Neutral Citation Number: [2020] EWHC 359 (QB)

Case No: QA-2019-000265

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

LYNN DOUBELL **Claimant**

- and –

KINGS COLLEGE HOSPITAL NHS TRUST **Defendant**

- -
- -

Mr Conor Dufficy (instructed by **Hart Brown**) for the Claimant
Mr Theo Barclay (instructed by **Kennedys**) for the Defendant

Hearing dates: 13 February 2020

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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.

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MR JUSTICE LINDEN

MR JUSTICE LINDEN:

Introduction

1. This is an appeal from a decision of Her Honour Judge Baucher sitting at the Central London County Court on 5-6 August 2019. Judgment was handed down on 30 August 2019, dismissing the claimant's claim for personal injury arising out of an accident which occurred on 15 June 2013 at Kings College Hospital ("the Hospital") where she was an inpatient.

2. Briefly, the background is as follows. The claimant was aged 65 at the date of the accident. She had been admitted to the Hospital on 5 June 2013 and she fell out of bed in the small hours of 15 June 2013 and landed on her knees. There were no obvious injuries but her knees were observed to be red. Quantum was agreed in the sum of £7500 and the only issue at trial was therefore liability.

3. The claimant's case at trial was ultimately that, on admission to the Hospital, she had been assessed by Nurse Andrew Edwards as requiring bed rails. The defendant had negligently failed to act on this assessment. Had the defendant done so, bed rails would have been put in place on 6 June 2013 and would have remained there so that they would have prevented the claimant's fall on 15 June 2013.

4. Judge Baucher rejected this claim and there are four aspects of her decision which are challenged by Mr Dufficy, who represented the claimant at the trial and in this appeal:

   i) The Judge considered that the focus of her judgment should be directed at the position on 15 June 2013 and whether there was a breach of duty on that day ("Ground 1");

   ii) She found as a fact that Nurse Edwards had assessed the claimant as not requiring bed rails. The claimant's case based on Nurse Edwards having decided that bed rails were required, but having negligently failed to communicate this, therefore failed ("Ground 2");

   iii) She also found as a fact that even if Nurse Edwards had assessed the claimant as requiring bed rails, and even if they had been put up on 6 June 2013, they would have been taken down by staff before 15 June 2013. On the balance of probabilities, staff would have reviewed the question of the bed rails given that the claimant's mental state was poor over this period and she was relatively mobile. Staff would have decided that the continued use of rails was inappropriate given the risks to the claimant ("Ground 3");

   iv) Finally, she found that in the light of the claimant's history whilst in hospital of waking up confused, having hallucinations, sleep talking and walking and getting out of bed, she was not satisfied that the claimant fell out of bed because of the absence of bed rails ("Ground 4").

5. Mr Dufficy acknowledged that he must succeed on all four of his Grounds if the appeal is to succeed. He also accepts that Grounds 2-4 are challenges to the Judge's findings of fact and that challenges of this nature will only succeed if the court is satisfied that no reasonable judge could have made such a finding: see *Perry v Raleys*

Solicitors [2019] 2 WLR 636. His position, however, was that this is a case in which I am in as good a position as Judge Baucher to assess the evidence and that it would therefore be open to me to interfere with her findings on these key issues.

The facts in more detail.

6. In the evening of 5 June 2013 the claimant was seen by a district nurse who found her to be short of breath and confused. The district nurse arranged for her to be taken to the Hospital.

7. The claimant was assessed in the Accident & Emergency Department at the Hospital and she was diagnosed as having chronic obstructive pulmonary disease. She was therefore admitted at 10:14 pm.

8. Nurse Edwards then risk assessed the claimant and completed certain forms, including a Risk Assessment Form and a Supplementary Risk Assessment form. I will return to the various forms below but at this stage it is sufficient to note that the process of assessing whether bed rails should be used includes consideration of the mental state of the patient as well as her mobility. Confusion or disorientation are contraindications to the use of bed rails because rails can increase the risk of injury in the event of a patient trying to climb over them. Higher levels of mobility are also a contraindication to the use of bed rails for similar reasons.

