Neutral Citation Number: [2024] EWHC 1304(KB)

Case No: QB-2022-000091

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
CLINICAL NEGLIGENCE

Royal Courts of Justice Strand
London
WC2A 2LL

Date: Monday, 4th March 2024

Before:

MASTER SULLIVAN

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Between:

MAN	**Claimant**
- and –	
ST GEORGE'S UNIVERSITY HOSPITAL NHS FOUNDATION TRUST	**Defendant**

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MR EDWARD RAMSEY, Counsel, appeared for the **Claimant**
MR MATTHEW BARNES, Counsel, appeared for the **Defendant**

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JUDGMENT

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[Transcriber's note: transcript prepared without access to all case papers.]

MASTER SULLIVAN:

1. This is, my ex tempore judgment on the Claimant's application dated 6 November 2023 in respect of two witness statements and a witness summary served by the Defendant. The application is that I exercise my case management powers, under Part 32, to say that they should be excluded from trial, on the basis that they are not admissible evidence, in the sense that they are either evidence in respect of matters that are not in issue in the case or are impermissible opinion evidence in witness statements of fact.

2. In respect of the witness summary, the Defendant has made an application, properly, to rely on that witness summary – I say "properly" because it has been made before the deadline for the exchange of witness statements. The Claimant's application is that that summary be excluded, in part because Dr Glazebrook is not a witness who is an appropriate witness, who can give proper evidence, but also because the requirements under CPR 32.9 for a witness summary have not been met.

3. In terms of principle, although there seems to be a difference in principle between the parties on what the requirements of pleadings are, it seems to me there is no particular difference in terms of the principle of when witnesses of fact are allowed in clinical negligence cases to give opinion evidence.

4. There are two usual reasons: one is because they are a clinician of some sort, who has been accused of negligence, and they are setting out what they did and why; the other is because they are dealing with the *Bolitho* question, of: what, but for an omission, would have happened in fact and potentially why that would have happened, insofar

as there has to be a discussion of whether or not what would have happened would also have been negligent.

5. Dealing, first, with matters in issue in the case. It is the Claimant's position that in the particulars of claim, it is pleaded positively, at paragraph 13, that the Claimant was in extreme pain and informed the nurse practitioner that she saw – who I understand to be Nurse Jabeen – that she was in extreme pain.

6. In the allegations of negligence, there are various specific allegations of what Nurse Jabeen failed to do, which includes, at paragraph 37(d):

> "Failing to give any adequate consideration during the first afternoon attendance in Accident and Emergency of soft tissue infection being the reason for the Claimant to be in exquisite left lower leg pain."

7. There are also allegations of failing to have the Claimant examined by a senior emergency physician and then a failure to urgently refer.

8. It is said that the Defendant's defence has failed property to deal with whether or not the Claimant was in exquisite pain is in dispute.

9. In respect of paragraph 13 of the particular of claim, the defence pleads at paragraph 4, "Paragraphs 3 to 35 are admitted, insofar as they are consistent with the entries made in the medical records". I pause, to note that the description of "extreme pain" is additional to what is in the entry in the medical record. It could properly be said by the Defendant that it is not consistent with the entries, and that is the reason why the Claimant has pleaded it specifically.

10. So, returning to paragraph 4 of the defence, it says

> "Paragraphs 3 to 35 are admitted, insofar as they are consistent with the medical records, which the Defendant will rely on at trial, and save

> as aforesaid, they fall outside the knowledge of the Defendant and the Claimant is required to prove them."

11. In respect of the allegations of negligence, at paragraph 6(a) the defence pleads,

> "For the purpose of this action only, it is admitted there was a negligent failure to discuss the claimant with a senior member of the Emergency Department and thereafter to refer to the claimant to surgeons. In the circumstances, the Defendant does not respond further to the allegations of breach of duty, particularly as in paragraph 37, and if the Claimant intends to rely on them, she is required to prove them."

12. In respect of causation paragraph 7 of the defence pleads an alternative timeline as to what would have happened, but for the negligence, to that set out at paragraphs 39(a) to (d) of the particulars of claim. None of those pleadings specifically refer to pain, and there is a mop-up pleading in the defence "save as aforesaid, paragraphs 39(a) to (d) are denied".

