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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 2332 (QB)



No. QA-2021-000097

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 19 July 2021

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

PHILLIP WELLER
(by his wife and litigation friend Mrs Diane Weller)

Claimant/Respondent

- and -

ROYAL CORNWALL HOSPITALS NHS TRUST

Defendant/Appellant

MR T. RYDER appeared on behalf of the Claimant/Respondent.

MISS C. JONES appeared on behalf of the Defendant/Appellant.

J U D G M E N T
(via Microsoft Teams)

(Transcript prepared without the aid of documentation.)

MR JUSTICE MARTIN SPENCER:

- 1 This is an appeal against the order of Deputy Master Fine on 26 March 2021, when she refused permission to the defendant to call evidence from a neuropsychologist on the issue of causation.
- 2 The background facts are that the claimant was born on 3 August 1947 and, when on holiday in Truro, on 26 March 2016, when he would have been aged 69, he suffered an episode suggestive of a stroke. In context, at that time, the claimant was an engineer working for a frozen food manufacturer and was well and active and still a regular cricket player. He was sent home from Truro Hospital and, two days later, on 28 March, when he was unrousable, he was taken back to hospital and seen in the Accident & Emergency Department, when, again, he was sent home with symptoms of mild speech disturbance and slight difficulty walking. The following day, 29 March, he was much worse, unable to communicate or walk or use his right arm, and he was diagnosed with a new stroke and was hospitalised for about six to seven weeks. The breach of duty issue relates to the diagnosis and treatment made of the claimant, in particular on 26 and 28 March.
- 3 The claimant was seen by his medicolegal expert, Dr Patel, a consultant neurologist, on 30 January 2018, and about three weeks later, on 22 February 2018, there was a letter from a locum consultant psychiatrist, Dr Lokesh Aresh, in which Dr Aresh reported to Mr Weller's general practitioner in Grimsby on his assessment which he had made the previous October, on 30 October 2017. In that assessment, he referred to a CT scan of the head carried out on 1 April 2016, which showed extensive hyperdensity involving the left parietal, occipital and temporal lobes and the diagnosis of an acute vascular event, presumed to be ischemic. The care plan was a referral to the Alzheimer's Society and Mr Weller had been given information and advice.
- 4 On 1 July 2019, the claimant was examined by a consultant psychiatrist for medicolegal purposes, Dr Ruth Jarman, and her report is dated 30 August 2019. It was Dr Jarman's opinion that Mr Weller did not have capacity, that being the principal purpose of the report.
- 5 There was a further examination by video with Dr Patel on 6 April 2020, and Dr Patel's report, purportedly addressing condition and prognosis but also in fact addressing breach and causation, is dated 12 June 2020 and was served with the particulars of claim and the proceedings.
- 6 The report, as I say, purported to deal with condition and prognosis because that is what Dr Patel headed the report, namely, "Independent Medical Report (Condition and Prognosis)", but at p.174 of the bundle, she said:

"It is clear that Mr Weller has been left completely disabled by the stroke. This could have been prevented if the correct guidelines and care were followed on either 26 or 28 March. He was subsequently found to have atrial fibrillation, which was the cause of his stroke. Such strokes can be prevented by anticoagulating with warfarin, or the newer direct oral coagulation inhibitors. He has since been started on a direct oral

coagulation inhibitor. If he was kept in hospital on the 28th and monitored as per guidelines, it is likely that his atrial fibrillation could have been diagnosed earlier and the stroke on 29 March could have been prevented.”

7 It seems to me that the issue as to whether Mr Weller was appropriately treated and appropriate investigations were carried out and, if they had been, whether his atrial fibrillation and the consequent stroke could have been prevented are archetypally matters for a consultant neurologist, although the treatment in the Accident & Emergency Department would be for an A&E expert.

