Case No: QB/2015/0498

Neutral Citation Number: [2016] EWHC 134 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2016

Before :

MR JUSTICE GARNHAM
- -

Between :

Zeb	**Claimant**
- and -	
Frimley Health NHS Foundation Trust	**Defendant**

- -
- -

Matthias Kelly QC and Daniel Stedman Jones (instructed by **Chambers Solicitors**) for the **Claimant**
John Witting QC (instructed by **Weightmans**) for the **Defendant**

Hearing dates: 27th January 2016

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Judgment

Mr Justice Garnham :

1. On 16 October 2015 Master Cook dismissed the claimant's application for an interim payment. On 17 November 2015 I gave the claimant permission to appeal that order. I heard both counsel on that appeal yesterday afternoon. I give this judgment having considered the matter overnight.

2. The claimant claims damages against the Defendant Trust for personal injuries she alleges she sustained as a result of clinical negligence for which she says the Trust was responsible, at Wexham Park Hospital in April and May 2011. As a result of that negligence, the claimant alleges, her condition of tuberculosis meningitis went undiagnosed and untreated until 9 May 2011 by which time she had suffered devastating brain injury which has left her severely disabled.

3. Proceedings were commenced on 15 April 2014 and in 2015 the claimant made an application for an interim payment in the sum of £750,000 to fund new accommodation. That application was refused by Master Cook at a hearing on 2 June 2015. That refusal was not appealed by the claimant.

4. On 16 October 2015 the claimant applied again for an interim payment, this time in the sum of £175,000 which she alleged was necessary to fund a rehabilitation assessment recommended by Prof Kischka, her consultant neurological rehabilitation expert. Master Cook refused that application, observing that the claimant had not appealed his earlier ruling and had not been able to point to any development since that date relevant to the material provisions of the CPR, that since contributory negligence was pleaded the trial judge would be entitled to make a deduction of anywhere between 0 and 100% and that the plea of novus actus interveniens, if established at trial, would provide a complete defence.

The History

5. To determine the merits of the appeal as it is now advanced, it is necessary to have regard to the appellant's history.

6. She moved to the United Kingdom from Pakistan on 16 April 2011. On 25 April 2011 she visited the Accident and Emergency Department at Wexham Hospital complaining of headache, abdominal pain and chest pain. She was discharged the same day. On 29 April 2011, she returned to the A&E department reporting joint pain and vomiting in addition to the previous symptoms. She was again sent home with a plan that she should be followed up at her GP surgery with the recommendation that she be referred to neurology outpatients.

7. The claimant alleges that she should have been admitted for further tests on 29 April 2011. As it was, the claimant attended her GP on 3 May 2011 and then returned to Wexham Hospital on 9 May 2011. She was admitted and the following day a lumbar puncture was performed. She was admitted to intensive care, incubated and ventilated. On 11 May 2011 she was diagnosed with TB meningitis. Later that day she was transferred to the John Radcliffe Hospital in Oxford for further care. By the following day it was plain that her prognosis was very poor. On 25 May 2011 her consultant, Doctor Kearns, noted that she had suffered "*devastating neurological injury due to tuberculosis meningitis*".

8. The claimant alleges that her treatment at Wexham Hospital on 29 April 2011 and 9 May 2011 was negligent. She alleges that but for that negligence her TB would have been recognised at an early stage, she would have been diagnosed and treated. The likelihood is, she says, that had that appropriate treatment been given she would have made a full recovery with no significant neurological sequelae.

9. Further she alleges that her treatment on 9 May 2011 was negligent. It is said she should have been admitted and referred for immediate treatment with anti-TB drugs and steroids, that had that occurred it is likely she would have avoided the onset of severe TB meningitis and made a substantial, probably complete, recovery.

10. By their defence, the defendants admitted that the claimant should have been admitted by the on-call medical team for further investigations on 29 April 2011. It is agreed that those investigations would have included a lumbar puncture and urgent MRI scan. The defendants further admit that had they not been in breach of duty, a diagnosis of tuberculosis meningitis would have been made on or about 29 April 2011, an appropriate course of treatment would have been commenced and the claimant would have made a full recovery without any permanent neurological sequelae.