9. The Risk Assessment Form therefore contains a grid which describes different mental states on the vertical axis and different levels of mobility on the horizontal axis. The assessor is required to make an assessment of the mental state and mobility of the patient and, through a grid and traffic light system, identify whether use of bed rails is "recommended". If the patient is in a "recommended" category her consent to use of rails is then required. The Risk Assessment Form also requires the person filling it in to indicate in a particular box, by inserting the letter "Y" or "N", whether bed rails should be used.

10. Unfortunately, Nurse Edwards' manuscript entry in the relevant box was unclear on this occasion. The issue in relation to breach of duty in this case therefore ultimately centred on the question whether Nurse Edwards had assessed the claimant as requiring bed rails but had failed to communicate this assessment clearly on the form.

11. It was common ground that failure to communicate such an assessment effectively would be negligent and that a clear "Y" in the relevant box would have resulted in rails being installed on 6 June 2013. However, the issues between the parties included whether Nurse Edwards had in fact assessed the claimant as recommended for bed rails. The defendant also disputed causation on the basis that it did not accept that, if they had been installed on 6 June 2013, bed rails would still been in place at the time of the accident on 15 June 2013. Nor did the defendant accept that rails would have prevented the claimant's accident.

12. In the light of the issues in the appeal it is relevant to note that subsequent assessments of the claimant's mental state noted that she was confused and experiencing hallucinations. It was also noted that the claimant was relatively mobile. The Judge specifically made findings about these matters at paragraphs 46 and 53-60, stating her overall finding as follows:

"53 I find that the Claimant's medical records unequivocally establish that the Claimant was confused in the days leading up to the incident. They also attest to her mobility."

13. As I have noted, both were contraindications to the use of bed rails given the risk that the claimant would try to get out of bed and suffer an accident which would be potentially more serious by reason of the bed rails. Thus, for example:

    i) At 00:11 on 6 June 2013, approximately two hours after Nurse Edwards completed the Risk Assessment Form, the claimant was assessed by a doctor who noted that her symptoms included acute confusion and dizziness;

    ii) A further assessment by doctor at 8.38 that morning also noted that the claimant was exhibiting signs of confusion and dizziness;

    iii) The record for 7 June noted that the claimant had been sitting on the edge of the bed and rocking. In relation to mobility, it was also noted that she could transfer independently, for example to use a commode, and that she was able to use her own wheelchair;

    iv) On 8 June it was noted that she had been hallucinating overnight;

    v) On 10 June it was noted that the claimant was partially mobile and had been *"going out for smokes"*;

    vi) On 11 June it was noted that the claimant had said that she had opened her bowels that morning *"but she's becoming increasingly confused so not sure if this is true"*;

    vii) On 12 June it was noted that the claimant was being encouraged to keep her cannula in place but that there were difficulties *"due to confusion".* Significantly, it was also noted at 4am that:

    "this morning, patient woke up and was confused about her whereabouts. She said that she thought she was at home and lit up a cigarette in the bay. Patient apologised.

    … <u>Mobilised to toilet on her own last night</u>. Encouraged to call bell when waiting to mobilise as she is short of breath on exertion and unsteady on her feet and high falls risk" (emphasis added)

    viii) On 13 June the claimant was, again, noted as being confused. A CT scan of her head was arranged so as to assess whether the claimant had dementia.

14. It is also relevant that, after the accident on 15 June 2013, the medical records noted that the claimant continued to be both confused and mobile. Thus, for example:

    i) later on the morning of the accident she was advised *"not to jump out of bed without assistance"*;

    ii) on 16 June it was noted that the claimant had woken up and thought that her grandson was in the toilet needing help;

iii) the entry for 17 June reads:

> *"Nursing staff report patient pulling off oxygen overnight and trying to get out of bed. Falls risk. Patient reports she keeps trying to get up at night and she wakes up confused and needing the toilet".*(emphasis added)

15. It is also relevant to note that, immediately after the accident, rails were installed. They remained in place until 22 June 2013.

