Neutral Citation Number: [2023] EWHC 367 (KB)

Case No: QB-2022-002617

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2023

Before :

MASTER STEVENS

- -

Between :

Rianna Read	**Claimant**
- and -	
Dorset County Hospital NHS Foundation Trust (1)	**Defendants**
and	
University Hospital Southampton NHS Foundation Trust (2)	

- -
- -

Anna Beale (instructed by **Stewarts**) for the **Claimant**
Helen Wolstenholme (instructed by **Browne Jacobson**) for the **Defendants**

Hearing dates: 16th January 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MASTER STEVENS

Master Stevens :

Statement of Reasons

1. Due to this one hour application overrunning I agreed to provide a short form summary of my reasons for dismissing the Defendants' application. In the event it was difficult to summarise adequately in a series of bullet points so I have set out my judgment in the more traditional way. The application was for a stay until 2 months after the Claimant has been examined by the Defendants' neurosurgical expert. The claim is a potentially high value one, with allegations that more prompt surgery would have preserved reasonable muscle power and full or near-full lower limb mobility.

The application dated 11.11.22

2. The application was drafted on the basis that the medical expert's examination was required so that he could finalise his opinion on causation and the Defences be drafted. It was asserted that "cauda equina cases are a good example of the frequent interplay in clinical negligence claims between "medical causation" and independent medical assessment of the Claimant on condition & prognosis. As in this case, there are frequently pre-existing conditions or co-morbidities to be considered". A long history of back pain was referenced and it was noted that the emergency cauda equina situation was caused by a large disc prolapse causing critical stenosis. It was acknowledged that the Claimant may well not yet have been examined by the Claimant's primary causation expert but it was noted that particular expert would have had the Claimant's condition and prognosis report (which the Defendants also have) and averred that the Claimant's expert would also have had the benefit of "other unserved expressions of Mr Desai's opinion". It was said that this put the Defendants' expert at a disadvantage such that he was "rightly mindful about finalising a balanced opinion for the Court with accompanying expert declaration when he considers that a vital assessment has not been carried out".

3. The Defendants also submitted that it would be a waste of costs to serve their Defences "with an incomplete or provisional response to the complex arguments on causation".

4. Finally, in the original application, the court was asked to take note " that the Claimant's refusal to be examined by the Defendant's expert also extends until after expert evidence on liability has been exchanged and so it seems there is even less reason to put this application off".

The background

5. In the pre-action Letter of Response issued by the First Defendant, having accepted that they caused a negligent delay in transfer to the Second Defendant's hospital, but not admitting a quicker transfer would have resulted in earlier surgery, they denied causation as follows: "The Claimant was in significant urinary retention (evidence of CESR) by 20:00.Accordingly, by that stage, there was no real prospect that surgical intervention would improve bladder or bowel function. For the avoidance of doubt, in

circumstances where the Claimant's motor function was assessed to be 3/5 at 01:40 on 1 August 2018 , it is denied that earlier surgery would have resulted in recovery to near if not full motor function in L5 and S1/2 bilaterally".

6. In the pre-action Letter of Response issued by the Second Defendant they stated, following a denial of breach of duty that, "It follows that causation of injury as alleged is also denied. The Defendant will aver that the timeframes for reporting of the MRI scan and in arranging transfer were reasonable and as such causation does not flow. For the avoidance of doubt, in circumstances where the Claimant's motor function was assessed to be 3/5 at 01.40 on 1 August 2018 it is denied that earlier surgery would have resulted in recovery to near if not full motor function in L5 and S1/2 bilaterally".

7. Following service of the Particulars of Claim there was an exchange of solicitors' correspondence about an examination by the Defendants' neurosurgeon. The hearing bundle may not contain everything but the correspondence which I can see starts with a request on 1st November 2022, "We would like our expert to examine the Claimant", followed by an exchange about the location for examination following a request for a domiciliary visit. The following day the Defendants' solicitor indicated that the Defences **might** (my emphasis) be delayed pending the examination. The day after that the Claimant's solicitor replied " Can you please explain why your neurosurgeon needs to examine Mrs Read in order to finalise his views, our own expert has not done so and been able to form his views to enable us to particularise our case?". The Claimant's solicitor made it plain that they were not refusing an examination per se, only the timing of it, and that they did not want further delay waiting for the Defence until after an examination, as the Claimant's needs were such that the case needed pushing on to resolution. They offered to speak on the telephone. The Defendants' written reply stated that the expert could offer an early home visit and explained, "The expert wants to see the Claimant. It is not uncommon in these cases for the causation expert to want to correlate his opinion with an assessment of C&P… We will need our expert's **finalised** (my emphasis) views to serve a full Defence". The day after that, the Defendants' solicitor advised that unless the home visit was confirmed that appointment would be lost.