11. The defence was significantly amended in March 2015 following disclosure of material relevant to the claimant's immigration history. The defendants now alleged that the claimant was guilty of contributory negligence and pleaded a defence of novus actus interveniens. It is said that on 7 February 2011, in Pakistan, a tuberculosis detection programme examination form was completed for the claimant, and that a consultant radiologist certified on that form that a chest x-ray had identified an abnormality consistent with TB infection. The defendants allege that a copy of the x-ray and a referral letter was given to the claimant and that she signed a patient's declaration confirming that she had been informed of the need for treatment. It is said that she was advised to provide a copy of the x-ray to the treating physician. The referral form consisted of a letter indicating that the Applicant's x-ray dated 31 January 2011 was found to be abnormal suggestive of pulmonary TB.

12. The defence goes on to allege that on 12 February 2011, in Pakistan, the claimant underwent a series of blood tests which indicated typhoid fever infection and other abnormalities. Further it is said that on 9 March 2011 the claimant presented to the Allama Iqbal Memorial Hospital with a severe headache and nauseousness. She also presented at a second hospital called the Fauji Foundation Hospital on 14 March 2011 where the clinical impression was noted as "*tuberculosis meningitis??*". There was a further hospital visit on 24 March 2011 where TB meningitis was apparently recorded as a diagnosis.

13. Against that background the defendants allege that the claimant had been diagnosed with probable TB meningitis, for which she had been proscribed a one year course of treatment, before she presented at the defendants' hospital in April 2011. In those circumstances it is alleged that the claimant was guilty of contributory negligence in failing to continue with the course of treatment proscribed in Pakistan, in failing to draw to the attention of the defendants' clinicians the history described in the defence, in failing to inform the defendants of the abnormality on the chest x-ray and of the working diagnosis of tuberculosis meningitis and in wrongly informing the defendants on 29 April 2011 that the tests she had undergone in Pakistan had been normal.

14. The defence goes on to assert that in the absence of the claimant's own negligence her TB meningitis would have been satisfactory treated and she would have made a full recovery. The defence concluded by alleging that the claimant's own negligence "*represented a novus actus interveniens which broke the chain of causation between the defendants' admittance of breach of duty and such injury, loss and damage as she has sustained*".

15. It is also material to note that the claimant's immigration status in the United Kingdom is far from settled. She entered the UK on a student visa which has long since expired. Accordingly she is presently here unlawfully. Both she and her husband have made a number of applications and pursued a number of appeals seeking permission to remain the UK, the last of which, an appeal to the upper tribunal, was determined against them on 28 July 2015. An application for permission to appeal to the Court of Appeal against that decision was refused on the papers on 18 November 2015 and, I was told in argument, is not being pursued orally.

16. I was told by Mr Mathias Kelly QC, who represents her, that the appellant is launching a fresh claim seeking leave to remain on human rights or humanitarian grounds. There is no clear indication as to when that application will be determined, but, Mr Kelly says, if it is unsuccessful, further appeals will be launched.

The Competing Arguments

17. Mr Kelly argues that Master Cook misapplied the test in CPR Part 2 25.7(1)(c). He says that CPR 25.7(1)(c) was met in this case because the Court could be satisfied that if the claim went to trial "*the claimant would obtain judgment for substantial amount of money*". It is said that the rule imposed an obligation on the Master to make a decision whether or not the claimant was likely to recover substantial damages.

18. It is argued that the novus actus claim is hopeless because the new act proceeded, rather than postdating, the defendants' negligence. It is said that whilst the Master was right to take into account contributory negligence, he should have reached a conclusion that contributory negligence was modest, and, on any view, most unlikely entirely to extinguish the claim.

19. Finally it is said that an interim payment of £175,000 would be a reasonable proportion of the damages the claimant would be likely to recover applying the principle set out by the Court of Appeal in Eeles v Cobham Hire Services Ltd. [2009] EWCA Civ. 204, a case to which both counsel referred.

20. In response, the defendant contends that the Master was right in his approach. Mr John Whitting QC, for the defendant, contends that there are no grounds on which the Master's reasoning can be impeached. Mr Whitting says that liability remains substantially in dispute because of the claimed novus actus and the contributory negligence. Mr Whitting asserts that it will be the defendant's case that the contributory negligence in this case should be assessed at 100%.

21. The defendant further contends that, even if the conditions precedent to the making of an interim payment under Rule 27 are satisfied, applying the assessment principles in Eeles should lead the Court to refuse the appeal. It is said that, applying the first stage identified in Eeles, only the claims for general damages, past loss, interest and future

accommodation should be taken into account in assessing what would be a reasonable proportion of the likely final award to make the subject of an interim payment. It is suggested that an award for general damages would be substantially less than £200,000, that there is no viable claim for past care and that, given the claimant's current accommodation in a state funded care home, there is no room for an allowance to be made for future accommodation.