The Judge's decision

16. The trial lasted two days, as I have noted. The Judge received oral evidence from the claimant and, on behalf of the defendant, Nurse Chetty. There was also oral evidence from experts on both sides: Ms Benbow was called by the claimant and Ms Heaps was called by the defendant. There was also evidence from Nurse Edwards in the form of a witness statement, a Civil Evidence Act notice having been served because he was working abroad.

17. I do not propose to embark on a more detailed summary of the Judge's careful judgement. Where relevant, I will give further details when I consider the particular grounds of appeal below.

18. But I do note one point at the outset. In relation to expert evidence, for reasons which the Judge explained and which have not been challenged she found the evidence of the claimant's expert, Ms Benbow, to be unreliable and the evidence of the claimant's expert, Ms Heaps, to be convincing. At paragraph 65 the Judge said this:

> *"it follows that based on my review of the records and policies I accept the entirety of Ms Heaps evidence. For reasons that will become evident I am satisfied that when Nurse Edwards completed the initial risk assessment on 5 June he intended to record, "no" and that he was entitled to do so. I therefore find that from the outset bed rails were contraindicated. I also consider that whilst there was a struggle to get there, on Ms Benbow's part, that was her ultimate position. I find that bed rails should never have been put up, and it is also evidenced that they were contraindicated in the days leading up to the accident and on the day of the incident."*

19. The Judge therefore rejected the claimant's case that there had been a breach of duty on 15 June 2013, hence the claimant's alternative argument that Nurse Edwards had in fact decided that bed rails were required but, in breach of duty, had not communicated this effectively on the Risk Assessment Form. Save for the finding of fact that Nurse Edwards intended to record "No" this paragraph has not been challenged in this appeal. As I put to Mr Dufficy, it is an unattractive feature of his appeal that success for the claimant depends on the court accepting that it was negligent for Nurse Edwards to fail clearly to communicate a decision which, on the Judge's finding at paragraph 65, and ultimately in the view of his own expert, would have been wrong.

Ground 1.

20. Ground 1 is said to be based on the decision of the House of Lords in *Bolitho v City and Hackney Health Authority* [1998] AC 232. Briefly, a two year old child, who had been admitted to hospital suffering from respiratory difficulties, experienced two episodes of a sudden deterioration in his breathing. On the second occasion the nurse reported the matter to a doctor by telephone but the child apparently recovered without the doctor attending. Shortly after this the child collapsed owing to failure of his respiratory system as a result of which he suffered cardiac arrest which, in turn, resulted in severe brain damage. The judge held that the doctor had been in breach of duty in failing to attend but that, even if she had attended, she would not have arranged for the child to be intubated. The claimant had, however, adduced expert evidence that any competent doctor attending the child after the second episode of respiratory compromise would have arranged for intubation and that this would have avoided the cardiac arrest.

21. The issue before the House of Lords was as to the relevance of the *Bolam* test to the question of causation where the defendant's case is, in effect, that it would not have taken the relevant preventative steps and the claimant's case is that failure to do so would be a further breach of duty. The House of Lords held that although the *Bolam* test generally has no relevance to the question of causation, where the breach of duty consists of an omission to do an act which ought to have been done, the question of what would have constituted a continuing exercise of proper care, had the initial failure not taken place, should be decided by reference to that test.