13. Nurse Jabeen was the nurse who saw the Claimant and discharged her, rather than referring her on to somebody more senior. She has provided a witness statement, dated 15 October 2023, in which she says – as is not unusual and there is no criticism – that she does not recall the Claimant personally. She was asked to comment on the care she provided shortly after the event, and she says she has exhibited some comments, dated 16 August 2016 (I do not have a copy of those, but anyway, they are there, apparently) and in the witness statement, deals with her interactions with the Claimant at that time.

14. Paragraph 10 notes that she, "can see the Claimant states, at paragraph 13 [that must be a reference to the Particulars of Claim], that she told me she was in extreme pain. I cannot recall this phrase being used and if she was in pain, I would have administered pain relief." She did give the claimant paracetamol, I think, but there we go. She goes on to say "Additionally, if she had been visibly distressed from pain, then I would

have recorded this within the notes. But in fact, my record says she was not distressed."

15. She then goes on to deal with what her impression was and why she did what she did.

16. The Claimant's position is that none of those matters are now in dispute between the parties because there has been an admission that there should have been a referral, and there is no denial of the extreme pain and that insofar as there is a reference to a non-admission, we should look at CPR 16.5. That says that:

> "1) In the defence, the defendant must deal with every allegation in the particulars of claim stating—
>
> (a) which allegations are denied;
>
> (b) which allegations they are unable to admit or deny, but which they require the claimant to prove; and
>
> (c) which allegations they admit."

17. Where they deny it, the defendant has to put forward a different version of events if they intend to do so.

> "(3) If a defendant—
>
> (a) fails to deal with an allegation; but
>
> (b) sets out in the defence the nature of their case in relation to the issue to which the allegation is relevant,
>
> the claimant is required to prove the allegation.
>
> (5) Subject to paragraphs (3) and (4) a defendant who fails to deal with an allegation shall be taken to admit that allegation."

18. It is the Claimant's submission that this is not a proper case where the Defendant can say that they are unable to admit or deny the allegation of extreme pain and the reporting of that pain. That would only be the case if they set out a good reason for being unable to admit or deny, such as it was not within their knowledge or belief.

But they could have spoken to Nurse Jabeen, there is no suggestion they were unable to do so, and so they have failed to deal with the allegation because they do not fit within any of the other options allowed for by 16.5 and should be taken to have admitted it.

19. If the Defendant wants to put in issue that there was no extreme pain or complaint of the same, they will have to apply to amend their defence. They have not done so. So I should not permit the witness statement of Nurse Jabeen, on the basis that it does not go to matters which are in dispute.

20. Mr Barnes' position is that the pleading has put the matter in issue, by saying that the Claimant has to prove all the matters that are not consistent with the medical records and, having done so, then it is entirely proper for Nurse Jabeen to give that evidence. Obviously, I understand that what the Claimant's condition was, at all the different times throughout this process, may well be relevant to the causation issue of how far the infection had progressed and so what the ultimate outcome would have been but for the admitted negligence.

21. So the Defendant's position is that it is also clear in the defence where, in respect of causation, it is said that anything outside of the timeline that has been averred by the defendant is denied. Paragraph 48 of the defence pleads save as the defence has set out in respect of the causation position, everything is denied. The Defendant is entitled to require the Claimant to prove causation and to serve a witness statement on that matter in issue. The the solution to the problem would be to require the Defendant to amend the pleading. If the Claimant had had a problem, and they were saying, "You have to amend", why did they not say so earlier and not just today?

22. In respect of Dr Glazebrook, who is the doctor for whom a witness summary has been served, he worked as a consultant in Accident and Emergency at the time, and it is said that he is a *Bolitho* witness, dealing with what would have happened in A&E at the time, had there been a referral to the senior A&E person, and that means that he is a proper witness and all the matters that are set out in the summary are dealing with either what the practice was in A&E at the time, or what he would have done, had he treated the Claimant.

23. The objections to the witness summary that are on the basis that, first of all, it is not clear that he was on duty that day, and so whether he is a proper *Bolitho* witness in respect of what he would have done. Additionally, the witness statement in support of the witness summary application simply say he is unwell and on long-term sick leave and that is not good enough. There has to be some evidence as to what the history of attempts to get witness statements are, perhaps some evidence as to what sort of sick leave he is on – whether he is likely to be able to attend trial. If he would not have been the treating doctor in A&E, why did they not just get another statement from a different consultant, who was on duty at the time? There is not enough to meet the formal test.