22. If, contrary to his primary submission, it were held that stage two of Eeles were to be reached, Mr Whitting says the claimant's uncertain immigration position makes any assessment of future loss wholly speculative.

Discussion

23. Rule 25.7 RSC provides as material

> "*(1) The court may only make an order for an interim payment where any of the following conditions are satisfied:*
>
> *...*
>
> > *(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim…*
>
> *(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.*
>
> *(5)The court must take into account—(a) contributory negligence; …*"

24. The appellant seeks to rely on sub paragraph (c). To do so he must satisfy the court that if the claim went to trial the claimant would obtain judgment for a substantial sum. The burden of proof is on the claimant and the standard of proof to which the court must be satisfied is that of balance of probabilities. It follows that I must put myself in the hypothetical position of being the trial judge and must be satisfied that the claimant would in fact succeed. A mere likelihood is not enough. It is a high burden that the appellant must discharge (see the commentary to the CPR at 15-104).

25. Faced with the competing arguments in this case, the Master was obliged, as I am now, to reach a judgment as to whether he was satisfied that the claimant would obtain judgment. I accept Mr Kelly's submission that in such circumstances the Judge or Master is not entitled to say that the mere pleading of novus actus or contributory negligence disentitles the claimant from succeeding. The Master correctly acknowledged in argument that pleading contributory negligence in a case where the appropriate deduction is well established – as in the case where an injured passenger is not wearing a seatbelt – will not prevent the making of an interim payment; the Court will take the usual deduction into account in accordance with Rule 25(5). In

other circumstances too the mere fact that contributory negligence is pleaded, or novus actus is pleaded, does not mean that the Court will be excused from what is often a difficult exercise of judgment in determining whether at trial the claimant would succeed.

26. That being so, it falls to me to reach a judgment as to whether contributory negligence or novus actus, on the facts of this case, would provide a complete defence.

27. In my judgment it cannot be said that the defendant's factual case on which these arguments are advanced is unfounded. The documents disclosed by the claimant and the defendant's witness evidence provides substantial support for that case.

28. Of particular importance is the witness evidence of Dr Ali Qureishi, a locum foundation 2 doctor working in the A&E department at Wexham Park Hospital at the time of the claimant's attendance on 29 April 2011. He says in a witness statement supported by a statement of truth which he has signed, that he spoke to the claimant after she had presented at A&E on 29 April 2011. He explains that he is fluent in English and Urdu and he was able to speak to the claimant in her native tongue. He says she told him that her symptoms had started three months previously and that she had been admitted to a hospital in Pakistan for an investigation which had included a CT of her head, a lumbar puncture "*and a lot of other tests which she and her husband told me had been all clear*". He explains that he then discussed the case with a registrar and consultant. It was on that basis that the decision was made that the patient "*was possibly suffering from chronic headaches requiring further investigation and that she should also be investigated for TB, both as an outpatient*".

29. Dr Qureishi goes on to say that he is confident that "*the patient did not tell me that in Pakistan she had had a chest x-ray which was suspicious for TB. I was not aware of any ... pre-departure tuberculosis investigations that may have been positive for TB. The patient also did not tell me that she had been treated with anti-tuberculosis medication in Pakistan, in fact she and her husband specifically denied this on questioning*".

30. On contributory negligence, I have no hesitation in rejecting Mr Kelly's argument that because the claimant attended the hospital and put herself in the hands of experienced clinicians there can be no contributory negligence. The need for an accurate history from a patient is fundamental to any medical assessment, especially in circumstances such as the present. However, given that the defendant has admitted breach of duty on 29 April 2011, I am satisfied that contributory negligence would not be found to be 100%.

31. As regards what Mr Whitting calls novus actus interveniens, the position is potentially rather different. Self-evidently I am not in a position to make a final judgment on the facts or the law – that will turn on the testing of evidence and submissions at trial. I have to do the best I can on the limited material available at this stage.