8 The complicating problem in this case is that Mr Weller has been diagnosed with vascular dementia and it would appear that this is a principal cause of his ongoing difficulties and cognitive deficits. Many people suffer strokes and recover from them, or recover cognitively from them, but the dementia is a considerable additional problem and its causative connection with the stroke will be at the heart of this case. Dementia is, of course, as Dr Patel says in her report, common in any event, and statistically, if it is to occur, will happen in the late eighties, and so if this is a question of causation, then the question may be whether the onset has been accelerated by the stroke or whether the dementia would have occurred when it did in any event. For dementia to have occurred in any event in a person as young and active as Mr Weller, without the stroke, would have been, one would have thought, unusual, but that will be a matter for the expert evidence in due course.

9 Mr Weller’s life expectancy is unfortunately attenuated by virtue of both the stroke and the dementia and, on Dr Patel’s evidence, the date when he would have had dementia on a statistical basis would occur after his expected date of death in any event.

10 The issue in this appeal is whether the Deputy Master was correct in refusing the defendant the facility of having expert evidence from a neuropsychologist. In a letter from Dr Patel dated 18 March 2021, she stated that, in her view, no such evidence was required. She said:

“I do not think a further neuropsychological assessment is required and could be too onerous for him. Such detailed psychometric assessments are incredibly lengthy, anxiety-provoking and stress-inducing and therefore should only be carried out if it will make a significant difference. I do not believe it will make a significant difference because we already know he has dementia and there is an assessment from 2018 which can only be worse now, three years later. Further, it is my assessment that Mr Weller’s stroke has caused physical complications. In addition, it has brought on the earlier onset of vascular dementia. It is for a neurologist to consider the implications of this, not a neuropsychologist.”

11 That letter was before the Deputy Master at the hearing on 26 March of this year and in the course of that hearing, the defendant’s solicitor, Ms Taylor, indicated to the Deputy Master that she had information from her instructed neurologist that he would be assisted by a report from a neuropsychologist. The Master pressed Ms Taylor as to precisely why it was that it was being said that a neuropsychologist was required, particularly when, as she understood it from the claimant’s solicitor, Ms Evans, testing had been carried out in the clinical arena and the results of those tests were available to the neurologists; thus, for example, at p.54 of the bundle, at (B), the Master said:

“I am struggling because, sure, Mr Weller has been diagnosed with vascular dementia. He will have had tests. Has your neurologist been through the medical records?”

And Ms Taylor confirmed that he had. And the Master said:

“And there must be something where he has been tested. People do not just pluck a diagnosis of vascular dementia off the shelf. There is usually something to support it.”

- 12 Ms Evans intervened to indicate that the diagnosis was made at his local hospital and that tests had been done, and the Master said:

“They will have done tests and that will all be recorded, and that will be in the medical records, and that will have led to the diagnosis. So I am not satisfied, Ms Taylor, that you need a neuropsychologist for the issue of dementia.”

And that was essentially the Master’s decision.

