Neutral Citation Number: [2020] EWHC 1504 (QB)

Case No: QB/2018/006845

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2020

Before :

THE HONOURABLE MRS JUSTICE LAMBERT

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Between:

Lucien Pearce **(By his mother and litigation friend, Isabel Pearce)**	**Claimant**
- and -	
East and North Hertfordshire NHS Trust	**Defendant**

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Mr Gerwyn Samuel (instructed by **Medical Solicitors**) for the **Claimant**
Ms Helen Wolstenholme (instructed by **Clyde & Co.**) for the **Defendant**

Hearing dates: 20 May 2020

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Approved Judgment

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THE HONOURABLE MRS JUSTICE LAMBERT

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 11 June 2020.

MRS JUSTICE LAMBERT:

1. This is an application by the Defendant to amend the Defence in this action for damages for personal injury arising from clinical negligence. The application is contested on the grounds that the application is made very late and, if granted, would require the trial to be vacated; that there is no good reason for the late timing of the application and the amendment raises an argument which, in the context of this claim, carries no realistic prospect of success.

2. Mr Gerwyn Samuel represents the Claimant and Ms Helen Wolstenholme the Defendant. I am grateful to them for their helpful submissions. The hearing was conducted via Skype for Business; both Counsel were able to raise and develop their arguments fully in spite of some connectivity problems (affecting Mr Samuel in particular).

Background

3. The claim arises from a delay in performing an ultrasound examination of the Claimant's hips following his delivery in the breech position by Caesarean section on 15 April 2012. The full new-born examination undertaken by Dr Sigdel on 16 April 2012 demonstrated no hip instability but, given that breech presentation is a risk factor for congenital hip dysplasia, a further examination by way of ultrasound hip scan was mandatory. It is the Claimant's case that the timing of the further examination is critical as, if an early diagnosis of hip dysplasia can be made, then it is likely that conservative measures (gentle manipulation and the use of an abduction brace) will enable the ball of the hip joint to grow normally with no long term problems. In the Particulars of Claim dated November 2018, it was pleaded that a favourable outcome could be achieved "*with prompt treatment following a scan at the six week mark (or alternatively at any time up to the age of 12 weeks)…"*

4. It is common ground between the parties that Dr Sigdel did not inform the Claimant's mother that the timing of the ultrasound scan was critical. Although an appointment for a scan on 19 June 2012 (at 9 weeks and 2 days of age) was sent to the Claimant's mother on 16 June 2012, the Claimant's mother was unable to keep the appointment and the appointment was re-arranged for the 17 August 2012 (at 17 weeks and 4 days of age). The scan demonstrated bilateral congenital hip dysplasia and the Claimant ultimately underwent surgery to his right hip on 11 April 2013 and to his left on 25 April 2013. His orthopaedic recovery has been good. He is now able to walk and run without asymmetry with only a mild tendency to external rotation of the hips when running. The long-term prognosis is however more guarded and it is the Claimant's case that a reasonably confident prognosis cannot be given until skeletal maturity at 17 or 18 years of age and depending on assessment at that time the Claimant may need bilateral hip replacements in his 50s with further revisions later on in life.

5. The Claimant's pleaded case raises a number of allegations of negligence. They can however be distilled down into two main criticisms: the failure by the Defendant to adhere to its own protocol and arrange for an ultrasound scan to be performed within a period of around 6 or 8 weeks of birth and the failure to inform the Claimant's mother that the timing of the ultrasound scan was critical. It was further alleged that, had the Claimant's mother been informed that the scan must be done within 6 weeks or so of birth, then far from cancelling the appointment which she was given at 9 weeks, she

would have chased the hospital and ensured that one was provided even earlier and within 6 weeks of birth.