22. Mr Dufficy places particular reliance on a passage from the opinion of Lord Browne-Wilkinson at 240B-G. His Lordship said this:

> *"a defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter".*

23. He then adopted the analysis of Hobhouse LJ (as he then was) in *Joyce v Merton, Sutton and Wandsworth Health Authority* [1996] 7 Med LR 1 who explained that in negligent omission cases:

> *"a plaintiff can discharge the burden of proof on causation by satisfying the court <u>either</u> that the relevant person would in fact have taken the requisite action (although she would not have been at fault if she did not) <u>or</u> that the proper discharge of the relevant persons duty towards the plaintiff required that she take that action."*

24. I had some difficulty in following why these passages have any real bearing on the present case given the issue they were considering and given that, in the present case, it was not disputed that if Nurse Edwards had clearly communicated that bed rails should be used they would have been put up on 6 June 2013. This, then, is not a case in which the defendant was arguing that there was a negligent omission but that it would not have taken the relevant preventative steps in any event had there been no omission, or where the claimant is able to argue (given the finding at paragraph 65 of the Judgment) that although rails would not in fact have been put up, it would have been a breach of duty not to do so.

25. On further probing of Mr Dufficy it was confirmed that his real complaint was that it was open to him to argue the case, albeit in the alternative, on the basis that there had been a negligent failure by Nurse Edwards to communicate a decision that bed rails should be used. He contended that despite this, the Judge had ruled that the only question was whether there had been a breach of duty on 15 June 2013.

26. The difficulty with this point is that, although the Judge's primary position was that *"the focus of my judgment should be directed at the position on 15 June 2013"* (paragraph 19), and although she went on to say, at paragraph 68, that *"the issue is the breach on 15th June"* she then addressed Mr Dufficy's argument in the alternative: *"I do not consider that the Defendant was in breach of duty in failing to ensure that bed rails were in situ on 5th June in any event"*.

27. The Judge therefore did consider, and reject, Mr Dufficy's case albeit in the alternative. Moreover, the analysis which followed paragraph 68 did follow the approach which Mr Dufficy had advocated: the Judge went on to consider whether Nurse Edwards had indeed intended to communicate that bed rails should be used and, if so, whether that was the cause of the claimant's accident on 15 June 2013.

28. There is therefore nothing in Ground 1 and it adds nothing. Success for the claimant depends on her succeeding on each of Grounds 2-4.

The law on challenging findings of fact.

29. Mr Dufficy accepts that Grounds 2-4 are challenges to the Judge's findings of fact based on her evaluation of the evidence so I start with consideration of the law relating to this type of challenge.

30. Both parties drew my attention to *Perry v Raleys Solicitors* [2019] 2 WLR 636 UKSC which contains a helpful summary of the position. I do not propose to quote from paragraph 49 to 51 at length but note:

    i) The Supreme Court's reiteration of the following passage from its decision in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 at paragraph 162:

    > *"It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."*.

    ii) The Supreme Court also reiterated Lord Reed JSC's summary of the reasons for this approach at paragraphs 3 and 4 of his judgement in *McGraddie v McGraddie* [2013] 1 WLR 2477. These include the fact that the trial judge receives the whole of the evidence in the case and is in the best position to assess the credibility and impact of the witness evidence on the case as a whole. She is also experienced and expert in this role and she receives the arguments of the parties and is therefore well aware of what is argued and/or emphasised and what is not. In short, she is likely to have a much better "feel" for the case than the appellate court.

31. The following passages from the judgement of Clarke LJ (as he then was) in *Assicurizioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, 580-581 are also helpful in the context of the present case:

> *"15 In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere.*
>
> *16 Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."*

32. Clarke LJ went on to say, at paragraph 17,

> *"Where the correctness of a finding a primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellate court approaches the matter. Once the appellant has shown a real prospect… that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence."*

33. Mr Dufficy placed reliance on the decision of the House of Lords in *Datec Electronics Holdings Ltd v UPS Ltd* [2007] 1 WLR 1325. He pointed out that in the *Datec* case the House of Lords had been prepared to set aside the trial judge's inference as to the probable cause of the loss of the three packages because it considered that it was in an equally good position to decide what inference should be drawn from the primary facts. Importantly, however, this was because the primary facts were not in dispute and the only question was therefore as to the permissibility of the trial judge's inference: see eg paragraph 47.

