



Neutral Citation Number: [2019] EWHC 5 (QB)

Case No: HQ17P03420

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 4 January 2019

**Before:**

**DEPUTY MASTER HILL QC**

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**Between:**

**STEPHEN MAYS**  
**(a Protected Party by his Litigation Friend, the Official Solicitor)**

**Claimant**

**-and-**

**DRIVE FORCE (UK) LIMITED**

**Defendant**

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**Bernard Doherty (for the Claimant)**  
**Ronald Walker QC (for the Defendant)**

Hearing date: 5 December 2018

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**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.

## **DEPUTY MASTER HILL QC:**

### ***Introduction***

1. This is a personal injury claim arising out of an accident the Claimant sustained on 12 June 2013, when he was working as a transporter lorry driver for the Defendant. On that day he was on top of the deck of the lorry above the cab. He leant on the top deck safety rail which unbeknown to him was defective. It snapped causing him to fall approximately 3 metres. The Defendant admitted liability through its insurers on 3 April 2014. The Claimant has sustained a traumatic brain injury and orthopaedic injuries as a result of his accident, which has had a catastrophic effect upon his life. He does not have capacity to conduct the litigation or manage his financial affairs. He has a clinical case manager, support workers and therapists working with him. He has been unable to return to paid employment since the accident and his marriage has broken down.
2. The case came before me on 5 December 2018 for a Costs and Case Management Conference. All matters were dealt with on that date, save for the issue of whether the parties should be granted permission to adduce expert evidence in the discipline of life expectancy. I directed that further written submissions should be made on that issue and those have now been provided and considered.
3. The Defendant argues that permission should be granted. The Claimant opposes that course.
4. It is pertinent to note that by agreement the Claimant has permission to rely on written evidence from a Consultant Neurologist, a Neuropsychologist, a Consultant Neuropsychiatrist, a Consultant Orthopaedic Surgeon, a Consultant Ophthalmic Surgeon, a Care and case management expert and a Deputy Cost expert. The Defendant has permission to rely on written evidence of a Consultant Neurologist, a Consultant Neuropsychologist, a Consultant Ophthalmic Surgeon, a Care and case management expert and a Deputy Cost expert.
5. It is also relevant that the parties agree that this is a claim of substantial value, the Defendant suggesting that it is in the region of £1-2 million and the Claimant that it is over £2 million. The cost of instructing a life expectancy expert has been cost budgeted at around £15,000 per party. The Claimant does not oppose the instruction of life expectancy experts on proportionality grounds.

### ***The Defendant's submissions***

6. The Defendant's submissions can be summarised thus:
  - (i) If a Claimant has co-morbid conditions in addition to the index event that affect his life expectancy, the Court should have access to expert evidence on the issue. This was accepted by the Court of Appeal in *Royal Victoria Infirmary and Associated Hospitals NHS Trust v B (a child)* [2002] PIQR Q10 and is an approach that has been followed in other cases such as *Sarwar v Ali* [2007] EWHC 274 (QB) (Lloyd-Jones J), *Burton v Kingsbury* [2007]

EWHC 2091 (QB) (Flaux J) and *Lewis v Royal Shrewsbury Hospital NHS Trust* [2007] 1 WLUK 628 (Sir Alistair MacDuff);

- (ii) There are a range of factors in the Claimant's case which are potentially relevant to his life expectancy other than the accident itself. The Consultant Neurologists already instructed by the parties have both acknowledged this. Moreover, while the Defendant's Consultant Neurologist, Dr Oliver Foster, has given a view on the impact of the Claimant's smoking on his life expectancy, he made clear that he would defer to another expert on the issue of the impact of his ulcerative colitis on his life expectancy. He has also indicated that "*such reductions in life expectancy are not strictly additive and I would defer to life expectancy expertise with regard to quantification of his overall reduction in life expectancy*". Accordingly, the Neurologists are not able to fully address the life expectancy issue;
- (iii) In contrast, in his report dated 21 June 2017, Professor Bowen-Jones has considered the impact on the Claimant's life expectancy of his cigarette smoking, his hypertension, his obesity and his colitis. Adopting a statistical approach, he has assessed the Claimant's life expectancy ignoring the epilepsy risk to age 73.5, which would represent a reduction of approximately 11 years. This is therefore a significant issue which could substantially affect the future loss element of the claim and the Defendant is entitled to rely on this evidence; and
- (iv) Professor Bowen-Jones has not examined the Claimant personally but has a clinical background and an expertise in statistics, and is qualified to give this evidence. He has provided evidence in at least one other case, *Wolstenholme v Leach's of Shudehill Ltd* [2016] EWHC 588 (QB). Any challenges to his expertise or ability to give reliable evidence are matters for the trial judge.