6. In its Defence, the Defendant admitted breach of duty in failing to adhere to its protocol which required ultrasound appointments to be arranged within 6 weeks. It also admitted, so far as it related to the Claimant, that the Defendant's system failed "*to ensure that children born in the breech position were given appointments within the six week period*." The Defence denied that the Claimant's mother should have been informed that the investigation was time-sensitive. The Defendant also denied causation, asserting that, even if the diagnosis of hip dysplasia had been made at 6 to 8 weeks, the outcome would have been similar: although a closed reduction in conjunction with the use of a harness might have been attempted, on balance, surgical intervention with all of its long term potential complications, would still have been required.

7. Given the terms of the proposed amendment, I need also mention as part of the background that, at a case management conference on 19 August 2019, the Claimant's legal advisors (following, as I understand it, some discussion with the Defendant's legal team) elected to proceed to a liability trial on the basis of the admitted breach of duty only. The Order of Master Yoxall records that the Claimant did not intend to pursue the allegations of breach of duty which had been denied. I understand fully why this course was adopted. Given the Defendant's pleaded case, and its admission that the ultrasound scan should have been undertaken within 6 weeks or so of birth, the only real remaining issue between the parties was causation. Nothing turned upon the contents of the discussion between the Claimant's mother and Dr Sigdel or upon whether it was a breach of duty by Dr Sigdel not to spell out that the ultrasound scan should be performed within a prescribed time-scale or why. Following the case management conference in August 2019 the only issue for trial was causation and, specifically, whether a diagnosis at 6 weeks with prompt treatment would have led to successful conservative treatment and a better long-term outcome.

The Proposed Amendment

8. The amendment focuses upon the Defendant's offer of an appointment for an ultrasound scan at 9 weeks and 2 days of age. On the Claimant's case the timing of the offer fell within the window (which extended up to 12 weeks) within which a diagnosis and prompt treatment would have been associated with conservative treatment and a good outcome. The Amended Defence maintains the Defendant's primary argument that diagnosis and treatment at or around 6 weeks would not have altered the outcome. It raises a further and alternative argument which denies the causative potency of the admitted breach of duty. The amendment asserts that the Claimant's injury was not reasonably attributable to the Defendant's admitted breach of duty (which amounted to a delay of 3 weeks in offering an appointment); and/or that the breach of duty was not the proximate cause of the Claimant's loss which was the Claimant's mother's failure to attend the appointment at 9 weeks; and/or the failure to attend the appointment offered at 9 weeks was a novus actus interveniens which broke the chain of causation.

9. The amendment was first proposed by the Defendant on 14 April 2020. When, on 28 April 2020, the Claimant's solicitor indicated that he did not agree to the amendment, this application was issued on 5 May 2020. The trial is listed in mid-July.

The Legal Framework

10. The legal framework is not in dispute and can be stated succinctly here. The starting point is CPR 17.3 which confers on the Court a broad discretionary power to grant permission to amend. The case-law is replete with guidance as to how that discretionary power should be exercised in different contexts. I need cite only two cases which taken together provide a helpful list of factors to be borne in mind when considering an application such as this: *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) and *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm). From those cases, I draw together the following points.

a) In exercising the discretion under CPR 17.3, the overriding objective is of central importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

b) A strict view must be taken to non-compliance with the CPR and directions of the Court. The Court must take into account the fair and efficient distribution of resources, not just between the parties but amongst litigants as a group. It follows that parties can no longer expect indulgence if they fail to comply with their procedural obligations: those obligations serve the purpose of ensuring that litigation is conducted proportionately as between the parties and that the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately is satisfied.

c) The timing of the application should be considered and weighed in the balance. An amendment can be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason. Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. A heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The timing of the amendment, its history and an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise: there must be a good reason for the delay.

d) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial, this may be an overwhelming reason to refuse the amendments.

e) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the

amending party's own conduct, then it is a much less important element of the balancing exercise.

Discussion and Analysis

11. There is no issue between the parties that the following matters are relevant to the discretionary exercise involved in the application.

a) The effect of the proposed amendment on the trial date

12. The first point I consider is whether, if I were to allow the amendment, the trial date could be kept. Ms Wolstenholme submits that the amendment raises a point of pure law which will not require evidential support and, at the most, it may extend the trial but, even then, only marginally. She submits that, if I were to grant her application, therefore there would be no need to vacate the trial date. I disagree.