34. Mr Dufficy also took me to paragraph 72 of the judgment of Arden LJ (as she then was) in *Alexander Langsam v Beachcroft LLP & others* [2012] EWCA Civ 1230 where she said:

> *"…where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multifactorial judgement, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements of the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding…"*

35. I found this passage particularly helpful in crystallising the central issue in relation to Grounds 2-4 of the present case. If the primary facts were not materially in dispute before the trial Judge it would be open to me to disagree with relevant inferences which she drew from them, albeit bearing in mind the advantage which she had in assessing the case as a whole. If, on the other hand, the Judge was required to evaluate all of the factors as she found them, and to determine what weight they should be given, I would only be entitled to interfere if her evaluation was clearly wrong or not one which was open to her on the evidence. Of course, there may be a spectrum between those cases where all of the primary facts are agreed, and the only question is one of the inference which should be drawn from them, and cases where all of the facts are in dispute and their resolution depends on the credibility of oral evidence and an overall evaluation of the facts which are found.

36. Mr Dufficy does not dispute that I would have to be satisfied that no reasonable judge could have reached the relevant findings in the present case. But he says that there are cases where the appeal court is in an equally good position to evaluate the evidence, and that this is such a case. He relies on the fact that a good deal of the evidence before the Judge was documentary and that the factual conclusions to be drawn from them on the key issues were a matter of inference and/or involved hypothetical questions. He also points out that Nurse Edwards did not give oral evidence.

37. For his part Mr Barclay drew my attention to the decision of the Court of Appeal in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA 1882 where Sir Ernest Ryder noted, at paragraph 15, the dictum of Lord Neuberger PSC in *Re B (a Child)* [2013] UKS 33:

> *"where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where the conclusion was one (i) which there was no evidence to support,(ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it"*

38. Sir Ernest Ryder also said, at paragraph 23:

> *"the application of a standard of proof is rarely a binary choice between items of evidence that are of equal weight. Weight is a contextual evaluation for the judge who reads, hears and sees the evidence of the witnesses. It is inappropriate for this court to interfere with that evaluation unless it is perverse.*

39. Mr Barclay also referred me to paragraphs 14, 15, 18 and 25 of the judgement with particular emphasis, given Mr Dufficy's reliance on medical records, on paragraph 25 where Sir Ernest Ryder said:

> *"the proposition that a contemporaneous clinical record is inherently likely to be accurate does not create a presumption in law that has to be rebutted in the manner submitted by the claimant. It is an important factor in evaluating materials of that kind so that reasoning is necessary to explain how records (or their absence) are being treated on the facts of a particular case. To raise the bar so high that an analysis of what might be sufficient to displace inherent reliability is needed in every case is to make the process a fact-finding to owners and mechanistic."*

40. Finally I note the following dictum from the judgment of the Court of Appeal in *Re Sprintroom Ltd* [2019] EWCA Civ 932 at paragraph 76:

> *"… on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'".*

Ground 4

41. For reasons which will become apparent I propose to take the grounds in reverse order.

42. At paragraph 88 the Judge noted that, given her earlier findings, it was not necessary for her to determine causation but that she *"would not have determined that issue in the Claimant's favour in any event"*. She explained that *"The Claimant has no idea how the accident happened"*, which was a reference to the fact that in her oral evidence the Claimant had said she *"remembered being on the floor and that was it"*.