24. On behalf of the Defendants, in respect of the application, it is said, that this is a sensitive matter and there is only so far that the defendant can go in explaining to the Court quite what the illness is. He is off work, and that is sufficient for the Court to say, well, that is good enough. It would be inappropriate and violate his Article 8 rights to a private life if there were any further details given.

25. In respect of Mr Vesely, Consultant Plastic Surgeon, he is clearly a potential *Bolitho* witness, and there is no dispute there. The issue between the parties is whether he

goes outside of permissible Bolitho evidence. The Claimant's application is to not allow reliance on his witness statement, but I think, in reality, it is not to allow reliance on large parts of his witness statement, rather than all of it. So for example, he gives some comment as to timing, and it is accepted that that is perfectly proper. Indeed, insofar as he gives evidence as to how he would approach a necrotising soft tissue infection surgery, in general, that seems to be that that is not disputed. The question is in respect of his evidence as to what he would have done in these circumstances.

26. The Claimant's position is, in this particular case, that is not permissible Bolitho evidence. It is stepping into the role of the expert because it requires him looking at certain evidence and then coming up with an opinion, as to what he would have done, and there is not a solid foundation, essentially, of what the Claimant's condition – or a non-disputed foundation of what the Claimant's condition – would have been at the time of surgery to enable him to do that.

27. In those circumstances, that part of the evidence, which gives his opinion as to what the level of amputation would have been, is opinion evidence, which the experts should be giving and not Bolitho evidence. Mr Barnes says, this is a classic Bolitho case. He would have done the surgery. He is entitled to say what he would have done and justify it, insofar as it is suggested that what he would have done is negligent, and that is what he is doing.

28. Taking matters in turn, it seems to me that the witness statement of Nurse Jabeen does deal with matters that are not properly in issue on the pleadings. The Defendant's position, that the complaint of extreme pain fell outside the knowledge of the Defendant and the Claimant is required to prove it, is not a proper pleading. Had the

Defendant spoken to Nurse Jabeen and asked the question earlier than it appears they did, they would have been able to answer that and would have properly been able to put it in issue.

29. It is right that in the commentary to the White Book, at 16.5.2, it says, "The language of non-admission should not be used and a practice of pleading numerous non-admissions can only be justified where a defendant is truly unable to admit or deny an allegation and so requires the Claimant to prove it. [Rule 16.5(1)] raises a positive duty for a defendant to admit or deny pleaded allegations which he or she is able to do so and so to prevent merely "a stonewalling defence with indiscriminate non-admissions". (Per Lord Justice Henerson in API North Ltd v Swiss Post International (UK) Ltd [2019] EWCA Civ 7.".

30. The commentary continues to say the same case went on to confirm, "There is no general obligation on a defendant to make reasonable enquiries of third parties at such an early stage of the litigation but instead, plead the defence on the basis of knowledge and information the defendant has readily available to him."

31. It seems to me that the allegations against the very practitioner who is alleged to be negligent is not, in these circumstances, an obligation to make enquiries of third parties. This is a vicarious liability case, and Nurse Jabeen should have been asked what she recalled. It seems to me it is not appropriate for a NHS Trust, in a clinical negligence case, simply to say, "Oh well, we have not been able to ask", particularly when I note that Nurse Jabeen, although I have not seen it, made a note relatively early on in investigations. It does not appear that there is any evidence that she had disappeared or there is any reason why the Defendant was unable to speak to her before drafting a defence responding to allegations of negligence against her.

32. In those circumstances, that there is an onus on the Defendants to plead properly, and if there is a matter that is of central importance, such as the level of pain that a claimant was feeling at a particular time, then that has to be positively pleaded.

33. I am not going to go further and deal with issues of whether or not the Defendant is able to amend their defence because it should be treated as an admission and therefore there would have to be an application to withdraw that admission. It seems to me entirely inappropriate. Mr Barnes makes the submission that it is in the interest of justice, that all proper allegations are before the Court at trial, and insofar as the Defendant wishes this to be part of the matters at trial, then an application will have to be made to amend the defence. I make no observations about the submissions in respect of whether or not the judgment in the case management hearing would preclude the Defendant from doing so. That is a matter for another day.

