Neutral Citation Number: [2020] EWHC 1296 (QB)

Case No: HQ18C03562

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2020

Before :

THE HONOURABLE MRS JUSTICE LAMBERT

- -

Between :

Gifty Quaatey **Claimant/Appellant**

- and -

Guy's & St Thomas' NHS Foundation Trust **Defendant/Respondent**

- -

The Appellant appeared in person
William Wraight (instructed by **Bevan Brittan**) for the **Respondent**

Hearing date: 29 April 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Thursday 21 May 2020.

MRS JUSTICE LAMBERT:

1. This is an appeal from the Order of Master Cook of 21 May 2019 striking out the Claimant's action for damages for personal injury arising from clinical negligence on the basis that the expert medical evidence relied upon by the Claimant did not substantiate the claim; although not expressed in his Order, the Master also determined that, had he not struck out the claim, he would have entered summary judgment for the Defendant because of the very long delay between the alleged negligence and the commencement of the action in 2018 and the effect of that delay on the cogency of the evidence. The Claimant appeals the Order with the leave of the single judge following an oral renewal of her application. Throughout this judgment, I refer to the Claimant and the Defendant, rather than Appellant and Respondent.

2. At the hearing before me, which was conducted by telephone pursuant to CPR PD 51Y, the Claimant appeared in person (having acted as a self-represented litigant throughout proceedings). The Defendant was represented by Mr William Wraight. I am grateful to them both for their helpful submissions, both oral and in writing.

The Claim

3. The claim dates back to 1995 when the Claimant underwent surgery for bowel problems. Since then, she has undergone a large number of further procedures and investigations in the hope of alleviating her condition but continues to suffer from distressing, painful and inconvenient bowel-related symptoms. The claim was issued on 8 October 2018 and proceedings served on 8 November 2018. The Particulars of Claim were drafted by the Claimant. Although they are repetitive, follow no logical structure and contain a number of unconnected references to her medical history and records, it is nonetheless possible to identify the procedures which are the subject of criticism and the particulars of negligence alleged. During the hearing before me the Claimant confirmed that my understanding of her claim was accurate.

4. The claim focuses upon two procedures: the first, a haemorrhoidectomy and lateral anal sphincterotomy which was performed on 27 June 1995 and the second, a rectopexy repair (for prolapse) which she underwent in February 1999.

5. In respect of the procedure in June 1995, the Claimant alleges that the surgeon injured her internal anal sphincter causing a defect in the muscle. She was not informed of this injury until many years later. She further alleges that during the procedure the surgeon failed to identify and remove a mucosal rectal polyp and that the continued presence of the polyp in conjunction with the defect to her internal anal sphincter have caused her ongoing symptoms. In respect of the second procedure (February 1999) the Claimant alleges that the Defendant inserted a mesh against her wishes and without her consent. Although the precise sequence of events is a little difficult to follow from the Particulars of Claim, I understand that she alleges that although a consent form giving permission for the use of mesh had been signed by her, this document had been signed in the absence of a full explanation of the procedure to be performed. Once, however, she understood the nature of the procedure and the proposal that a mesh would be used to support the prolapsed area, she withdrew her consent to the mesh insertion and demanded that the consent form which she had signed should be removed from her records. In spite of this, the mesh was inserted. After the procedure, she alleges that the consent documentation was then fabricated

and manipulated by the Trust and that various documents were removed from her medical records. She alleges that as a result of the mesh insertion she has suffered adhesions.

6. The Particulars of Claim have clearly been drafted with an eye to the possibility that the very long interval of time between the alleged events of 1995 and 1999 and the commencement of the action might present a potential stumbling block to the success of the litigation. The Particulars of Claim therefore provide an explanation for the delay. They refer to the Claimant having reported a complaint to the Trust in July 1999 concerning the unauthorised use of mesh earlier that year. A claim for compensation arising from the mesh insertion was also apparently made to the Trust at that time and solicitors were instructed. The Particulars of Claim assert that important information and medical records were withheld by the Trust which therefore prevented her solicitors from proceeding with a claim at that time. The Particulars of Claim also raise date of knowledge arguments in respect of the missed polyp and the defect in the internal sphincter muscle. They record that the alleged sphincter muscle injury only came to the Claimant's notice when, in 2018, she reviewed her medical records (which had been obtained by a second set of solicitors instructed in 2016) even though the defect had been demonstrated on an MRI scan some years earlier; they record that she did not come to know of the missed polyp and that it was the cause of many of her symptoms until September 2015.