43. The Claimant herself was therefore unable to give an account of how the accident happened, but Mr Dufficy relied on what had been recorded in her medical records. In particular, there is an entry in the claimant's electronic medical record at 01:56 which reads as follows:

> *"Adverse incident reporting:*
>
> *The patient was sleeping in bed, when at approximately 01:35 she fell out of bed landing on her knees on the floor. The incident was heard by staff nearby at the nurses (sic) station and observed by one other patient who also called for help."*

44. The Judge's finding in relation to this entry was that it was:

> *"not recorded by any nursing staff who witnessed such, and the reference to another patient simply says she observed it, not how it occurred."*

45. The Judge went on to say:

> *"given that the Claimant had a history whilst in hospital of waking up confused, having hallucinations, sleep talking, and walking and getting out of bed, I am not satisfied that the claimant fell out of bed because of the absence of bed rails."*

46. There are three points to make about the Judge's findings at paragraph 88:

i) First, as Mr Barclay points out, Mr Dufficy accepts that the claimant had the burden of proof, and the Judge went no further than to say that she had failed to discharge that burden. This, of itself, is not a totally surprising conclusion given that the claimant had been unable to give an account of the incident, but it is not the only point.

ii) Second, it is true that, as the Judge pointed out, the medical records did not necessarily record any person's account of how the claimant came to be on her knees on the floor. I accept that the note records that a patient observed the incident and that, as Mr Dufficy pointed out, the record begins with the words "*The patient was sleeping in bed, when ..".* But it is not 100% clear that the patient saw how it happened and that whoever made the record was recording that the claimant was sleeping in bed whereupon she rolled out of bed. The record is necessarily an account of the note maker's interpretation of the event and of what s/he was told, and it is not a crystal clear or comprehensive account of what occurred or what the other patient had seen or said. I agree with Mr Dufficy that a number of judges might well read the records in the way that he contends for, but I do not accept that all judges would have been bound to do so.

iii) Third, Mr Dufficy would have been on stronger ground if the medical records were the only evidence of how the incident happened or might have happened. But they were not. As noted above by reference to the Judge's findings at paragraph 53 to 60 of her judgement there was a good deal of evidence to support the conclusion that the claimant had fallen because she was confused and was in the habit of moving around and getting out of bed during the night. The Judge's conclusion was that the medical record was not sufficient, when considered with the other evidence in the case, to satisfy her on the balance of probabilities that the accident would not have happened had rails been in place.

47. In my view, this is a classic example of an evaluation of the medical record in the context of the other evidence which the Judge received and where a trial judge will have a significantly better "feel" for the case having seen, in particular, the claimant give evidence and having considered the evidence as a whole. Whilst I accept that other judges might have come to a different conclusion, I therefore do not consider that it can be said that the Judge's evaluation was not open to her or was not based on any evidence, or was flawed in some other way or otherwise perverse.

48. Ground 4 therefore fails. In the light of this conclusion, Grounds 2 and 3 are academic but I will consider them briefly given that they were fully argued.

Ground 3

49. The Judge's findings in relation to this issue specifically are at paragraphs 86- 87 of her judgment. At paragraph 86 she said this:

> *"86 The Claimant's argument therefore proceeds on the hypothesis that no nurse, on any… day [after 6 June 2013] would have reviewed the decision to direct bed rails. Restraining a patient with bed rails is something no responsible nurse takes lightly as is clear from the Defendant's own policy document. The suggestion therefore that no one would have reviewed their use over 10 days, particularly in the light of the Claimant's deteriorating mental state, is untenable. It would require considerable callousness indeed, or carelessness, on the part of the nursing staff, and it would also mean that the Claimant was restrained in breach of the Defendant's own policy and risk assessments as there was a risk that the Claimant could go over the top of the rails. The fallacy of the argument is*

> *therefore proved by the fact that the Defendant would, on Mr Dufficy's argument, have been deploying a dangerous policy at the material time on 15 June.*
>
> *87 Mr Dufficy has to prove that the bed rails would still have been in place on 15th June when any subsequent nurse reviewed, and that he or she would have concluded they were properly in place. That flies in the face of the evidence from the nursing experts. The argument is therefore untenable."*