32. First, it seems to me that the Latin tag used by Mr Whitting is unhelpful and inaccurate. This was not a new act intervening between the defendant's breach of duty and the damage, at least not substantially. What in substance is being alleged is that the claimant's conduct, both in Pakistan and on her arrival at the hospital, constituted a complete and sufficient cause for the injury she subsequently suffered. And, it is

alleged, that was the first such cause in time. The concept of successive sufficient causes are discussed in Clarke and Linsell on Torts (21st edition) at paragraph 2-96. The learned authors write:

> "*Where there are two simultaneous independent events, each of which would have been sufficient to cause the damage, the 'but for' test produces the patently observed conclusion that neither was a cause. The only sensible solution here is to say that both caused the damage. Where the two events are separated in time, the simple answer is that the first event should be treated as the cause. This is normally the case where both events are tortuous…*"

33. The authors go on at 2-102:

> "*The net result of the cases involving supervening events is that where there are successive sufficient causes of damage where both events are tortuous, cause or responsibility will be attributed to the first tort ...*"

34. If it is right that the claimant received a probable diagnosis of tuberculosis in Pakistan a few weeks before she travelled to the UK, with prescribed treatment both for the first ten days and then for the following year, that she failed to take that treatment or request its provision, that she was asked to pass the referral letter to subsequent treating clinicians and did not do so, and that when asked at Wexham Park Hospital whether her recent tests in Pakistan were normal, she said "*yes*", then it seems to me that, at least arguably, she was negligent. What is more, that negligence occurred not just in Pakistan but continued when she reached the UK and when she visited Wexham Park Hospital.

35. In those circumstances there is an argument of reasonable substance that the claimant failed to use reasonable care for her own safety. Even if not strictly speaking "tortious" (because her carelessness was not a breach of a duty to another), there is a proper argument that her own negligence was the operative cause for her subsequent illness and injury. Furthermore, it can fairly be argued that the chain of causation between her negligence and her injury was not breached by the defendant's negligence because it continued throughout and materially affected the defendant's conduct. In those circumstances there is a proper argument that the rule identified in Clarke and Linsell - to the effect that, in the case of successive sufficient causes, the first should be regarded as the one to which liability attaches - should apply. That, arguably, would provide a complete defence and would disentitle the court from making an award under rule 25 (1) (3).

36. In my judgment there is enough in that point to mean that I cannot, on the present state of the evidence and argument, be satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money.

37. That must mean this appeal fails. However, in case the matter goes further, I briefly set out what my conclusions would have been if I had been satisfied that the claimant would establish primary liability.

38. Had I reached the alternative conclusion on what has been called novus actus, I would have held that there was an argument of real substance that the court would find the claimant guilty of contributory negligence. I could not be confident that the claimant would do better than a finding against her of 50% contributory negligence. After all, on the defendant's case, her failure to follow the Pakistani medical advice and her failure to inform the English doctors of her condition, diagnosis and treatment would have been a serious failure and would have been of substantial causative potency.

39. I would have held that general damages for pain, suffering and loss of amenity for a claimant who, at least arguably, is only minimally conscious was likely to be £175,000, and that it was impossible to be confident that the past care claim - to reflect the additional assistance provided by the claimant's husband over and above the care provided by the care home - would be more than £10,000. Accordingly, allowing for a modest award of interest on general and special damages, the claim to date could not confidently be valued at more than £190,000.

40. The claim in respect of future loss, and in particular the claim for future accommodation costs is, in my judgment, simply impossible to value given the real uncertainty about the claimant's immigration status.

41. Considering matters as they are at present, the claimant has no right to remain in the United Kingdom, her appeals have failed and the Court has no evidence about the nature or prospects of the new claim for a right to remain. There can be little doubt, if the claimant is removed to Pakistan, that she would face additional costs in obtaining suitable accommodation. But I have precisely no evidence as to what those costs would be and I cannot possibly speculate on that in a way that would enable me to reach a conclusion favourable to the claimant within the terms of order 25.

42. Even as regards the claim that the present care arrangements in England are inadequate for the future, there is a serious issue to be tried and I would simply be speculating if I tried to assess what the outcome of that issue was likely to be.

43. In those circumstances I cannot be satisfied that the claimant would obtain judgment for future accommodation in any identifiable sum at all.

44. Precisely the same considerations apply to all other aspects of future loss, had it been necessary to consider stage two of the Eeles approach to interim payments. It would have been a matter of pure speculation how the balance of the claim should be valued and I would not have been in a position to order the payment of any interim payment, regardless of the purpose for which it was sought, based on other aspects of future loss.

45. In those circumstances, had I not found that there was a properly arguable defence based on what, for convenience, has been called novus actus, I would have been amenable to making an interim award, not in the sum sought, but for a reasonable proportion of 50 % of £190,000. I anticipate my award would have been in the sum of £75,000.

46. As it is, for the reasons I have set out, this appeal must fail.