8. The application was then issued and correspondence continued about why the expert needed an examination which did not result in any further significant detail being provided. Following issue, on 9th December 2022, there was an exchange about when the Claimant was suggesting the examination should proceed, be it after exchange of lay liability witness evidence or exchange of expert liability evidence and the Claimant confirmed it was the former. The Claimant also expressed concern that something may get overlooked on an examination if her witness evidence had not been served first as she might forget to mention various facts during the appointment.

9. Within the hour before the hearing on 16th January 2023, the Defendants' solicitor produced a letter from their expert dated 13th January 2023 stating, " I understand that my overriding duty is to the Court but still feel that in order to comply with that duty, I would need to assess the Claimant before opining on causation". He went on to discuss that an assessment comparing the pre-injury condition and post-injury condition was important when opining on the different outcomes absent any breach of duty. He mentioned the presence of co-morbidities which might be influencing functional impairments (e.g. obesity, exercise tolerance) and an internal

inconsistency, as he viewed it, in some measurements taken by the Claimant's expert on condition and prognosis which could only be verified on assessment.

The Law

10. Both parties acknowledged that the correct test is set out in *Laycock v Lagoe* [1997] P.I.Q.R. p 518 CA. It is a two-stage test. First, I have to decide if the interests of justice require the examination sought. Only if I find that they do, I then need to consider stage two which is whether the party opposing the examination has a substantial reason for the test not being undertaken . It must not be an imaginary or illusory reason. In deciding stage two, I have to take into account, "on the one hand the interests of justice in the result of the test and the extent to which the result may progress the action as a whole: on the other hand, the weight of the objection advanced by the party who declines to go ahead with the proposed procedure, and any assertion that the litigation will only be slightly advanced if the test is undertaken. But if the [claimant], for example, has a real objection, which he articulates, to the proposed test, then the balance will come down in his favour".

11. There was also no disagreement that the court has power to order a stay pursuant to its inherent jurisdiction and under CPR 3.1(2) (f), whereby a stay can be granted until such time as the claimant has agreed to an examination or until they have undergone medical tests.

Submissions – the Defendants

12. The Defendants submitted that causation is key to the outcome of the claim and it cannot be adequately pleaded without examination. Under the first limb of the *Laycock* test it would be in the interests of justice and in accordance with the overriding objective to allow the Defendants to plead full Defences now, rather than having to amend later.

13. Under stage two, they asserted that the Claimant's objections had been inconsistent, inadequate and unreasonable. They asserted her only concerns were as to timings. They referenced the solicitors' correspondence outlined above, citing the agreement to be examined, the subsequent request for a domiciliary visit and then concern about delay. They noted that when an early medical appointment was offered, this was refused on the basis that such examination should only take place after exchange of liability witness evidence.

14. Finally, the Defendants referenced what they perceived to be wholly unnecessary delay and expense if the examination took place after exchange of lay witness evidence because they could then only plead holding Defences, which they would need to amend later. This, they said, would delay the narrowing of issues, and could disrupt standard directions that may be given at CCMC.

Submissions-the Claimant

15. Under stage one of the *Laycock* test, the Claimant submitted that the Defendants have not demonstrated that the interests of justice require submission to the examination now. They referenced the causation position outlined in the Letters of Response to the

claim, as set out above, demonstrating that the Defendants are able to plead to the allegations to a level of detail not uncommon in this type of proceedings. They referenced the normal way in which issues become refined through standard clinical negligence directions, allowing full documentary exchange plus witness evidence ahead of examinations and exchange of expert evidence. Furthermore they asserted that the Defendants have not explained how an examination now could assist in opining on the factual causation timeline.

