

Neutral Citation Number: [2020] EWHC 1662 (QB)

Case No: QB-2018-000376
TLQ 18/1375

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 22 June 2020

Before :

Mr Justice Martin Spencer

Between :

PQ (A Child proceeding by her father and litigation friend RS)	<u>Claimant</u>
- and -	
Royal Free London NHS Foundation Trust	<u>Defendant</u>

Lizanne Gumbel QC (instructed by Irwin Mitchell LLP) for the Claimant
Owain Thomas QC (instructed by Bevan Brittan LLP) for the Defendant

Hearing dates: **22nd June 2020**

RULING ON ANONYMITY

1. In this matter an application has been made for the identity of the claimant and her family to be anonymised for the purposes of this trial. This is a liability only trial in which the court is to determine whether or not the defendant NHS Trust is liable to pay the claimant damages for breach of duty arising out of the circumstances of the claimant's birth on 21 August 2014. The Claimant is a protected party and the action concerns severe brain injury acquired at about the time of birth leading to cerebral palsy. The Claimant is now almost 6 years of age.
2. In relation to approval hearings for settlements of such claims, it is the normal position that anonymity orders are made without the need to persuade the court on each occasion that such an order is necessary, following the decision in *JXMX v Dartford & Gravesham NHS Trust* [2015] 1 WLR 3747. That case was confined in its ratio to such approval hearings.
3. It seems to me that, in ruling as it did, the Court of Appeal effectively approved and endorsed three reasons or rationales for such an approach which were proposed on behalf of the intervener by Mr Robert Weir QC:
 - i) The court's function when approving settlements is essentially protective and fundamentally different from its normal function of resolving disputes between the parties to proceedings;
 - ii) The publication of highly personal information about the claimant's medical condition involves a serious invasion of his and his family's rights to privacy;
 - iii) Unlike adult litigants at full capacity, who are free to settle their claims in private, the children and protected parties have no choice but to seek the court's approval of their settlements in proceedings open to the public and are thus placed at a significant disadvantage to other litigants in obtaining respect for their private and family lives contrary to article 14 ECHR.
4. The first and third reasons do not apply in proceedings which are confined to the resolution of liability. The first reason, namely that the court's function when approving settlements is protective and fundamentally different from its normal function of resolving disputes between the parties to proceedings, clearly does not apply because the function of the court in these proceedings is to resolve the dispute between the parties to these proceedings, namely whether or not liability should attach. It is not a protective function.
5. So far as the third reason is concerned, namely that adult litigants are free to settle their claims in private but the same choice is not available to children and protected parties who are obliged to seek the court's approval, again that cannot and does not apply because adult litigants whose claims are not settled are in the same position as protected parties: they equally have no choice but to bring proceedings if they are to obtain damages and adult litigants are thus in exactly the same position as children or protected parties: they have to come to court in order to achieve satisfaction.
6. However, the second reason, namely the publication of highly personal information about the claimant's medical condition, does apply and would certainly be involved to some extent in these proceedings even though the proceedings are dealing with liability rather than quantum: they still involve a serious invasion of the family and its rights to privacy and this is very much a case where the interests of a child and the family under Article 14 ECHR collides with the interests of the press under Article 10 ECHR.
7. In *JXMX v Dartford* at paragraphs 26-27, Lord Justice Moore-Bick said this:

"26. In paragraph 13 of his judgment Tugendhat J. observed that advocates commonly address the question as simply one of balancing the demands of privacy and freedom of expression. He rejected that analysis, however, holding that the true question for decision is whether it is necessary for the court to grant a derogation from open justice and thus from the rights of the public at large. In our view he was right to do so and he was also right to hold that the absence of any objection from the defendant or the media does not relieve the court of the duty to consider whether a derogation from the principle of open justice is necessary.

27. Any application of the present kind, therefore, gives rise to tension between the principle of open justice and the need to do justice in the individual case; or, if the matter is considered in Convention terms, a question whether it is necessary to interfere with the rights of the public and the Press under article 10 in order to protect the rights of the claimant and his or her family under article 8 and vice versa. The constitutional importance of the principle of open justice, as recognised in the authorities, is such that any departure from it must be justified strictly on the grounds of necessity."

8. In my judgment, the demand for necessity is met in a case such as the present. In the event that the claimant is successful, then the reporting of the subsequent proceedings for recovery of damages, which would necessarily need to be approved by a court for the reasons set out in *JXX*, would be severely restricted because of the so-called "jigsaw effect": if the liability trial has been reported in full - including the name of the claimant - then the ability of the court to protect the interests of the child at the settlement hearing would be severely constrained because the public would be able to associate any report of the subsequent settlement proceedings with the previous liability proceedings. However, it seems to me that it is in the interests of open justice that the press should be free to report settlement proceedings to the fullest ability that they can without trespassing upon the rights of the child and for the family by identifying their names.
9. Thus there is the following dichotomy: on the one hand, the principle of open justice, fully satisfied by there being no anonymity order at the liability stage, is then more severely restricted at the approval stage because of the jigsaw effect which may well mean that the settlement proceedings cannot be reported at all; on the other hand, if there is some restriction on the reporting of the liability proceedings by the making of an anonymity order, then the ability of the press to report the settlement stage is preserved in full. In my judgment there is no black and white answer to this and the question is whether the criterion of necessity is more satisfied by an anonymity order throughout, as Ms Gumbel QC has submitted, thereby preserving the ability of the press to report the full proceedings, including any settlement or decision as to damages, or is better preserved by allowing a full report of the liability stage, without any anonymity with the consequent effective inability to report the settlement stage at all, because of the "jigsaw effect".
10. In all the circumstances, in my judgment it is necessary for these proceedings to be anonymised. The limited derogation from the principle of open justice in the press not being able to report the claimant's name is more than offset by the correlative ability to report the proceedings from start to finish, including both liability and quantum.
11. Of course, the proceedings may not get to the quantification stage, but it is quite impossible to anticipate the outcome of the liability proceedings in deciding whether or not to make an anonymity order at this stage.
12. In those circumstances, in my judgment it is appropriate to make the anonymity order sought.