13. I have no doubt that if I were to allow the amendment then fairness to the Claimant would require me to vacate the trial (which was fixed as long ago as 3 October 2019) in order that the allegations of breach of duty which the Claimant elected not to pursue following discussion at the August 2019 case management conference could be resurrected and pursued. Directing the spotlight upon the cancellation of the appointment of 19 June 2012, raises acutely the issue of whether it was a breach of duty to fail to inform the Claimant's mother that the scan was time sensitive and, if so, what action the Claimant's mother would have taken in the light of that information. This may require a supplemental statement from the Claimant's mother which on its own would not threaten the trial date. However, more importantly, if these allegations of breach were to be pursued, then expert evidence from a paediatrician/neonatologist to address the standard of the care provided by Dr Sigdel would be required. Such evidence is not currently available and it would be unrealistic to suggest that such evidence could be obtained, put in a form suitable for disclosure and exchanged before trial.

14. Ms Wolstenholme makes two further linked submissions, both of which I can deal with swiftly. Her first point is that the trial may be vacated in any event due to the pandemic so there would be no injustice to my granting the amendment and breaking the trial fixture. However, if in due course, either or both parties were to seek an adjournment, then an application to vacate the trial should be made in the usual way, supported by evidence. Neither she, nor I, can pre-judge the outcome of that application. All that I can say is that it does not follow inevitably that such an application will succeed. It will depend upon the impact of the pandemic upon the availability of witnesses and/or whether the Court accepts that justice could not be done via a remote hearing. Her second point is that if the trial had to be vacated then any adjournment need only be short. However, whilst from the parties' perspective it may be that the additional evidence can be obtained reasonably quickly (I do not know) and the pleadings regularised, it would be naïve to think that the Court would be able to accommodate the adjourned trial shortly thereafter. Even in normal conditions the listing may be some months after the trial is ready and the effect of the pandemic is that there is bound to be some backlog. What is clear is that the need to re-list this trial will take court time away from other business.

15. It follows that this application must be categorised as a "very late application." As such, the balance is loaded heavily against the grant of permission, even before I turn to consider the issue of the explanation for the timing of the application.

b) The Timing of the Application

16. Ms Wolstenholme told me that the impetus for the amendment was the receipt of the joint note of the orthopaedic experts (Theologis/Clarke) of 22 January 2020. Although, in that document, Mr Theologis and Professor Clarke disagreed about the type of treatment and its outcome, they agreed that the treatment and outcome would have been similar whether the Claimant had undergone a scan at 6 weeks or at 9 weeks. This statement clarified the experts' respective positions and crystallised the apparent significance of the 9- week appointment. There was a short delay between January and April whilst instructions were sought and the amendment drafted. After the draft amendment was served on 14 April 2020, there was she submitted no delay in getting on and making the application.

17. There are a number of problems with this explanation. The first, and most obvious, is that the contents of the joint statement should have come as no surprise to the Defendant, certainly so far as Mr Theologis' opinion was concerned. The statement added nothing to the Particulars of Claim in which it was pleaded, fairly and squarely, that the treatment and outcome would have been the same at any point up to 12 weeks of age. Indeed, the Claimant's position (that the window for conservative treatment and a good outcome extended to 12 weeks) was made in the Letter of Claim. Uncomfortably for the Defendant, the very argument which it wishes to deploy now, by way of the proposed amendment, was made in the Letter of Response of July 2018.

18. For these reasons I am simply unable to accept that the joint statement was the springboard for the amendment: or if it was, it should not have been. If it had been intended to rely upon the causation argument advanced in the amendment, then it should have been pleaded in the Defence. Whilst Ms Wolstenholme was prepared to accept that the failure to do so was due to an oversight on the part of Counsel previously instructed, I bear in mind that the draft Defence was, in all likelihood, reviewed not only by her instructing solicitor but by the case-handler at NHSR. The oversight, if that is what it was, was therefore wholesale.