16. The Claimant asserted that claimants frequently have co-morbidities, but that does not take cases out of the normal pathway for evidence gathering and the Defendants had not demonstrated any particular reason in this case.

17. Furthermore, the Claimant set out the potential implications of an early examination which could increase costs as the expert could well require another examination after seeing witness statements.

18. The Claimant pointed to the delay already in receiving Defences which were initially due by 3rd November 2022, with an agreed extension to 6th December and then a court order extending time until this hearing on 16th January. It is not in the interests of justice, they contended, to introduce yet more delay now pending examination, especially when such an examination could lead to a repeat request for further examination following lay witness evidence exchange.

19. As regards the law, counsel noted that the *Laycock* case, and the two other authorities in the bundle which followed it, concern absolute refusals to undergo a particular examination which is plainly a very different scenario from the instant one. Counsel also noted that the case law made it clear that it is for the Defendant who seeks the stay to satisfy the court why it should be imposed.

20. The Claimant criticised the Defendants for only producing a letter from their expert immediately before the hearing, seeking to explain his position more fully, as they had been requesting this for some time. The substance of the letter, they said, did not demonstrate any special reasons why this case should follow a different directions pathway to the normal one. Additionally they submitted that pre-existing back problems are an almost invariable feature in cauda equina cases.

21. Under stage two of the test, which in the present case they said overlaps with the interests of justice under stage one, they asserted a substantial reason for not undergoing the examination now, is because it is "likely" that the examination "may not yield" all the information needed, such that a second examination would be requested which would only increase costs.

22. Furthermore, the vulnerability of the Claimant was emphasised as a substantial reason for not subjecting the Claimant somewhat unusually to the potential prospect of two examinations by the causation expert, when a single one later could suffice. It was submitted that any examination will be intrusive, painful and distressing for her, and therefore the number of appointments should be minimised. In support of this contention, the Claimant relied upon the previously disclosed condition and prognosis report of Mr Desai at pages 23 and 24. On those pages Mr Desai clearly set out that, on his examination, the claimant had scored 9/10 on the British Society of Rehabilitation Medicine Depression Scale where a score of 10 is categorised as severe

depression and suicidal ideation. He noted that the Claimant struggles with suicidal thoughts, and that she had commented "It is so much to cope with cauda equina stuff". He recommended regular input from a clinical psychologist and access to psychiatry services to monitor medications (she was already receiving antidepressants at the time of his appointment).

My determination

23. Under stage one of the test, I cannot find that the Defendants have demonstrated that it is in the interests of justice to divert this case from the usual order of play in multi-track clinical negligence directions in the High Court, as currently referenced at paragraph 10.27 of The Queen's Bench Guide 2022 and available on the GOV.UK website. Such directions are considered at first case management conference following service of the Defence, and provide for subsequent exchange of lay witness evidence followed by exchange of expert witness evidence. The court is very familiar with litigation involving the development of cauda equina and the issues of comorbidity raised in this case are not unusual enough to require a different approach. There are frequently pre-existing back conditions in these types of case and the other features noted by the Defendants are not uncommon either.

24. As to a perceived unfairness for the Claimant to have the benefit of an examination before pleading, which the Defendants have been denied, that is pretty much hardwired into the CPR (by the requirement to serve a Condition and Prognosis report with Particulars), and into standard directions. The Defendants have acknowledged that the author of the Condition and Prognosis report may well not be the Claimant's primary causation expert (he is not a Neurosurgeon). To my mind there would need to be something exceptional to depart from normal directions concerning medical examination by an opponent's expert, as those have been designed to accord with the overriding objective; identifying a couple or so alleged inconsistencies of measurement in the initial disclosed report of the Claimant, does not in my view, mean that the interests of justice are not well served by refusing an examination now. I will return to this point in paragraph 27 and subsequently below.

25. I also accept the Claimant's submissions that there are important factual causation timelines which the Defendants can plead to now. The Letters of Response also demonstrate that the Defendants are able to form a view on causation already, and the standard of detailed pleading which they asserted they are required to produce, goes beyond what is regularly seen in cases such as this, and beyond what counsel for the Claimant said would be considered acceptable in this claim.

