

Case No: QA-2020-000105

Neutral Citation Number: [2020] EWHC 2555 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 9 July 2020

BEFORE:

MRS JUSTICE LAMBERT

BETWEEN:

SEBASTIAN JAMES WILCOX

Claimant/Respondent

- and -

KING'S COLLEGE HOSPITAL NHS FOUNDATION TRUST

Defendant/Appellant

SAMANTHA PRESLAND appeared on behalf of the Appellant/Defendant
ANDREW RITCHIE QC appeared on behalf of the Respondent/Claimant

JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400

Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

1. MRS JUSTICE LAMBERT: This is an appeal from the Order of Deputy Master Bard of 10 March 2020 refusing the Defendant's application to rely upon surveillance evidence of the Claimant at the trial listed for January 2021. The appellant/Defendant is represented by Ms Presland and the respondent/Claimant by Mr Ritchie QC. Both appeared below. I am grateful to them for their helpful submissions today.

The Claim

2. The claim arises from an admitted delay in the diagnosis and treatment of the Claimant's cauda equina compression in August 2016. The Particulars of Claim allege that, in consequence of the delay in performing the necessary decompression surgery, the Claimant has sustained a permanent disability in the form of an incomplete paraplegia at L3 with reduced lower limb strength and sensation and neuropathic pain affecting both lower limbs. The pain is exacerbated by walking and sitting for extended periods and the Claimant needs to use walking sticks for mobility which is limited to around about 250 metres. The Particulars of Claim also assert that the Claimant has the usual bowel-related problems associated with damage to the cauda equina. It is alleged that the Claimant needs help with many of the activities of daily living and that his care requirements will increase with advancing age. A report on condition and prognosis from Mr Gawronski, annexed to the Particulars of Claim, substantiates the Claimant's complaints. The report documents right knee weakness, right foot drop, distal weakness in the left lower limb and chronic neuropathic pain unlikely to be resolved by medication. Mr Gawronski reports that the Claimant needs physical therapy and some care, currently being delivered by the Claimant's husband, but he forecasts a need for a commercial care regime on the basis that the Claimant should not have to rely upon his partner for the assistance in many activities of daily living.
3. Judgment was entered on the basis of the admission that there had been a culpable delay in treating the Claimant's symptoms. However there remains a live causation issue between the parties, the Claimant asserting that, but for the admitted delay, he would have made a near total recovery, the Defendant that he would not have avoided his injuries, although there may have been an improvement in the extent of the injuries.

4. Although the Schedule of Loss served with the Particulars of Claim is in outline form only, the potential size of the claim is conveyed by the Claimant's witness statement of October 2019 which refers to the impact of Claimant's disabilities on his activities of daily living, for example, his inability to use public transport or to walk further than short distances and only then with the assistance of a stick. It documents the lengths taken by the Claimant to continue his work with the Pensions Regulator and ultimately his decision to take ill-health retirement. The statement further refers to the need for adapted accommodation and Claimant's wish to relocate from his current rented accommodation in Haywards Heath to the Dulwich area of London so as to be able to tap into his social network; to the Claimant's wish to purchase an adapted sailing boat for mental and physical stimulation; and to his intention to employ a buddy to assist him for 2 or 3 days per week and so alleviate the burden currently placed upon his husband.
5. It is no secret that the extent of the Claimant's loss of amenity as described in the witness statement (and therefore likely size of the claim advanced) was the impetus for the Defendant's decision to obtain covert surveillance evidence of the Claimant. The firm, Robertson & Co were instructed and the Claimant was filmed over several days between July and December 2019.

