TRANSCRIPT OF PROCEEDINGS

Ref. D90PR196
Neutral Citation Number: [2021] EWHC 2525 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Before THE HON MR JUSTICE ROBIN KNOWLES CBE

IN THE MATTER OF

JONATHAN LEWIS BOND (Claimant)

-v-

(1) SPECSAVERS INTERNATIONAL HEALTHCARE LTD
(2) MAHMOOD MOUSTAFA (Defendants)

MR S BUTLER appeared on behalf of the Claimant
MR H CHARLES appeared on behalf of the Defendants

JUDGMENT
28th MAY 2021, 14.07–14.51

Hearing 25-27 May 2021

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MR JUSTICE ROBIN KNOWLES:

1. These are proceedings claiming damages for alleged negligence. This is the court's judgment on the trial this week of preliminary issues ordered by District Judge Anson in the following terms on 14 April 2020:

> "Breach of duty. A, should the changes which have taken place which the second defendant had detected have raised concerns at the September 2012 appointment? B, if so, then should the second defendant have carried out additional checks at that appointment or thereafter? (1) If so, what and when? Or (2) recalled the claimant and if so, when? Or (3) referred the claimant and if so, to whom and when? Causation, subject to findings in respect of A to B. C, Had the claimant been referred by the second defendant, what would the subsequent referral and treatment pathway have been over what period? D, Had the second defendant made a recall recommendation, what would the subsequent referral and treatment pathway have been over what period? E, Accordingly and to the extent the same as not enumerated in reply to C and D, would any significant difference be expected between the claimant's current condition and prognosis, whatever it may be, but for any breach of duty identified at A and B?"

2. The claimant, Mr Jonathan Bond, was born on 25 March 1996. On 2 September 2012, when 16 years old, Mr Bond attended a branch of the first defendant, Specsavers in Accrington for an appointment. Mr Bond's mother, Mrs Denise Bond, was with him. He was seen for his appointment by Mr Mohammed Moustafa, the second defendant.

3. Mr Moustafa has a degree in optometry, undertaking his pre-registration training after that from 2001-2. He became a fully qualified registered optometrist in January 2003, working after that as a full time, self-employed local optometrist in several towns and cities across the northwest. He began work at Specsavers Accrington as, in his words, "a self-employed local optometrist with no regular fixed dates or guarantee of regular days."

4. Mr Bond described getting headaches in 2008 to 2009. He was referred to hospital for this and other potentially unrelated problems. His evidence was that with regard to his headaches, he was asked at the hospital referral if he had had his eyes tested and was advised to get them tested to "rule out that a vision problem was not causing my headaches." He first attended a branch of Specsavers in February 2009 and was advised that he needed glasses, as he put it, "So the cause of my headaches was put down to the fact I needed glasses."

5. However, despite glasses being prescribed at that point, Mr Bond's evidence was that his headaches continued on a regular basis. He attended further eye examinations at Specsavers on 2 September 2009, 6 September 2010 and 21 October 2011. In the summer of 2012, around the time he was taking GCSEs at Bolton School, Mr Bond said in his evidence that he noticed that his eyesight had deteriorated and he was getting more frequent and severe headaches.

6. After taking his GCSEs in the summer of 2012, his headaches did not improve and as a result, his mother, Mrs Bond telephoned Specsavers in August of that year to arrange an appointment for another eye test. Mr Bond's evidence was that initially, Specsavers told his mother that his previous eye test was done in October 2011 and therefore, he was not due an eye test until October 2012.

7. However, his mother explained to Specsavers that he had difficulties with his vision during revision for his GCSEs and had been having more headaches. As she insisted that he was seen earlier, an appointment was arranged for 2 September 2012. On arriving at Specsavers on that day, Mrs Bond's evidence was that whilst she and her son sat in the waiting area, a receptionist asked for Mr Bond's then glasses.

