the cause unless the parties make submissions on this topic of costs within 14 days.

The Court orders:

1. Leave is granted to the plaintiff to serve the medical report of Dr Negus by 8 July 2021.
2. Leave is granted to the plaintiff to serve the reports of Drs Downes-Brydon dated 3 February 2021 and 28 May 2021 and a report of Dr Waldron by 21 June 2021.
3. Costs be costs in the cause unless the parties wish to make submissions on this topic within 7 days.
4. The defendant is to file and serve his evidentiary statement by 29 October 2021.

Amendments

26 August 2021 - Hilbert Chiu's appearance added

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Decision last updated: 26 August 2021

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