The Hearing before the Deputy Master

6. The Defendant's application for permission to rely upon surveillance evidence of the Claimant came before the Deputy Master on 10 March 2020. Much time was taken up at the hearing dealing with the issue of relief from sanction given that Master Eastman had directed that any surveillance evidence should be disclosed by no later than 31 October 2019. The Deputy Master granted relief and there is no challenge to this finding. There was also a lengthy and at times quite heated debate before the Deputy Master focussing upon the integrity of the footage, the possibility that the footage had been manipulated and the extent to which the footage to be deployed by the Defendant was a fair representation of the footage as a whole. The Deputy Master concluded that there was no reason to impugn the work undertaken by Robertson and Co nor the selection of the footage included in the clip which the Defendant proposed to deploy.

Again, I need say no more on this topic given that there is no Notice challenging the Deputy Master's finding.

7. The Deputy Master delivered an ex tempore judgment. Upon the critical issue of the relevance of the material contained in the surveillance footage he accepted the submission of Mr Ritchie that there was, when properly analysed, nothing in the footage which particularly contradicted the contents of the Claimant's witness statement. Mr Ritchie submitted that the issue was no more than a storm in a teacup. As the Deputy Master put it, "*the material relied on does not appear to me to have very much substance to it.*"
8. Three sections of the footage in particular (which the Deputy Master viewed) were relied upon by the Defendant. One section showed the Claimant driving on a motorway in heavy traffic and poor weather conditions with poor visibility, suggesting that he remained a confident and competent driver; the second showed the Claimant shopping in a crowded supermarket just before Christmas and mobilising up and down stairs and the third showed him negotiating (with some difficulty) steps on a bus. The Deputy Master concluded that the Claimant's ability to do these things was however not inconsistent with the Claimant's case as put forward in the witness statement, not least because the Claimant had described himself in his statement as someone who tried to the extent possible to remain independent, who preferred to do things for himself if he could and who preferred not to use a wheelchair. The Deputy Master noted that the Claimant did not dispute the accuracy of the footage and observed that: "*the material sought to be relied on does not seem to me to be of particular substance; much of it could probably be dealt with by Part 18 questions or notices to admit – for example that the Claimant had driven 140 or 200 miles on the days in question; that he had walked in a crowded Waitrose supermarket before Christmas and so forth and there can be cross examination on those issues of him at trial.*"
9. In refusing permission to rely on the footage, the Deputy Master took into account its marginal relevance to the contentious issue of the Claimant's condition and prognosis. He also considered that, if the footage were to be admitted, it would impact upon the duration of the trial, adding perhaps a day to the listing and that additional litigation costs were bound to be incurred by the parties. He considered whether, given his

conclusion that the material was not of “*particular substance*” it would be proportionate to grant permission. He doubted that a claim for care based upon the Claimant’s witness statement and the footage was likely to be an exaggeration but noted that “*if it is, then I do not think that the material which is described as appearing from the video footage is simply worth the additional cost and expense and delay in terms of extending the trial date of [it] being adduced.*”

10. Having refused the Defendant’s application, the Deputy Master then however (and surprisingly) granted permission to appeal, his reasoning being that: “*this is not altogether a run-of-the-mill case, potentially big sums are involved.*” His decision to grant permission followed Ms Presland’s submission that the issue of proportionality may yet acquire a rather different complexion if the Schedule of Loss generated a very large multi-million pound claim for care based upon a “*massive buddy care programme.*” It appears that in the light of that submission he was persuaded that “*the proportionality test perhaps had not received as much scrutiny as it might.*”

This Appeal

11. There is a single ground of appeal: that the Deputy Master’s ruling was wrong because there was no evidence from either party concerning the potential value of the claim, in particular, the Claimant’s care claim. In her skeleton argument Ms Presland submitted additionally that the Deputy Master was wrong to reach his decision to refuse permission on the basis, in part, of proportionality without having heard proper submissions on the value of the care claim. Crucially, however, so far as my decision is concerned, there is no challenge the Deputy Master’s finding that the video footage was evidence without “*much substance to it*” nor to his conclusion that it was improbable that the footage would impact materially upon a substantial care claim nor to his conclusion that the video footage did not justify the additional court time or the additional litigation expense.
12. Without detracting from the range and quality of the arguments deployed before me by Ms Presland, I find I can deal with the issues raised in this appeal very shortly. I dismiss the appeal for two reasons.