7. Given that the Claimant's grounds of appeal from the Master's Order include that the Order was unjust because of procedural irregularity, I need set out in more detail than might otherwise be necessary the procedural course of the litigation following service of the proceedings.

8. The Claimant failed to serve a Schedule of Loss and a report substantiating her condition and prognosis along with the Particulars of Claim as required under CPR 16PD 4.2 and 4.3. The Defendant issued an application on 10 December 2018 requiring service of those documents which came before Master Eastman on 7 January 2019. The Claimant did not attend the hearing. Master Eastman directed that the Claimant serve a Schedule of Loss and report detailing her condition and prognosis by no later than 14 January 2019. In addition, and of his own motion, the Master made an Order that by the same date the Claimant should confirm that she was in possession of supportive expert evidence in respect of liability and that she should specify the name and specialism of the liability expert and the date of the liability expert report. From the attendance note of the hearing, it appears that the further requirements reflected Master Eastman's concern that the Claimant may not have drafted the Particulars of Claim with the benefit of expert evidence and that, if not, the claim was liable to be struck out as an abuse (see: *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] 3189 (TCC)).

9. The Claimant did not comply with the Order. She applied for an extension of time and the Defendant cross-applied by way of an application, dated 13 March 2019, to strike out the claim on the basis of the its limitation defence, the Claimant's failure to comply with the Order of Master Eastman and the absence of any supportive expert evidence; or, in alternative, seeking summary judgment on essentially similar grounds.

10. The two applications came before Master Cook on 18 March 2019. Once again, the Claimant did not attend. Master Cook adjourned the Defendant's application, granting the Claimant a generous extension of time for service of the various documents required under the Eastman Order until 31 May 2019.

11. On 12 April 2019, in purported compliance with the Order of Master Eastman the Claimant filed and served a large bundle of documents, running to over 230 pages. The index to the bundle referred to only two expert medical reports (from Mr Roger Springall, a consultant colorectal surgeon) dated 12 February 2019 and 14 March 2019. The bundle also included a variety of letters from the hospital notes, extracts from the clinical notes, photographs and published case studies.

12. Mr Springall's report of February 2019 was intended to substantiate the Claimant's injuries. It is a short document, in which Mr Springall sets out the Claimant's medical history and her reported historical and current complaints and her prognosis. The report does not identify those injuries said to be causally related to the alleged negligence or indicate in what way or ways the Claimant's condition has been affected by the alleged negligence. To this extent therefore the report is deficient. The further report from Mr Springall of March 2019 is headed "*Response to Particulars of Claim.*" This also is a short document. In it, Mr Springall notes that the defect in the internal sphincter was due to the surgery in 1995 but is silent as to whether the defect was negligently inflicted and the effect of the defect on condition and prognosis. The report rejects the suggestion that the Claimant had had a rectal polyp as alleged in the Particulars of Claim. He describes confusion in terminology and says that what was, or may have been, referred to as a polyp, was likely to be only a prolapsing fold of bowel tissue. As for the procedure in 1999, he comments that there was no evidence in the documents which he had seen suggesting that the fixation of bowel was unauthorised. He notes that whether the mesh had been inserted absent consent was an argument between the Claimant and Defendant.

13. The Defendant's application for the claim to be struck out was relisted for 21 May 2019. The Claimant was not able to attend owing to a medical appointment on the same day but she made no application for the hearing to be adjourned on that basis, or on any other basis. In email correspondence with the Defendant, she invited the Court to deal with the application in her absence, submitting a further document in the form a witness statement. The witness statement covered a good deal of ground, providing further details concerning her medical history, setting out that the Defendant had only recently confirmed that surgical note for the mesh operation been incorrectly dated 9 February 1998 (rather than 1999) and providing further details concerning her allegations and a submission concerning her claim for general and special damages.