### ***The Claimant's submissions***

7. The Claimant's submissions can be summarised thus:

- (i) The cases referred to by the Defendant do not support common practice of permitting life expectancy evidence to deal with matters extraneous to the tort. Life expectancy is generally treated as a clinical matter. In the cases relied on by the Defendant the life expectancy evidence generally came from clinicians: in *Sarwar* and *Burton*, for example, which were both cases involving tetraplegia, the experts were both spinal injury surgeons;
- (ii) Separate statistical evidence is normally reserved for cases in which the clinical experts interpret the data in a fundamentally different way;
- (iii) Matters such as smoking and mild hypertension are common conditions and the Consultant Neurologists instructed by each party are best placed to consider the impact of these factors on the Claimant's life expectancy evidence;

- (iv) If Professor Bowen-Jones' evidence is permitted in this case, it would be to permit a hitherto uncommon practice of permitting life expectancy evidence to deal with non-accident factors. It would lead to him or a similar expert being instructed in all cases, and this would be contrary to the good administration of justice;
- (v) Professor Bowen-Jones' statistical approach derives from the insurance context and is not necessarily validated in personal injury claims; and
- (vi) His evidence contains a good deal of speculation around issues such as whether the Claimant's obesity would have necessitated retirement from HGV driving at aged 60.

### ***Discussion and conclusions***

8. The caselaw makes clear that in an appropriate case the Court should consider whether factors other than the index event have impacted on the Claimant's life expectancy, and is likely to be assisted by expert evidence in that regard. The issue at the heart of this application is who should provide that expert evidence.
9. In the *Royal Victoria Infirmary* case, statistical evidence had been provided by a Professor Strauss. Difficulties had been caused by the fact that no statistical evidence had been adduced by the Claimant and Professor Strauss had not been called to give oral evidence. Tuckey LJ did not accept the argument that the customised life table prepared by Professor Strauss based on his Californian database should be given the status of the tables produced by the government actuary. However, he held that such evidence is not necessarily inadmissible: "...[i]n an appropriate case it may well provide a useful starting point for the judge...Such evidence, together with medical evidence, should provide a satisfactory inter-disciplinary approach to the resolution of issues of the kind which arose in this case" (paragraph 21). Sir Anthony Evans held that statistical evidence of the sort given by Dr Strauss "is both relevant and admissible and the judge must take account of all the evidence, including this, when deciding what assumption he should make as to the future lifespan of the Claimant" (paragraph 36). He went on to suggest that Courts should primarily be guided by clinicians, but that statistical evidence could play its part (paragraph 38). Thorpe LJ also did not accept that judges had to rely on clinicians alone for this evidence and they were entitled to receive whatever expert input they felt was of assistance, in an inter-disciplinary way (paragraph 46).
10. In *Lewis*, Sir Alistair MacDuff described the "bottom up" and "top down" approaches to assessing life expectancy. He held that that statistical evidence was highly relevant to the issues he had to decide and provided a "good guide or a starting point" for the likelihood of survival (paragraph 101), albeit that he then went on to consider the criticisms that had been made of it.
11. In *Wolstenholme*, HHJ McKenna (sitting as a judge of the High Court) had admitted the evidence of Professor Bowen-Jones but ultimately preferred the life expectancy evidence given by the opposing expert.

12. All of these cases suggest to me that statistical evidence of the sort provided by Professor Bowen-Jones in this case can be admissible in an appropriate case, alongside the evidence given by the clinicians. There is a basis for concluding that such evidence may assist the trial judge in this case, given the number of potential co-morbid factors in issue, and given that the Consultant Neurologists have not so far felt able to address them all. This is a high value claim where the evidence may make a significant difference to quantum. Accordingly, the parties should be entitled to rely on this sort of evidence, and the addition of this expertise is proportionate. I am not persuaded by the “*floodgates*” arguments hinted at by the Claimant. Granting permission to rely on life expectancy evidence in this case is in my view consistent with the broad principles set out above. Ultimately it will be a matter for the trial judge to determine whether statistical evidence is of assistance, and to consider any challenges that are made to the credibility of the evidence. For all these reasons I grant both parties permission to rely on expert life expectancy evidence.