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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION



No. QB-2019-002094

[2020] EWHC 919 (QB)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 10 March 2020

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

JXM

Claimant

- and -

AN NHS TRUST

Defendant

REPORTING RESTRICTIONS AND ANONYMISATION APPLIES

MR N. SHELDON QC (instructed by Irwin Mitchell LLP) appeared on behalf of the Claimant.

MISS M. BOWRON QC (instructed by Hempsons Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

(Please note this transcript has been prepared without the aid of documentation)

MR JUSTICE MARTIN SPENCER:

- 1 The claimant was born on [a date in] 2013, the second child to his mother and father, they having had a daughter, S, born on [a date in] 2012. Within a short period of the claimant's birth, he was subject to criminal assault by his father such that when he attended the defendant's hospital on [a date in] 2013, chest x-rays showed healing rib fractures which were not non-accidentally incurred. Sadly for the claimant, the defendants' staff failed to identify those rib fractures at all so that the claimant, instead of being investigated in relation to the non-accidental injuries, was discharged home to, putting it this way, the "care" of his parents.
- 2 On 14 January 2014, at shortly after 10 to 3 in the morning, an ambulance was called to the premises and on attendance, the ambulance staff found the father attempting resuscitation of the claimant who had stopped breathing. The claimant was rushed to hospital. Life-saving treatment was administered but a CT scan revealed that he had sustained devastating brain damage at the hands of his father. I say that because in 2014, his father was convicted of assault occasioning grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861, and was sentenced to an extended sentence of 15 years imprisonment with a custodial element of twelve years of which he will have to serve at least eight. I therefore anticipate that his date of release will be sometime in 2022 but I am not sure of the date of his conviction. In those circumstances, the defendant Trust has admitted liability for the injuries sustained by the claimant because of its breach of duty in failing to detect the non-accidental injuries and the consequences in failing then to arrange for investigations to be carried out which would have enabled the claimant to be taken into the protective custody of Social Services.
- 3 The injuries sustained by the claimant are described in the medical report of Dr Santosh Mordekar, consultant paediatric neurologist, who describes the claimant having sustained: brain damage, namely a diffuse hypoxic brain injury with bilateral subdural haemorrhages, acute and bilateral retinal haemorrhages; rib fractures; burst fracture of the C3 vertebrae of the spine; and a fractured rib and tibia. This has left the claimant with cerebral palsy and epilepsy with the result that he has no independent mobility and has no prospect of gaining mobility. He is doubly incontinent and will probably never attain continence. He has global intellectual impairment assessed by Dr Mordekar as a severe level of intellectual functioning by which I think he means a severe level of deficit of intellectual functioning. He also has cortical visual impairment and is registered severely visually impaired. It is clear that his claim is a significant one which I would anticipate eventually will run into some millions of pounds.
- 4 The family of the claimant includes his maternal grandmother who is a retired nurse and his maternal grandfather, as well as a maternal aunt, the elder sister to whom I have already referred, and also a younger child to whom the mother has given birth since. They live in accommodation which is wholly inadequate for the claimant properly to be cared for. The position is that the maternal grandmother has taken on the task of looking after the claimant on a fulltime basis and she has given up her job as a nurse in order to do so at great sacrifice to herself and indeed with enormous dedication. She is the litigation friend and the appointed guardian of the claimant it, of course, being no longer appropriate that the claimant should be within the guardianship of either his mother or his father, his mother having been convicted of an offence in relation to the neglect of the claimant and being

sentenced to a term of imprisonment of 18 months, suspended for two years. However, although the mother was convicted of that offence, I have no doubt that her neglect of the claimant was in consequence, at least in part if not in whole, of the influence of the father who was also someone who took to assaulting her and she will have been in some fear of him.

- 5 In those circumstances, I understand that the Social Services have allowed the mother full contact with the claimant and they all now live together as a family in the home of the maternal grandparents. I have no doubt that if the Social Services had any ongoing concern as to the safety of either the claimant or his sisters, they would not have sanctioned that arrangement but would, for example, have taken the new baby into care and made other arrangements. Therefore, I proceed on the basis that the ongoing arrangement is one which will be sanctioned by the Social Services and does not cause any sort of problem from the point of view of the destiny of the interim payment.
- 6 Having read Dr Mordekar's report and also the assessment of Karen O'Brian carried out in early 2019 and reflected in her report of 11 April 2019, it is quite clear that a substantial interim payment is required to enable a property to be bought for the family to move to, so that this claimant can be given proper care. It is a feature of these cases that the accommodation is often the key to unlocking the care which is required both in terms of the ability for the injured party to have his own space, to have his own equipment, for him not to be a burden on the other children or other members of the family insofar as he needs significant care at night, and in order to allow therapies to take place in the home and for the equipment properly to be stored. Therefore, the sooner an appropriate property is bought, the better so that it can unlock the proper care of this claimant both now and over the next number of years when his development will be all important so that he achieves the best possible level of functioning that he is able to within the limits of his disability.
- 7 A property has been identified at Bargate in Grimsby which has been assessed by an occupational therapist, an Elaine Carr, and by an appropriate accommodation expert. Thus, it would appear that a property is available which can be bought and adapted to allow the family to move into it relatively quickly. On that basis, the defendant has agreed to make an interim payment of £600,000 and I have no doubt that on the basis of both *Eeles 1* and *Eeles 2* it is appropriate to make an order for such an interim payment to be paid in accordance with the consent order which has been placed before me.
- 8 There is, however, this complication. The claimant, were he to die before he is 18, would necessarily die intestate because no statutory will can be made on his behalf until he is 18 assuming at 18 that he does not attain capacity, which appears unlikely. The defendant has raised with the court, rightly and responsibly, the issue as to whether the interim payment in particular and the damages in general would potentially accrue to the claimant's mother and father were he to die before the age of 18, they being his heirs under intestacy. To that end, an application has been made to the Court of Protection for the creation of a trust whereby it is hoped that arrangements could be made for any property of the claimant to be held in trust and to accrue to others other than his heirs on intestacy should he die before the age of 18.
- 9 In any event, although I have not had any detailed submissions in relation to this, I would expect that upon an application to the court upon the death of the claimant, the court would have the power to make an order that the estate of the claimant be distributed other than on the normal rules of intestacy upon the basis that should either of his parents inherit any money from him, that money would be almost certainly representing the damages payable to the claimant by the defendant as a result of the criminal acts of his parents and, in particular,

his father. Therefore, the court would be able to trace the source of the money as being the unlawful acts of his parents and order that they should not gain from their unlawful acts by inheriting.

- 10 The immediate risk is that the claimant dies before the Court of Protection has the opportunity to make the trust order which has been sought but were that to happen, then the interim payment would be effectively repayable to the defendant subject to the claim for damages which the court could then make in the different circumstances which would apply. It might involve the sale of the house but not if the eventual damages exceed the amount of the interim payment. However, the court could make an order that the money be held pending an appropriate order from the intestacy court or the court of protection.
- 11 In the circumstances, I do make the order sought and I simply comment that whilst I do not believe that the concerns of the defendant are likely to result in practice in either of the parents gaining from their criminal activities, I nevertheless recognise that as the partial guardian of public funds and to taking a responsible attitude towards their position as guardians of public funds, the defendant has rightly brought this matter to the attention of the court so the court is appraised of the circumstances and is able to monitor the situation relatively carefully because of the risk which has been identified.
- 12 In those circumstances, I am grateful to both Miss Bowron and also Mr Sheldon for the approach they have taken to this application.

CERTIFICATE

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