8. At the appointment, Mr Bond's evidence was that he explained to Mr Moustafa that he had been having difficult with his eyesight during his revision and exams and over the summer and had been having lots of bad headaches. He said to Mr Moustafa that this was the reason why an early appointment for an eye test was requested. Mr Moustafa advised Mr Bond that he needed some new glasses. Those were arranged and Mr Bond acknowledges that they helped with his vision and the frequency and severity of his headaches was better. In oral evidence, he elaborated that the improvement was "not massive" but was "better." The frequency of his headaches before he saw Mr Moustafa had been every day.

9. School restarted in September 2012 with the first year of Mr Bond's A-level studies. It was in or around March 2013, more specifically at the beginning of March when he found he had difficulty in economics that he noticed he was having worse vision and headaches and he brought this immediately to his mother's attention.

10. A further appointment with Specsavers Accrington on 21 March 2013 followed. This was not with Mr Moustafa. Mr Bond was told by the person he describes as "the optician" that that person thought he had keratoconus and needed an urgent referral to hospital for this diagnosis to be confirmed.

11. His referral to hospital was to the Royal Preston Hospital on 4 April 2013. And there, he saw a Mr Patel. Mr Patel in turn referred him to Mr Vose, a cornea specialist at Royal

Preston Hospital and he saw Mr Vose on 2 May 2013. During his consultation with Mr Patel, there was a discussion of what was described as a "new treatment" called collagen cross-linking. Mr Vose recommended Mr Lake at the Centre for Sight, East Grinstead or Mr Batterbury at the Royal Liverpool Hospital.

12. Mr Bond said in cross-examination that his mother had asked of Mr Vose, "What would you do if this was your son?" And received the answer, "Mr Lake or Mr Batterbury." Mr Bond said that he could not recall exactly that conversation but it was to the effect that cross-linking would slow the deterioration in his sight. Mr Bond, in due course, saw Mr Lake and he recalls that Mr Lake expressed the view that he should have the cross-linking but there were risks.

13. In due course, a first cross-linking treatment on Mr Bond's left eye was undertaken on 14 June 2014, a date that on Mr Bond's account took into consideration when he had to do his AS exams. All of this evidence from Mr Bond and his mother, Mrs Bond, I accept having heard each of them.

14. Let me return to some of the details of the appointment on 2 September 2012. Mr Moustafa, who also gave evidence at this trial of preliminary issues, accepted that he did not have an independent recollection of the visit. This is not surprising. He referred to and he relied on a computer record of the visit and his own general course of practice. He accepted that the computer record was not completely accurate.

15. In the sections of the computer record headed "Advice given/action taken" there is the entry of Mr Moustafa inserted, "New or sig myopic/astigmatic change." In the section headed "External eye and ophthalmoscopy" Mr Moustafa allowed or did not disturb the answer, "No" alongside each of the options "Direct" "Indirect" "VOLK" "Dilated" and "Slit lamp."

16. However, further within that section, the following entries were made by Mr Moustafa. First, alongside "External eye" the entry "lids/lashes/bulbar/conjunctiva/sclera/cornea normal as seen." Second, alongside "Anterior chamber" the entry "clear & quiet." Alongside "Lens" thirdly, the entry "clear lens." And fourthly, alongside "Vitreous" the entry "clear." These four entries that were the subject of particular focus at this trial within the section of the report, were identical for left and right eye.

17. The entries for "External eye" were not identical to those for the record from the previous examination at Specsavers on 21 October 2011. This rules out one suggestion raised by Mrs Bond, namely that the entries in September 2012 were in some way copied across from before, but that suggestion is not ultimately material.

18. Mr Moustafa pointed to entries in the record as suggesting some further form of examination using equipment in order to reach the observations that were made when, on the face of the record, the use of equipment was not indicated.

19. Mr Moustafa used only a traditional trial frame into which lenses would be inserted according to Mrs Bond. Mrs Bond's recollection was that Mr Moustafa did not use other equipment and in particular did not use a slit lamp.