13. First, there is no challenge to the finding that the video footage was of only marginal relevance to the issues to be resolved at trial. The Deputy Master found that there was no dispute between the parties that the footage showed the Claimant driving and walking with sticks and negotiating stairs, albeit with difficulty. He also found that there were really no significant inconsistencies between what the Claimant was shown to be doing on the footage and what he had said concerning his disabilities, and the impact of his disabilities upon his everyday function, in his witness statement. These findings in conjunction with the further (and, again, unchallenged) finding that the admission of the evidence would increase the costs of, and the length of, the trial justifies the Deputy Master's decision to refuse the application. Indeed, having reached those conclusions, it is difficult to see how he could have done other than refuse permission. The admission of the evidence falls at the first hurdle of relevance. Whether the care claim was in due course to be valued at £1,000 or over £500,000 would make no difference to the outcome of the application if, having reviewed the footage and cross-referenced it with the Claimant's own evidence there was no significant inconsistency. That is not to say that there may not be other valid grounds upon which the Defendant may yet, at trial, challenge a very high care claim (or housing or travel claim). But deploying evidence which has not "*much substance*" would be no more than an expensive distraction and wholly inconsistent with the overriding objective.
14. This conclusion is sufficient to dispose of the appeal. Given the simplicity of the analysis, I remain perplexed by the fact that the Deputy Master granted permission in the first place, even taking into account the low threshold for the grant of permission. I see some force in the possibility (ventured by Mr Ritchie upon my inquiry) that, following a long and at times rather heated hearing, Ms Presland's impassioned submissions on permission must have persuaded him that he had failed to take sufficiently into account the possibility that an overblown and exaggerated Schedule of Loss was about to be deployed by the Claimant's solicitors. But, as I have already remarked, this possibility makes no difference to the outcome of the application. There may be other lines of attack to be deployed by the Defendant at trial if it is faced with an exaggerated Schedule, but a video which does not significantly undermine the Claimant's own account of what he can or cannot do by reason of his injury is unlikely

to assist either the Defendant or the Court at trial in resolving the true position of the Claimant's current and future level of amenity.

15. I also dismiss the appeal on the ground advanced by the Defendant. Although the Defendant submits that the Deputy Master failed to consider adequately the likely value of the care claim and failed to seek or hear submissions on the value of the claim, these omissions lie at the door of the Defendant. I take into account that, to an extent, the Defendant's hands were tied because, by the time of the hearing of the application, there had been a (confidential) mediation during the course of which the value of the claim had been discussed in some detail and a without prejudice Schedule served. However, even without trespassing into the forbidden territory of those confidential discussions, it would have been possible for Ms Presland (had she thought it necessary) or her solicitor to give the Deputy Master a broad indication of the value of a care claim based upon a buddy regime by advancing a bracket of hourly rates and the appropriate multiplier. Alternatively, there could have been some discussion before the hearing between Ms Presland and Mr Ritchie concerning whether the valuation of the claim as forecast at mediation could be revealed to the Deputy Master. Neither of these steps were taken.
16. If for any reason my conclusion above is wrong, both parties agree that it would be open to me to make the decision afresh taking into account the likely value of the care claim and other elements of loss. Adopting the appropriate discount rate for a man of the Claimant's age and applying an hourly rate for 24 hours per week for 60 weeks per year, I acknowledge that a care claim based upon a buddy regime may be £500,000. Even higher. However, given the unchallenged finding of the Deputy Master concerning the marginal relevance of the evidence, in conjunction with the need to allocate resources fairly across the cohort of all court users, together with the increase of litigation costs, I would have no difficulty in refusing permission. The video evidence is not admissible simply because it is not relevant. Even therefore if I were making the decision afresh, the outcome would be the same.
17. This appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: civil@epiqglobal.co.uk