50. Mr Dufficy accepted that the burden of proof was on the claimant in relation to this issue although he argued that *"there was an evidential burden on D to establish that some review would have taken place and what that review would have encompassed, how that review would have been undertaken and what it was likely to conclude"* (see paragraph 35 of his skeleton argument). I confess that I remained unclear as to precisely what was meant by this. I accept that it would be for the defendant to raise an issue as to this aspect of the case and, arguably, to adduce at least some evidence. But Mr Dufficy accepted that the reference to the evidence from the nursing experts included the evidence of Ms Heaps which the Judge noted at paragraph 47. She told the court that *"the clinical records showed nurses were doing assessments which were consistent with not using bed rails"* and she added that: *"when we do the falls training it is drummed into us that patients who are confused and mobile and non-compliant can go over the top of the rails, and we are told the real risk is a head injury"*.

51. This was evidence and it supported an inference that an informal review would have taken place in the period 6 to 15 June 2013 as a result of which any rails put up on 6 June would have been taken down given that, on various occasions after this, staff recorded that the claimant was both confused and mobile and was exhibiting precisely the sort of patterns of behaviour which gave rise to a significant risk of serious injury if rails were in place.

52. I pressed Mr Dufficy on whether he was arguing that the evidence of the experts was inadmissible in relation to the issue of what might have happened. He accepted that this evidence was admissible and relevant but, perfectly fairly, pointed out that the experts could only give their opinion as to what the clinical records suggested nursing staff were doing and as to what generally occurs in relation to training. He said, and I accept, that this goes to weight.

53. Mr Dufficy also pointed out that there was evidence that, contrary to the notion that staff would have carried out the required assessments and reached the right conclusions as to the use of rails, an assessment was supposed to have taken place on 11 June 2013 but it had not been carried out. He said that a review on 12 June 2013 was also required but it had not taken place. Moreover, rails had been installed on 15 June 2013 despite the evidence of the claimant's confusion and mobility. He submitted that this made the Judge's finding untenable.

54. Mr Dufficy went on to note that the rails remained in place until 22 June 2013 despite the claimant's confusion and mobility and despite the fact that staff were recording this in the medical records. Thus, he said, it could not be inferred that in the 10 day period between 5 and 15 June 2013 the same patterns of behaviour would have led to the rails being taken down. Very fairly, however, Mr Dufficy conceded that this argument had not been put to the Judge and is, in effect, a new point. In my view, it is

not open to him to take this point for the first time on appeal: the point was available to him at the time of the trial, is not a pure point of law and, if I were to accept the point, I would not be able to determine the claim: it could equally be argued that this aspect of the evidence supports the conclusion that the rails would have been taken down at the latest after 7 days (i.e. before the accident). Rather, the case would have to be retried: see *Singh v Dass* [2019] EWCA Civ 360 paragraphs 16-18 as to taking new points on appeal.

55. I see the force of the arguments which Mr Dufficy put to the trial judge but, again, it seems to me that her finding is not one with which I should interfere. Obviously, the question was hypothetical: if rails had been installed on 6 June 2013, would they still have been there on 15 June 2013? Having concluded, particularly at paragraph 65, that at all material times it would have been the wrong decision to have rails in place, and having considered and evaluated the whole of the evidence, the Judge thought it more likely that the rails would not have remained in place than that they would have. Again, she based this on her overall assessment of the evidence and her feel for the case. Again, I do not consider that the primary facts were sufficiently clear cut for me to say that I disagree with her assessment. I can well see that the fact that rails were installed on 15 June 2013 must have given her pause for thought but, as Mr Barclay pointed out, this decision was not explored in the evidence and it may well have been a reaction to the accident.

56. Accordingly, Ground 3 fails as well.

Ground 2.

57. In relation to Ground 2, Mr Dufficy took me on a detailed tour of the documents which were before the Judge as well as referring to aspects of the oral evidence and the submissions to the Judge, which are in the transcript. I hope I will be forgiven if, in the light of my conclusions on Grounds 3 and 4, I do not deal with these arguments in great detail. They are helpfully recorded at paragraphs 26 to 33.7 of his skeleton argument dated 13 December 2019 and Mr Dufficy took me through each of these points.