20. By reference to his usual practice, Mr Moustafa indicated that the consultation room used for the visit was of a type that offered a technology-based alternative to a traditional trial frame, such that although a traditional trial frame was available, it would not necessarily be required to be used. In his witness statement of 23 July 2018, Mr Moustafa went on to suggest that he used various other equipment and tests, including retinoscopy but I was not confident in his evidence in this regard. The record does not bear out the detail that he offers in that witness statement and I do not find his general practice is capable of explaining the patient-specific points he details when, as he acknowledges, he has no independent recollection of this patient and his visit.

21. I take the view that both Mrs Bond and Mr Moustafa nonetheless were doing their best to give honest evidence but as between the two, in terms of accuracy, I prefer on balance the recollection of Mrs Bond. It was questioned why she should have a specific recollection of the appointment and the equipment used at that appointment but I consider there is a good answer to that question, which is that the appointment had occurred at a point of appreciable concern on her part over her son's eyesight. The visit was not for her or her son routine or forgettable.

22. I should add that I regard the pro forma form provided by Specsavers and used at this appointment, and the procedure for its completion and use, as needing considerable improvement. Perhaps the form has been revised since 2012 but as it stands and as Mr Moustafa described the way in which it would be completed, including the operation of default settings, it is not in my judgment of a good standard. It does not capture all that it should and it too readily allows errors in its completion.

23. Mrs Bond's evidence from the appointment on 2 September 2012 was that Mr Moustafa did not say that there was anything to be concerned about with regard to Mr Bond's new prescription and Mr Moustafa did not say that there had been a significant change in her son's eyesight or vision or that it was unusual or that there was anything that they ought to be concerned about or that they should get a second opinion. I accept this evidence.

24. What Mr Moustafa did do in addition to dispensing a prescription for new spectacles was to set a 24-month period before return for a further appointment. In his evidence, Mr Moustafa was frank enough, to his credit, to volunteer that he regretted at least the length of that period.

25. Thanks in part to the involvement of expert witnesses in these proceedings and to directions from District Judge Anson for appropriate meetings between the experts, there is now a large amount of common ground.

26. It is common ground that Mr Bond presented at the appointment with a large change in astigmatism in the left eye since a previous appointment on 21 October 2011. It is further common ground that this large change in astigmatism in the left eye was of sufficient magnitude over a sufficiently short period of time to raise suspicion of keratoconus or other pathological cause and should have raised concerns. The parties are agreed that where signs of possible pathology are detected during eye examination, there is a duty further to investigate those signs and/or refer the patient.

27. As regards investigation, it is common ground that a number of additional checks or actions could have been conducted to further investigate the change in prescription. These checks or actions include:

> "(1) Conduct retinoscopy. Assessing the quality of the reflex for any signs of corneal irregularity and noting the result either positively or negatively on the record. (2) Performing keratometry. Measurement of corneal curvature to investigate the nature of the astigmatic change, assessing the quality of the mires for signs of corneal irregularity and noting the result on the record card. (3) Asking about a family history of keratoconus or any associated systemic risk conditions such as atopy. (4) Assessing the reliability of the autorefraction result. (5) Noting the presence or absence of specific signs of keratoconus during slit lamp examination. (6) Recalling the patient at a shorter interval to monitor for further change."

28. If some additional tests detailed above were carried out and did not show evidence of keratoconus and therefore did not raise further suspicion of the condition, the experts and the parties are agreed that a recall period of around six months should have been offered and that referral to ophthalmology was not required but would have been acceptable.

29. It is common ground that Mr Moustafa detected signs of pathology but failed further to investigate or to refer. That is not to say that he was required to investigate but it is to say that if he did not investigate, he was required to refer. It is also common ground that this

omission both would not be supported by a reasonable body of optometrists' opinion and fell below the standard reasonably to be expected of an optometrist.

30. Expert evidence of optometry was provided by Ms Gillian Whitby, instructed on behalf of Mr Bond, and Mr Ian Cameron, instructed on behalf of Mr Moustafa. Both experts made a useful contribution. Their joint report to the court, dated 4 December 2019 recorded their agreement, adopted by the parties in the common ground to which I have referred, that "where signs of possible pathology are detected during an eye examination, there is a duty to further investigate those signs and/or refer the patient."