34. There is a purpose to pleadings, and it is to make clear what is in issue and what each party's case is on matters in issue. It is the scheme of Part 16, and always was, that if the Defendant is putting forward a different version of events, that that should be pleaded; and it has not been. The defence is in breach of part 16.5(1).

35. In any event "putting the claimant to proof" means just that. The Claimant must lead evidence to prove their allegation but the Defendant is not able to lead evidence on matters put in issue that way. That is consistent with the scheme of Part 16. It the Defendant is unable to plead because does not have knowledge of the issue, they can put to proof. If they have positive evidence they wish to rely on, they must plead a positive case.

36. In respect of Dr Glazebrook, it seems to me he is a potentially perfectly appropriate Bolitho witness, and the sorts of matters that are in his witness summary are exactly

the sorts of matters that one would see in a *Bolitho* witness statement. However, it is not clear to me whether he is properly a *Bolitho* witness because if he was for example on holiday for those two weeks, although the part of his witness summary as to what the general practice was may well be appropriate, the evidence that he seeks to give as to what he would have done, or not, would then not be proper *Bolitho* evidence. The point of *Bolitho* evidence is where you have the witnesses who would have been within the pool of doctors who would have treated but for the negligence. Then those doctors can give factual evidence of what they would have done, or if it is a general systems issue, then any doctor who worked there are the time can give evidence as to the general systems. It is entirely unclear to me in respect of the former, whether Dr Glazebrook is an appropriate witness or not. As I said, insofar as he gives evidence as to systems, it seems to me he is appropriate. I am not sure in respect of the rest. The majority of his witness summary does seem to me to be about what he would have done, rather than the systems. But it may be the parties can help me with that.

37. I have some sympathy with the issue that he is on sick leave, and quite what information should be given to the Court about that. The reality is, if somebody is on sick leave at the time the witness statements are due to be signed, then they will not sign them. Whilst it would be helpful for the Court to know a bit about the history of it, insofar as that can properly be disclosed, there are merits in Mr Barnes' submission, that if somebody is off sick, so that they are unable to attend the Trust, they are not going to be able, in all probability, to give any witness statements.

38. So in respect of the witness summary, insofar as it deals with systems, it seems to me it is appropriate, insofar as it deals with what he would have done, I have insufficient

information to be able to give permission in respect of that.

39. In respect of Mr Vesely, the issue is that it is not common ground between the parties, as far as I understand, as to what the Claimant's condition would have been at the time of surgery. In *Bolitho*, the question was, "Would there have been intubation or not?" It does not seem to me there was any significant dispute about what the condition of the Claimant would have been at the time.

40. Mr Vesely's witness evidence makes assumptions about what the Claimant's condition would have been at the time, although they are not entirely clearly expressed. But insofar as saying a debridement at any stage would have necessitated an excision of those muscles, presumably being the muscles of the upper calf, which would have made it impossible to perform a below the knee amputation, that is making the assumption as to the state of the muscles at the time of the condition. It seems to me that that is an issue in dispute.

I also have concerns that whilst I fully accept that it was the Defendant's intention to ensure that Mr Vesely was not making a hindsight judgement, and trying to limit what he had seen, to what he would have had, had he come upon the Claimant on that night, in fact, he has relied on matters later in the timeline. For example, the Claimant's description in the Particulars of Claim include a red area spreading from the top of her calf to below her knee at 06.00, which is five hours after the time at which surgery would have occurred, on the Defendant's case. In addition there is reliance on the photo at 6.27 am. So there are, in fact, matters that have been given to him, which occurred later than the time when he would have undertaken the surgery but for the negligence. I am not clear – I do not know whether the "50p piece at four" is at 4.00

am or 4.00 pm the day before so I will leave that out of consideration because I do not know. I think it must be at 4.00 am, actually, looking at the timeline of it.

41. Had he been given, for example, a number of hypotheticals and said, "What would you do in this circumstance?", then it seems to me that would be appropriate evidence. But where he has gone over the line, it does seem to me he has gone over the line, is in his witness evidence, dealing with what it is properly the remit of the experts, and only the remit of the experts, to assist the judge in deciding what the Claimant's condition would have been at the start of surgery.

42. It seems to me that insofar as he does that in paragraph 7 and paragraphs 9 and 11, it sems to me that is inadmissible. So had he said, "If there had been this much damage, I would have done this. If there had been a bit more damage, I would have done that", it seems to me, that would have been perfectly admissible. It is that stepping over the line, to give opinion as to what the condition was.