The Master's Ruling

14. In his judgment, Master Cook set out the procedural history of the claim. He emphasised the need for supportive expert opinion in any action alleging professional negligence, referring himself to *Pantelli*. He expressed considerable sympathy for the Claimant, observing that it was clear to him that she had spent a considerable amount of time analysing her medical records and trying to understand the cause of her condition. He referred to the extracts from her medical records which the Claimant had exhibited to her various statements and submissions pointing out that sections had

been underlined and asterisked. However, he noted that the Claimant was not medically nor legally qualified and that, having analysed Mr Springall's report, it did not support the allegations. Although not reflected in the Order, the Master further decided that, had he not struck out the action for want of supportive expert underpinning, he would nonetheless have entered summary judgment for the Defendant on the basis that the action had been brought too late and it was not arguable that the Court's discretion to set aside the prescribed time limits under section 33 Limitation Act 1980 would be exercised in her favour. The delay was very long; there had been no good reason advanced by the Claimant for the delay in commencing proceedings, particularly given that solicitors had been instructed as long ago as 1999; the claim was not supported by expert evidence and it would be inevitable that the delay would have a prejudicial effect upon the cogency of the evidence to be deployed by the Defendant.

Grounds of Appeal

15. The Claimant's Grounds of Appeal run to many pages. Like many of the documents which the Claimant has filed over the procedural lifetime of this action, the bulk of the document takes the form of a series of assertions concerning the Claimant's medical history interspersed with references to, and short extracts from, the Claimant's medical records. However, the essential basis of the challenge to the ruling is that, when the Court considered the strike out application on 21 May 2019, an important document was not before it. The first report of Mr Springall, dated January 2019, should have been before Master Cook, but it was not. Following the strike out, the report was served and it was served before the 31 May 2019. There was, the Claimant submits therefore, no breach of Master Eastman's Order, as extended. It was on the basis of this alleged procedural irregularity that the single judge gave permission. However, as Mr Wraight observes, the grounds of appeal are sufficiently widely drafted to encompass a more general challenge to the Master's conclusion that the expert evidence did not support the Claimant's case. Although permission was not granted on this ground explicitly, I am prepared to consider this ground also.

16. The Claimant understands that I can interfere with and set aside the Order of Master Cook only if I was satisfied that it was wrong or unjust as a result of a serious procedural or other irregularity (CPR 52.21(3)).

Submissions/Discussion

a) Procedural Irregularity

17. In considering whether there was a procedural irregularity in the hearing before Master Cook, I make the following observations.

    i) The Claimant told me that the January report from Mr Springall had been included in the bundle which was served on the court on 12 April 2019 and must have become detached and lost by the Court after it had been lodged. I have no difficulty in rejecting this assertion. I have no doubt whatsoever that the first Springall report was not included in the bundle of documents which the Claimant filed and served for the purpose of the hearing of the Defendant's strike out application in April 2019. I reach this conclusion for two reasons.

First, the Claimant accepted that a duplicate bundle of documents was served on the Defendant. That bundle did not contain the report either. Second, the January report was not referred to in the index to the bundle served on 12 April. The Claimant explained its omission from the index on the basis that she regarded the two liability reports from Mr Springall as being a single document, the March instalment being merely a continuation of the earlier report. However, this explanation is inconsistent with her description of the March report in the bundle index as "*Medical Expert Report Response 14 March 2019 to 5 points of Claimant's Particulars of Claim*." This was how Mr Springall had entitled his March report. I doubt that the document would have been referred to in this way by the Claimant if it had included the earlier report of January of which the March report was only a continuation. I accept that the Claimant intended to include the earlier report and it was only by mistake that it was not before the Court. However, it was through no one's fault but her own that the report was not considered by Master Cook.