31. In circumstances where I conclude on balance that further investigation was not undertaken by Mr Moustafa, it follows from that agreed position (which I accept) that Mr Moustafa should have referred Mr Bond. In these circumstances, my answers to the two preliminary issues under the heading "Breach of duty" are as follows. "A, Should the changes which had taken place which the second defendant had detected have raised concerns at the September 2012 appointment?" My answer is yes. "B, If so, then should the second defendant have carried out additional checks at that appointment or thereafter and (1) if so, what and when? Or (2) recalled the claimant and if so, when? Or (3) referred the claimant and if so, to whom and when?" My answer is that he should have referred the claimant and right away to a hospital or equivalent.

32. Turning to causation. There are three preliminary issues under this heading but in light of my conclusions on issues A and B, causation issue D, which was premised on recall rather than referral does not arise. The remaining preliminary issues ask, "What would the subsequent referral treatment and pathway have been, over what period, had there been a referral?" and "Would any significant difference be expected between Mr Bond's current condition and prognosis, whatever it may be, but for any breach of duty identified at A and B?"

33. The parties are agreed that Mr Bond had good spectacle-corrected vision 6/6 right and left in September 2012 and can be expected to have retained that level of vision had he been cross-linked close to that time. Without the referral, the parties agree that Mr Bond is likely to have noticed systematic deterioration in his spectacle-corrected vision at some time between mid-January 2013 and March 2013. The parties also agree that by 21 March 2013, Mr Bond's spectacle-corrected acuity had dropped to 6/10 right and 6/12 left, such that he would have required contact lenses to achieve 6/6 acuity.

34. Mr Bond had his first fitting of rigid gas-permeable contact lenses to correct vision on 19 April 2013 and achieved a good level of visual acuity. He has however had repeated

problems with tolerating the discomfort of the contact lenses and has not at any time reported that he has achieved acceptable long-term comfort.

35. It is common ground that Mr Bond's most successful period of contact lens wear is reported as being from March 2014 onwards, after lenses were fitted by an optometry practice in Preston. Mr Bond's description of being able to wear those lenses four to six hours per day with the wearing time limited by discomfort is supported by the optometry records.

36. It is further common ground that Mr Bond was referred from the high street optometrist on 21 March 2013 to his general practice doctor, advising routine referral to the hospital eye service, which was initiated on 22 March 2013. Mr Bond was referred to the Royal Preston Hospital, where he was seen by the ophthalmologist, Mr Patel on 4 April 2013. A diagnosis of keratoconus was made and he was referred to a corneal subspecialist ophthalmologist at the Royal Preston Hospital, Mr Taherian, replaced by Mr Vose and to a contact lens practitioner.

37. The GP wrote a further letter to Mr Vose requesting additional treatment on 22 April 2013. The appointment with Mr Vose was on 2 May 2013. After that Mr Bond was referred to the local teaching hospital for a subspecialist opinion and possible corneal collagen cross-linking. Mr Bond and his family then requested a new GP referral to a further subspecialist unit in East Grinstead, under the NHS scheme "Any Qualified Provider" because the waiting time was shorter. He was seen by Mr Lake on 31 May 2013.

38. Corneal cross-linking, CXL, was carried out to the right eye on 21 June 2013 and to the left eye on 12 July 2013. CXL was repeated because of concern about possible progression on 24 May 2015, left eye and 20 August 2015, right eye. In September 2014, Mr Bond was advised that a cornea transplant in both eyes would be needed. Although the CXL in 2015 was then carried out, he was put on the transplant list for his left eye on 6 September 2017 and underwent a transplant on 8 August 2018. On 1 February 2021, Mr Bond underwent a transplant in his right eye.