- 13 Notice of Appeal was issued on 20 April 2021, and a ground of appeal is as follows: the decision was wrong because (a) the pleadings demonstrate that there is an issue between the parties regarding the cause of the claimant’s vascular dementia and whether it would have occurred in any event and, if so, when; (b) the opinion of an expert neuropsychologist is reasonably required to determine the cause of the claimant’s cognitive difficulties and whether the vascular dementia is attributable to the alleged breach of duty; (c) the Deputy Master failed to give adequate weight to the fact that the defendant’s expert neurologist has advised that the cause and extent of cognitive difficulties are not within his sphere of expertise and deferred to the opinion of an expert neuropsychologist; (d) the Deputy Master failed to consider the issue of proportionality.
- 14 I have to say that the complaint that the Deputy Master failed to give adequate weight to the fact that the defendant’s expert neurologist has advised that the cause and extent of cognitive difficulties are not within his sphere of expertise and deferred to the opinion of an expert neuropsychologist rings somewhat hollowly when there was no such evidence to that effect before the Deputy Master at the hearing on 26 March. True it is that Ms Taylor suggested this, but the proper way to put that information before the court, in particular when it was clear, in advance of the hearing and in particular since the service of the letter from Dr Patel of 18 March that this was going to be an issue at the hearing, the appropriate course would have been to do what has now, at the fifty-ninth minute of the eleventh hour, been done on this appeal, and that is put before the court evidence from the neurologist and the proposed neuropsychologist in question.
- 15 Mr Ryder complains, with some force in my judgment, about the late service of the evidence, but he does not seek an adjournment in order to obtain further evidence of his own and is happy to deal with the further evidence on its merits, and he does not suggest that I should refuse to consider that evidence but submits that the way in which it has been served late goes to the weight that should be attached to it.
- 16 I turn then to the evidence which is now relied on, and the first is a letter from the instructed consultant neurologist, Professor Wills, dated 12 July 2021. He informs the court that a neuropsychology opinion will be valuable with respect to causation because the cause and extent of the claimant’s cognitive difficulties are, he says, within the particular province of a neuropsychologist and, without such an opinion, he would risk straying beyond his own field of expertise. He considers that such expert opinion is reasonably required to delineate,

firstly, which cognitive deficits are attributable to the original stroke and which are due to the vascular dementia or a depressive illness; secondly, why the formal tests of the clinician appear to be stable between 2017 and 2020, whereas there are subjective complaints of deterioration expressed by the doctors looking after Mr Weller and his family; thirdly, to give an opinion as to why, in spite of an apparent diagnosis of vascular dementia, Mr Weller was advised to contact the Alzheimer's Society and, further, he points out that, in a clinical setting, neurologist and neuropsychologists often work together to assess patients with dementia. In a medicolegal setting, the review goes further, to consider and delineate between the causes of cognitive impairment, and it is certainly my experience that, in cases such as this, neurologists and psychologists work closely together to determine the causes of cognitive deficits in cases such as this.

- 17 Professor Wills' view is supported by a letter from the proposed neuropsychologist for the defendant, Dr Ian Baker, who is a well-known and well-respected clinical neuropsychologist, and Dr Baker confirms that, in his view, neuropsychological evidence will provide the court with the most detailed information and assessment of the claimant's cognitive status by the administration of what he calls a "comprehensive battery of well-validated tests of attention, memory, visuospatial abilities and frontal lobe function". He says the information obtained from clinical interview with the claimant and close relatives and the neuropsychological test data will, in conjunction with neurology opinion, give the best chance of clarifying for the court so as to be able to comment on and describe the current cognitive presentation and the cause of it, the history and evolution of the claimant's cognitive dysfunction and assist the court because, on the claimant's own case, he has suffered multifactorial cognitive dysfunction, and the neuropsychological assessment will assess in delineating between the causes of the cognitive impairment. Thus, he says that the report will assist the court in the medicolegal context in the same way as set out in Professor Wills' letter.
- 18 He gives comfort in relation to the impact on the claimant by suggesting that expert neuropsychologists are highly experienced in minimising anxiety or potential distress in patients with cognitive impairment and guiding them through the cognitive testing procedure so as to optimise the validity of the tests and minimise the anxiety or distress to the patient. He confirms that he would be prepared to travel to the claimant's home to minimise the anxiety and distress and disruption caused by the examination.
- 19 Relying on those letters, Miss Jones, who represents the defendant today, submits that the additional evidence is proportionate because the cost, in the region of £7,000, of Dr Baker's report has to be put in the context of a claim where the provisional damages claim is damages of £1,142,432, and that excludes items still to be assessed. She submits that there is a subtle and careful distinction between the roles of the neurologist and the neuropsychologist, and it is only when such experts work together in the way described by Professor Wills that the court can be confident that the opinion it is getting is one which has been fully covered by experts who have been operating within their own fields of expertise.
- 20 For the claimant, Mr Ryder, who has made his submissions with conspicuous clarity, if I may say so, and in a most persuasive way, submits that it remains unclear quite why the causation issues which arise in this case cannot be dealt with exclusively by the neurologists. He relies on the further letter from Dr Patel, which was dated 11 July 2021, in which she repeats her view that neuropsychological evidence is not required in this case. He points to the fact that the diagnosis of vascular dementia is not in fact in active dispute on the pleadings, and so the issue for the court is not whether vascular dementia is suffered by the claimant, but whether that condition has been caused or accelerated by the effects of the stroke in March 2016, an issue which is wholly for a consultant neurologist. He submits that