26. The case law relied upon references an absolute refusal to undergo an examination which is plainly not all fours with the current situation. Indeed, no precedent was supplied where a stay has been ordered in the present circumstances ahead of Defences. The application appears to have been drafted on the basis that the Claimant would not undergo examination until after causation reports had been exchanged. That is not the situation at all, and I do not impute that meaning to the pre-application correspondence. It is quite plain now in any event that the Claimant will undergo examination at the usual juncture.

27. Multiple examinations by an expert should be avoided where one can suffice. They expend time and money. The Defendants' expert referred to his experience in taking

medical histories such that he could not see why, following receipt of the Claimant's witness statement, he would need to examine again. However, counsel for the Defendants was not prepared to agree to a direction that the expert be limited to one examination only, if the examination went ahead now.

28. On the subject of delay, there may be delay down the line if the Defences have to be amended, but amendments may be necessary for any number of reasons following exchange of further evidence, so the situation is hypothetical. Right now there will be some further delay if the Defendants have to wait for an examination before concluding their pleading, although that may not be great depending on diaries. Delay, it is said, would not have occurred if the examination had gone ahead when previously offered, but the Claimant could not be compelled to undergo such examination without court order, and this early request is highly exceptional and, until the eve of the hearing, no explanatory letter from the expert had been produced which would be common practice. Again, I note this is in circumstances where I have been shown no authority to stay proceedings pending examination pre-Defence.

29. I have read the assertions about inability to finalise a report prior to examination in the Defendants' solicitor's correspondence and that of their expert carefully. It seems to me that there has been a confusion between the expert committing himself to a signed and disclosable report which will not happen until after an examination in any event, and the requirement for him to give his opinion privately to the Defence legal team so that they can draft the Defences which he will not be signing. The legal team will undoubtedly be experienced in drafting pleadings which will not go beyond what their experts, and the evidence then available, enable them to conclude and sign with a statement of truth.

30. Finally, I consider it has to be in the interests of justice to take account of the Claimant's vulnerability pursuant to the overriding objective. Although the Defendants criticised the Claimant for not specifically referencing vulnerability prior to this application, I cannot ignore the fact that one expert witness, whose duty is to the court above all else, has already opined in a report disclosed with service of proceedings, that the Claimant is suffering serious depression with suicidal thoughts. Counsel explained that she is willing to undergo examination at the normal time in a clinical negligence claim but does not wish to undergo multiple examinations, the potential for which is enhanced if I permit the Defendants' application. As I have noted above the Defendants could not commit to having one examination only, when I tried to explore that possible avenue, saying that they would revert to court for a direction if it was necessary for a repeat visit. If the Claimant is pushed to a point where her mental health deteriorates further, it is plain that there is even greater potential for delay in resolving the claim which may also be accompanied by additional cost.

31. Even if the stage one test had been satisfied, I am persuaded that the Claimant has demonstrated substantial reasons for declining the examination now. Her health is one of them; her anxiety cannot be characterised as minor. It has been submitted that she will find the examination distressing so efforts should be made to minimise this by reducing the number of times she may have to attend an expert where possible, and by ensuring that her lay evidence on relevant factual issues has already been served, to reduce her anxiety about forgetting material points in the "heat of the moment" when examination takes place. As referenced above, the Defendants criticised the

Claimant for not alluding to this in correspondence, but the period of time in which discussions took place between the request for an examination and the issuing of the application was very short, and the previously disclosed expert report clearly sets out the nature of the clinical problem. The vulnerability of the Claimant cannot be considered "imaginary" or "illusory". It is a substantial reason.

32. When balancing the interests of justice and the identified "substantial reasons" of the Claimant there is significant overlap on issues of delay and expense. There is no proven time saving overall, if I were to allow the application, it is only a possibility, but there could just as easily be delay if the examination does go ahead now and has to be repeated. The submissions on expense suffer from the same difficulty-they are not sufficiently evidenced to displace the normal order of evidence gathering under the RCJ model directions in clinical negligence claims. I am also satisfied that the Defendants will have a fair opportunity to complete their Defences now on the basis of evidence usually available at this juncture, and for their expert to conclude their reporting in the normal way following an examination, without the court needing to order an early examination. The substantial issue of the Claimant's mental health cannot be ignored; it is a real objection which firmly pushes the balance in her favour for resisting examination before exchange of liability witness statements in the usual way.

33. Accordingly the application is dismissed.