39. Each party called ophthalmology experts. Mr Mark Batterbury, instructed on behalf of Mr Bond and Mr Martin Leyland, instructed on behalf of Mr Moustafa. Again, both experts provided valuable evidence.

40. The following is also common ground between the parties.

41. (1) There were no agreed national criteria for corneal collagen cross-linking, CXL, at the time. Ophthalmologists providing a CXL service used a combination of change in spectacle prescription, patient reports of deteriorating sight in the presence of topographically

confirmed keratoconus and serial corneal topography, using a device such as the pentacam to detect progressive keratoconus and offer CXL treatment. CXL might also be offered at first visit to patients at high risk of disease progression, such as onset in childhood or teenage years.

42. (2) The short term effect of CXL is pain and blurred vision during initial recovery and in around 10 per cent of cases, significant inflammation requiring treatment, lasting one to two weeks. The medium term prognosis is fluctuation in corneal shape, sight and sight testing refraction, until around three months after treatment. The longer term prognosis is most commonly a halt in the progressive corneal steepening seen in keratoconus corneal stabilisation. And in many cases, a small effect of gradual flattening of the cornea, regression of the disease. CXL is successful in halting progression of keratoconus in approximately 76 per cent of eyes less than 18 years of age.

43. (3) The post-operative recovery period involves pain and blurred vision, such that some patients may choose to expedite or delay treatment to minimise effect on their education. Other patients prioritise their vision and proceed with treatment when required and accept any effects on their education. There is no suggestion in the medical record to support there being any consideration of the impact on educational needs affecting treatment decision in this case. Although in the first witness statement of Mrs Bond, she reports that Mr Lake suggested that CXL be delayed until after Mr Bond's examinations.

44. (4) The primary aim and effect of CXL is to stabilise the cornea. Thus, a patient who required contact lenses for good vision prior to CXL is likely to continue to require them after treatment.

45. (5) There are no defined criteria for carrying out corneal transplant surgery. The decision is clinical and made by doctor and patient together, after discussion of risks and potential benefits. Patients with good spectacle-corrected vision or contact lenses requiring patients with acceptable contact lens tolerance would be unlikely to have transplant surgery. Patients with poor spectacle-corrected vision, who are unable to achieve acceptable vision or have unacceptable discomfort with contact lenses may be considered for transplant surgery. In general, patients with more advanced keratoconus, having steeper, more prominent corneas are less likely to be successful with contact lenses and are more likely to require transplant surgery.

46. For all the common ground, the parties do not agree what the referral and treatment pathway would have been and do not agree whether or not there would have been any

significant difference to be expected between the claimant, Mr Bond's, current condition and prognosis but for any breach of duty.

47. Mr Leyland recorded when dealing with the question, "Scenario A, referral and treatment pathway in respect of an immediate referral to hospital following the September 2012 appointment with Mr Moustafa," in the joint statement of the ophthalmology experts, his own opinion in the following terms:

> "In NL's opinion, Mr Bond would have been referred to and seen by a general ophthalmologist at the Royal Preston Hospital on or around 17 September 2012 and been diagnosed with keratoconus. He would have referred on to a corneal subspecialist within the same hospital and have been seen in mid-October. In mid-October, the examining ophthalmologist may have advised monitoring of the condition with a view to referral to Liverpool for CXL if the keratoconus worsened, i.e. following the Moorfields Eye Hospital protocol or have instead advised immediate referral to Liverpool for CXL. At this time, the condition was mild, the claimant had good spectacle corrected acuity and it is more likely than not that the advice would have been to monitor the condition."

48. Mr Batterbury's opinion, as expressed in the joint report was that at a mid-October appointment with the corneal subspecialist:

> "The claimant, Mr Bond, would have been referred to Liverpool for an opinion on CXL, resulting in an appointment in late November. It is likely that at that point, he would have been listed for CXL, which would then have taken place in January 2013. This is on the basis that teenagers, presenting with keratoconus are at high risk of progression and may be offered early treatment without confirmation of disease progression."