it remains unclear what additional information a neuropsychologist will be able to provide, and the court needs to balance the benefit from such a report against the distress and problems which it is likely to cause to a patient in the condition of this claimant, given the difficulties described by Dr Jarman and the way in which Mr Weller, after some thirty-five minutes, became fatigued and was wringing his hands in distress, and whether, for the court to require Mr Weller to go through the comprehensive battery of tests of mental function is appropriate and proportionate, not so much in terms of money, but in terms of the benefit against the burden which that would entail for Mr Weller.

- 21 He points out that Professor Wills has not even, himself, yet examined the claimant and how Professor Wills' opinion about the value of a neuropsychologist would be validated if Professor Wills had seen the claimant for himself and determined that a neuropsychologist was required, as opposed to giving that opinion as a desktop exercise.
- 22 In my judgment, where experts as reputable and with such expertise as Professor Wills and Dr Baker tell the court that a neuropsychological opinion is required in order for the court properly to assess causation in this case, a court would with some reluctance reject such evidence as a case management decision. Clearly, I am now in a much better position to assess the need for that evidence than Deputy Master Fine was, and I have no doubt that the decision she made was correct at that time, on the basis of the information which she had. However, having now seen the letters from Professor Wills and Dr Baker, and understanding better from Miss Jones the context in which the neuropsychological evidence is required, I consider that the defendant should be afforded the facility to adduce such evidence.
- 23 I suspect that Dr Baker will not, in the end, gain a lot of assistance from his examination of Mr Weller because of the progress of Mr Weller's dementia and his probable inability to comply with the tests which Dr Baker would normally wish to administer, but I have no doubt that Dr Baker will, at an early stage, desist from trying to persist in the administration of such tests if it becomes apparent to him that the claimant is either unable to deal with them or is becoming distressed or fatigued or otherwise unable to cope, and that will, by itself, provide significant information if that is what happens. I therefore would hope and expect that a visit by Dr Baker will not be unduly detrimental to the claimant's mental health and physical health, and I accept Dr Baker's assurance that he will conduct any examination sensitively and compassionately, given the known condition of this claimant.
- 24 It is right that there should not be a single joint expert because it is important that Professor Wills and Dr Baker be able to discuss Dr Baker's findings freely and without the constraints which would be caused were Dr Baker to be a single joint expert.
- 25 Also, on reflection, it seems to me that there may be difficulty in Dr Baker sharing fully the results of the tests that he does, given the confidentiality of some of those tests, but I would hope and encourage Dr Baker to share what he is able to share so that any neuropsychologist instructed on behalf of the claimant may find it unnecessary to repeat the tests or carry out his or her own tests and thereby compound the difficulties for this claimant.
- 26 In the end, this is a substantial claim for damages, and I consider that the defendant is entitled to defend itself to the best of its ability against such a substantial claim, and if the defendant considers, as it does, that that requires the evidence from a neuropsychologist, then I do not consider it right for the court to refuse that facility when eminent experts are explaining to the court how and why such evidence will assist the court. How the matter will turn out eventually is another matter, but that is not for me to consider or decide at this

stage and, in the circumstances, I allow the appeal and there shall be directions made accordingly.

27 At the moment, I am minded to award the costs of this appeal against the defendant in any event, but I will hear Miss Jones if she wishes to try and persuade me to make some other order as to the costs.

CERTIFICATE

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This transcript has been approved by the Judge.