43. Paragraphs 13 to 15.2 seem to me completely permissible because that is about his general approach, and it seems to me that he is entirely entitled to say that, because that would feed into the judge's knowledge of what he would be likely to have done on the day.

44. Paragraphs 16 to 17 deal with an allegation about something that would have happened by a plastic surgery SHO in the Emergency Department. HIs position is that he would not have undertaken it, had he been the doctor who had been called, who he might have been. It seems to me that that, whilst slightly nuanced, I think that is okay, rather than having to call an SHO, who was there on the night. If the consultant says, "I would not have done that in the Emergency Department", it seems to me that is okay.

JUDGE SULLIVAN: Mr Barnes, if the Defendant wants to get Nurse Jabeen's evidence in, then you are going to have to apply to amend your defence.

MR BARNES: So Master, can I just deal, first of all, in terms of Dr Glazebrook.

JUDGE SULLIVAN: Yes? Insofar as systems, it is fine. But insofar as he is, at this stage – unless there is something that you can say to me, "No, no, he was working that day" ---

MR BARNES: I am not going to make any submissions about that now. I think the time for that has passed. But I just want to make sure that I understand which of the paragraphs come out and which stay in.

JUDGE SULLIVAN: *(Inaudible)*. That is a point, yes.

MR RAMSAY: Master, I had a look at this as you were speaking.

JUDGE SULLIVAN: Yes?

MR RAMSAY: 4(a), I think, deals with systems. "He would expect the Trust nurse practitioners to discuss".

JUDGE SULLIVAN: Yes.

MR RAMSAY: But then I think (b), (c), (d), (e), (f), (h) ---

JUDGE SULLIVAN: Well, no, not all of (f).

MR RAMSAY: Not all of…?

JUDGE SULLIVAN: No, because "an X-ray will take about an hour to arrange" is fine.

MR RAMSAY: Yes, so he would have – yes, so anything starting with the word, "he", any sentence starting with the word "he", I would imagine.

JUDGE SULLIVAN: Yes, (g), probably on any view is not what – well, I suppose if he is saying this is what he would have done. But anyway, the (i) is okay, because that is systems.

MR RAMSAY: Yes, okay.

MR BARNES: So as I understand it, what stays in ---

JUDGE SULLIVAN: Yes?

MR BARNES: --- is 4(a).

JUDGE SULLIVAN: (a).

MR RAMSAY: Yes, and also 1, 2 and 3. Obviously, 1, 2 and 3.

MR BARNES: Sorry, hang on a second. 4(a) stays in?

JUDGE SULLIVAN: Yes.

MR BARNES: Then I think that (f) second and third sentence stay in, on the basis of what you have just said, I think, Master.

JUDGE SULLIVAN: I think the timings, I am not sure whether we can deal with the time.

MR BARNES: No, those appear to be system related.

JUDGE SULLIVAN: Yes, but it refers – I am looking at it refers back because it says, "It would have been available by approximately 6.30". That is on an assumed timeline.

It may be, I think what he is saying is that it would have been an hour after – I think, he is basically saying, "It would have been available in about an hour".

MR BARNES: Yes, I think that is right.

MR RAMSAY: Yes, I think he is saying, he would have requested an X-ray ---

JUDGE SULLIVAN: At 17.30.

MR RAMSAY: --- and they take about an hour to arrive.

JUDGE SULLIVAN: Yes.

MR RAMSAY: So Master, I do not have a problem with the second, sorry the third sentence.

JUDGE SULLIVAN: Yes.

MR RAMSAY: "An X-ray would take about an hour to arrange and for the results to be available." But I think the sentences either side of that ---

JUDGE SULLIVAN: Yes.

MR BARNES: Well, okay, so ---

MR RAMSAY: Well, yes. The sentences either side, yes.

MR BARNES: Well, I really do not want to debate this. I just want to make sure I am clear on what it is.

JUDGE SULLIVAN: No, so it seems to me that ---

MR BARNES: (f), second sentence.

JUDGE SULLIVAN: (f), "An X-ray would take about an hour to arrange and for the results to be available". Yes, that is fine.

MR BARNES: Yes.

JUDGE SULLIVAN: Then (i) is in.

MR RAMSAY: Yes.

MR BARNES: Thank you, Master. That is understood.

(Hearing continues)

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