19. There are further difficulties facing the Defendant concerning the timing of the application. I accept Mr Samuel's point that, even if its omission from the Defence was due to an oversight, there were many other occasions when the Defendant could have raised the point. In particular, at the case management conference in August 2019 when there were discussions concerning the scope of the Claimant's case on breach of duty and in the run-up to the joint expert meeting (which, at the Defendant's insistence, included questions relating to the hypothetical management following a scan on 19 June 2012). I do not accept the full force of Mr Samuel's point that by seeking to include such questions without explaining why, the Defendant was laying a trap for the Claimant and acting in bad faith. However, in retrospect, it does seem that the Defendant must have had an eye to adjusting its case when the agenda was being crafted. If so, then it makes the delay from January 2020 to April 2020 even less explicable.

c) The merits of the amendment

20. I turn then to the merits of the causation argument reflected in the amendment. Ms Wolstenholme submits that the amendment provides her with an additional and alternative causation defence. She does not submit that the offer of an appointment at 9 weeks disposes of the claim on the basis that the "but for" causation test is not satisfied but argues that the fact that an appointment was offered to the Claimant within the 12-week window means that either the admitted breach is not the proximate cause of the harm sustained by the Claimant; or the harm is not reasonably attributable to the admitted breach; or the failure to accept the offer constitutes an event breaking the chain of causation. She supports her pleading by drawing my attention to sections of Clerk and Lindsell.

21. I have a real doubt concerning the merits of all of these arguments, none of which, it must be said were fully realised by Ms Wolstenholme in either her written or oral submissions. In broad terms, the effect of her argument is to engage the Court in an examination of the legal responsibility of the Defendant for the harm sustained by the Clamant. This is bound to be, in part, fact sensitive – hence the need to resurrect the particulars of negligence which were not pursued in August 2019 and to examine the circumstances of the Claimant's mother's decision to re-schedule the 9 week appointment. Further, given that it is no part of Ms Wolstenholme's case that the Claimant's mother is in any way culpable for failing to keep the appointment at 9 weeks, it would seem that the Defendant would encounter an uphill struggle in seeking to persuade the Court that its admitted breach had no causative relevance. Particularly given Mr Samuel's point that, but for the Defendant's admitted breach in failing to ensure that an appointment was sent out within 6 weeks of age, the appointment at 9 weeks would have never have been needed. That said, I am not persuaded that the argument carries no real prospect of success (which it is agreed is the test which I must apply).

Conclusion

22. I refuse to allow the Defendant to make the amendment sought. The inevitable need to adjourn the trial coupled with the failure to supply any good explanation for the need for the amendment and the lateness of the application drive me to the conclusion that the balance of prejudice tips heavily in favour of refusal. I bear in mind the pressure on court resources, the public interest in the efficient discharge of court business. Although not a critical factor, I also bear in mind the additional stress which would be caused to the Claimant's mother if the trial were to be adjourned. Although Ms Wolstenholme minimises the impact of any delay in resolving liability on the basis that any damages would be paid into court and not available to the Claimant until his majority, this submission fails to recognise or acknowledge the stress provoked by a trial hanging over a Claimant (or in this case a Litigation Friend).

23. I also bear in mind that in refusing the application I am depriving the Defendant of running a causation argument at trial. On the basis of the information currently available, it is not possible for me to fine-tune my evaluation of the merits of the amendment further than to record that I am unable to conclude that it has no merit or only a fanciful prospect of success. However, even if I had concluded that the

amendment raised a strong defence on causation, I would still not have allowed the amendment. Any prejudice to the Defendant in being deprived of running the argument is neutralised by the fact that the Defendant has brought the situation upon itself and for no good reason.

24. The application is dismissed. I invite the parties to draw up the Order giving effect to this disposal.