ii) The Claimant further submits that, even if the report had not been included in the bundle, the hearing was nonetheless premature in the sense that the hearing took place before the expiry of Master Eastman's Order as extended and the January report was served within the deadline of that Order, albeit after the claim had been struck out. However, this submission overlooks two important facts (neither of which, regrettably, were drawn to the attention of the single judge by the Claimant when permission was granted). The first is that the documents served on 12 April were served by the Claimant explicitly in compliance with the Orders of Master Eastman and Master Cook. As the Claimant recorded in her witness statement for the purpose of the hearing of the Defendant's application to strike out her claim "*the Claimant has filed in Court and served on the Defendant ... the Medical Expert Report and the Schedules of Loss on 12 April 2019 before the deadline of Court Order given to the Claimant to submit the remaining documents for the proceedings; until 31 May 2019*." Second, as Mr Wraight points out, there was electronic discussion between the parties concerning the date of the hearing of the strike out application after the Claimant had informed the Court and the parties that she would be unable, once again, to attend the hearing. In her email to the Defendant of 16 May 2019 not only did she not seek an adjournment, she also requested the hearing proceed in her absence on the basis of her witness statement and her email (and its extensive attachments of documents and extracts from her hospital records). At no stage did she apply for the hearing to be adjourned for any reason. She did not indicate that there was further material upon which she intended to rely or that for some other reason the hearing should be put back to a date after 31 May 2019.

18. I find that there was no procedural irregularity in the conduct of the hearing before Master Cook, let alone a serious irregularity leading to injustice. The Master considered the material which the Claimant had served. That material, extensive though it was, did not include the January report from Mr Springall. The hearing was not premature: the Claimant had made clear that she had served the material upon which she intended to rely in compliance with the Eastman Order (as extended by Master Cook) and she never sought to postpone the hearing until after 31 May 2019. Having served the material upon which she intended to rely, there would have been

no reason to delay the hearing of the Defendant's application until after 31 May 2019. The Court was entitled to consider the material before it on the basis that it represented all that the Claimant intended to rely upon in compliance with the Eastman Order and reach its conclusion on that material. Furthermore, as Mr Wraight submits, the claim was struck out, not as a consequence of any technical breach of Master Eastman's Order, but because the expert evidence upon which the Claimant relied did not support her claim. It is to this that I now turn.

b) Was the Decision Wrong?

19. I move on to consider the wider ground of appeal which is, in essence, that the Master was wrong to strike out the claim or in the alternative enter summary judgment on the basis of the expert evidence before him. In this context, I also consider Mr Springall's January report. I do so in part on the basis that if, for any reason, I am wrong in my conclusion above that the Master's decision was not vitiated by his failing to consider all three reports from Mr Springall, including that of January 2019, then in these circumstances it would be open to me to consider the issues raised in the Defendant's application afresh. It is in this context therefore that I consider the "missing" report from Mr Springall and the extent to which it, in conjunction with his other reports, supports the Claimant's claim.

20. The January report from Mr Springall does not assist the Claimant at all. Indeed, given that it is a much fuller document than its March successor, if anything, it is even more clearly unsupportive of the allegations made by the Claimant. I note the following points:

i) Mr Springall states that the Claimant suffered no "injury" during the procedure which was performed in 1995. The Claimant's internal anal sphincter was divided but that division was integral to the procedure. There was no accidental damage to the muscle and no negligence. He makes this plain, saying that a lateral anal sphincterotomy "*does specifically involve division of the internal muscle. Back in 1995 this was a procedure that was performed more frequently than it is now. Haemorrhoidectomy itself may cause areas of apparent change when seen on MRI imaging*."

ii) As Mr Wraight submits, given that there was no "accidental injury" inflicted during the procedure, there would be nothing about which the Defendant would be under a duty to reveal to the Claimant either immediately following the procedure or later. Although in his March report, Mr Springall comments that the Claimant should have been informed of the later ultrasound findings, he also observes that it was not uncommon for such information not to be communicated. In any event, given that the defect was neither accidental nor negligent, no loss would flow from any failure to inform the Claimant.

iii) In respect of the same operation Mr Springall notes that a polyp was removed during the 1995 procedure as evidenced by the fact that the tissue was sent for histology. He rejects the suggestion that any remaining excess tissue, whether truly a polyp or excess mucosal tissue, had caused any of the Claimant's symptoms. He states unequivocally that none of the Claimant's persistent problems since 1995 were caused by a missed polyp; nor did such cause her

"*economic loss, interference with her family life or any restriction on her activity.*"

iv) In the January report he concludes that, in respect of the 1995 surgery "*it is impossible to say that the surgery was performed erroneously or that the surgery had fallen below an appropriate standard*".

v) As to the use of the mesh in the 1999 procedure, on the basis of the information available to him, he was unable to conclude that there had been any deceit on the part of the clinicians. Further, the formation of adhesions was not associated with the use of mesh but associated with any surgical procedure inside the abdomen. The very act of opening and closing the abdomen may result in adhesions.

vi) Mr Springall observed in January 2019 that he was unable to detect any area of negligence and that he is not in a position to substantively support the claim.