58. I accept Mr Dufficy's arguments that:

i) There was a powerful body of evidence, in the forms which were filled out at or around the admission of the claimant on 5 June 2013, that she was not assessed by Nurse Edwards as being confused so as to warrant a "no rails" assessment. Indeed, as Mr Dufficy pointed out, in his closing submissions to the Judge Mr Barclay said: "One thing we can say for certain is that Nurse Edwards found the Claimant alert and oriented, that was accepted by pretty much everyone and I accept it, on his assessment on five June, in the evening."

ii) Similarly, I accept that there was a powerful body of evidence in the forms to indicate that the claimant was not assessed by Nurse Edwards as being sufficiently mobile to warrant a "no rails assessment".

iii) There was therefore a powerful body of evidence that, if the matter was looked at in terms of what Nurse Edwards was likely, subjectively, to have thought, he would have recommended the use of rails.

iv) This view is fortified if it is right that Nurse Edwards did not recommend any other measures to address the risk of the claimant having a fall. In other words, if Nurse Edwards had not recommended the use of rails despite the fact that they were not contraindicated he would have recommended other measures. Here, I accept that the Judge appears to have relied on an interpretation of one of the forms (the Supplementary Risk Assessment form at page 267 of the bundle) to conclude that Nurse Edwards did recommend other measures without any evidence to explain the form, without giving the parties an opportunity to address the point and in circumstances where it cannot be said that the document is self-explanatory.

59. If, therefore, this had been the point on which the case turned, I would have been tempted to uphold Ground 2 on the basis of a procedural flaw which might well have affected the Judge's view in balancing the competing evidential considerations. I emphasise, however, that I would not necessarily have done so because it is not the case that the evidence was all one-way:

i) Again, whether Nurse Edwards did conclude that rails were recommended is a matter of inference and, as I have pointed out, the inference which is invited by the claimant, given paragraph 65 of the judgement, is that he made objectively the wrong decision. As far as I am aware, there was no evidence to suggest that the starting point should be anything other than that Nurse Edwards was entirely competent. Indeed, my understanding is that the claimant's case was that he should be assumed to be so and this was a reason to infer that he had recommended the use of rails.

ii) Secondly, although Nurse Edwards did not give oral evidence, and although his witness statement cannot be said to be unequivocal, the thrust of his evidence was that he believed that the decision was not to recommend the use of rails. He also said, at paragraph 11 of his witness statement, that he understood that other preventative measures were put in place "such as lowering of the bed and close observations from the Nursing team."

iii) Thirdly, I do think it was open to the Judge to infer, as she did, that in all likelihood Nurse Edwards would have been aware of the reasons for the claimant's admission at the time of his assessment. This inference is not inevitable but it would be surprising if he had made no enquiries as to the reasons why the claimant was admitted and/or no one had told him.

iv) Fourthly, although there is a circular aspect to this point, the Judge was entitled to take the view that it was relevant that rails had not in fact been put in place. This proceeded from an assumption that Nurse Edwards and his colleagues were competent but that was evidently the overall view of the Judge on the basis of her "feel" for the case.

v) Finally, it is important to note that the Judge gave thorough consideration to all of these issues at paragraphs 69 to 83 of her judgment. I accept Mr Barclay's point that the exercise which I was being asked to carry out, which involved weighing competing evidential pointers was precisely the sort of exercise which the authorities say should not be carried out on appeal. It also gives rise to a very significant risk that the appellate judge falls into the trap of being

convinced by a point which appears attractive but is less so when considered in the context of all of the information and arguments which were available to the trial judge in the course of the hearing before her. I would therefore have been highly reluctant to set aside her assessment on this point, particularly given the value of the claim viewed in the context of the overriding objective.

Conclusion

60. For all of these reasons, then, I dismiss the appeal.