49. The experts differed on their opinion as to the progression of the keratoconus, including acceleration of progression in this case. Mr Batterbury was of the opinion that the condition was progressing from before September 2012 and continued. Mr Leyland was of the opinion that Mr Bond's condition was progressing slowly from before September 2012 but the rate of progression "increased significantly from March 2013 onwards."

50. Mr Batterbury had the opinion based on greater experience of the position within the northwest at the material times. I was readily satisfied from his evidence that a referral from Preston to Liverpool was likely for a person of Mr Bond's then young age and at that time and that triage would then likely to have been followed by the availability of cross-linking treatment.

51. I appreciate that Mr Leyland's conclusions would lead to a later time in terms of the availability of treatment but Mr Leyland was not able to contribute as reliably in terms of experience as Mr Batterbury in the particular context of a 16-year-old being referred in 2012 to specialist ophthalmologists in the northwest.

52. The common ground refers to the absence of agreed national criteria at the time. There was in effect, a discussion through cross-examination between counsel and the experts whether in circumstances where NICE guidelines were not developed until 2013, the position in Liverpool over cross-linking was in fact developed in 2012 to the degree that Mr Batterbury's evidence suggested. I am quite satisfied that it was. The point made that the publication of the NICE guidelines would follow some developed existing usage was in my assessment, sound.

53. Moreover, Mr Batterbury was able to describe the development of cross-linkage in Liverpool from a starting point as early as 2009/10. He was a very impressive expert witness, careful, precise and informed and his contribution to the resolution of issues in this case was in my judgment, considerable.

54. A copy of some guidelines for Liverpool, entitled, "Referral into St Paul's Eye Unit, corneal cross-linking service" was produced in the course of the hearing and I accept Mr Batterbury's evidence to the effect that these indicated the position in 2012 as well as at the date, 2018, on which the document was saved on the computer. They stated that:

> "Since the purpose of corneal cross-linking is to stabilise a progressively ectatic cornea, usually keratoconus, treatment will be most appropriate in an eye where 'locking' it in its current state is advantageous to the patient … refer, (1), at high risk of progression (for example, young age). Progressing then subjectively (patient states that he/she is getting worse) objectively refraction topography. There are no definite criteria for progression on topography and refraction. Sometimes it is a matter of clinical judgement."

The reference to young age is, in my judgment, material.

55. I am persuaded that on the balance of probabilities, had Mr Bond been referred in September 2012, cross-linking treatment would have been offered to him by November 2012. I am quite satisfied that he would have taken that opportunity, just as he did in fact, in 2013. Treatment would have followed in January 2013.

56. Mr Batterbury's conclusion, with which I agree on the balance of probabilities, is that had Mr Bond been referred on 2 September 2012, he would have received CXL at a time when he would have retained useful, unaided visual acuity and good spectacle or contact lens

assisted acuity or acceptable contact lens comfort. The balance of probabilities is that he then would have avoided corneal transplant surgery. He might also have avoided the severity of visual symptoms that he now has.

57. As I say, I agree with those conclusions and they summarise my own. But insofar as necessary for me to make this clear, in my judgment on the balance of probabilities and by reference to Mr Batterbury's use of the word "might" in the final sentence to which I have just referred, in my judgment the position is that he would have avoided the severity of visual symptoms that he now has.

58. In these circumstances, my answers to the three preliminary issues under the heading, "Causation" are as follows. "C, Had the claimant been referred by the second defendant, what would the subsequent referral and treatment pathway have been, over what period?" Answer, as described above and in line with Mr Batterbury's evidence." "D, Had the second defendant made a recall recommendation, what would the subsequent referral and treatment pathway have been, over what period?" Answer, not applicable. "E, accordingly and to the extent the same is not enumerated in reply to C and D, would any significant difference be expected between the claimant's current condition and prognosis, whatever it may be but for any breach of duty identified at A and B?" Answer, yes and as described above and in line with Mr Batterbury's evidence.

59. That completes my judgment.

60. I am grateful to Counsel for their assistance.