21. There is therefore no reason to conclude that the Master was wrong to strike out the claim arising from the surgery in 1995, either on the basis of the material which was before him, or that which (as the Claimant asserts in this appeal) should have been before him. The allegation concerning the 1999 procedure differs in the sense that it is not solely dependent upon expert opinion for success but would also engage the court in a fact-finding exercise concerning events which took place over 20 years ago. To this extent it would have been preferable had the Master given it separate consideration in his judgment and reflected his conclusion on the summary judgment application in his Order. The original grounds of appeal did not include an appeal from the Master's conclusion on limitation (which was the basis for the Master's conclusion on the alternative summary judgment application) and no application was made to me to amend those grounds. In any event though, even if this were a live ground of appeal, I would be unable to fault Master Cook's approach to summary judgment as an alternative disposal of the allegations arising from the procedure in 1999. Limitation was raised centre stage in the Defence. Given the contents of the Particulars of Claim and the other material before the Court, the claim arising from the 1999 procedure was doomed to fail on limitation grounds. The Claimant was aware that mesh had been inserted (allegedly) against her wishes at the time of the procedure in 1999 or shortly afterwards – hence her approach to solicitors and her claim for compensation in July 1999. There can be no question of a later date of knowledge and the limitation period therefore expired 16 years before proceedings were issued. The Claimant provided no good reason for the delay either in the Particulars of Claim or within any of the other many documents and submissions which were before the Court: the fact that the Claimant did not know that the mesh could not be removed or that it may have caused adhesions until later is no good reason for the delay in commencing proceedings (nor for suggesting a later date of knowledge) arising from the unauthorised use of the material. The Master's view that the effect of the delay would prejudice the cogency of the evidence to be deployed by the Defendant is unimpeachable and it follows that a fair trial of the issues of fact raised by the Claimant would be impossible given the length of the delay.

Conclusion

22. I have listened carefully to the Claimant's submissions during this appeal and taken fully into account all that she has said and written in support of her claim and this appeal. She expressed her disagreement and dissatisfaction with Mr Springall's conclusions. She challenged his understanding of her medical history. She disputed that he did not support her arguments drawing my attention to an email from him in which he apparently recorded that if provided with an "accurate Statement of Claim" he would support her claim. She relied upon this as an indication that, notwithstanding the contents of his various reports, he was in fact supportive of the claim. I am unable to share this interpretation of the email in which, to my mind, Mr Springall was simply saying was that he would in principle be prepared to continue with the instruction if he received a formulated claim which reflected his opinion. In any event, that email must be set against the contents of his reports which (and clearly) do not assist the Claimant's case. As Master Eastman and Master Cook stated, an allegation of professional negligence must be supported by a written report by an appropriately qualified professional, absent which the claim is liable to be struck out as an abuse of the court's process. I have no doubt that the Claimant genuinely believes that she has been the victim of medical negligence (hence her approach to at least two firms of solicitors) but her own view, based upon her detailed consideration of her medical records, is no substitute for supportive expert opinion.

23. It follows that this appeal must be dismissed. I have been given no reason why the Claimant should not pay the costs of the appeal and I so order. I therefore invite the parties to draw up an appropriate Order giving effect to this disposal.

....

THE HONOURABLE MRS JUSTICE LAMBERT for the purposes of typographical corrections and any factual errors, I have received from the Claimant a further lengthy submission in the form of a statement from her and a raft of attachments including extracts from her medical records (annotated by her) and email correspondence. I have read this material with care. It demonstrates no errors of fact in the draft judgment. Nor, had it been permissible for me to do so, would it have caused me to alter my disposal of this appeal.