Case No: HQ17C03457

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2019

Before :

ROWENA COLLINS-RICE
(sitting as a Deputy Judge of the High Court)

- -

Between :

Tahir YOUNAS	**Claimant**
- and -	
Majella OKEAHIALAM	**Defendant**

- -
- -

Benjamin Bradley (instructed by **Stewarts**) for the **Claimant**
Claire Toogood (instructed by **the Medical Protection Society**) for the **Defendant**

Hearing date: 26 September 2019

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IN THE MATTER OF THE DEFENDANT'S APPLICATION FOR PERMISSION TO APPEAL

STATEMENT OF REASONS

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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Rowena Collins-Rice :

Background

1. The circumstances of this case are set out in the judgment. Mr Younas sustained a spinal cord injury as a result of a fall on 24th January 2014 caused by a sudden loss of consciousness. That in turn was caused by a subsequently diagnosed heart condition: intermittent atrioventricular (AV) block. Mr Younas claims damages for his injury, on the basis that it was caused by Dr Okeahialam's negligence, in failing to refer him for specialist cardiology investigations on receipt of an abnormal ECG test result on 21st October 2013. That negligence was admitted. The only issue for trial was causation.

2. The trial took place on 26th-28th June 2019. Causation being a matter of fact and evidence, it is common ground that there were three areas in which findings of fact needed to be made: (a) whether it was more likely than not that Mr Younas had already developed intermittent AV block over the period between 21st October 2013 and 24th January 2014 (the underlying condition); (b) whether, if he had been referred to cardiologists when he ought to have been, the hospital diagnostic and treatment processes more probably than not would have been undertaken in time before 24th January, thereby averting the accident (the timetable); (c) whether those processes would, more likely than not, have revealed Mr Younas's condition at all (the diagnosis). Written and oral evidence on these questions was received from the parties, and from expert cardiologists instructed for each.

3. A draft judgment was returned to court officers on 19th July and forwarded to Counsel for checking in the following days. It set out findings of fact in all three areas, and concluded in favour of Mr Younas on the question of causation. Counsel identified an error in the draft's internal cross-referencing to the dates of one of the stages of the hospital processes. In rectifying that error, further clarification appeared desirable in the way the draft set out some of the reasoning underlying the conclusions on the facts as to timetable, in particular to put beyond doubt the distinction between the analytical process leading to the conclusions, and the conclusions themselves.

4. A revised draft was returned to court officers on 31st July, under cover of brief observations explaining the purpose of the drafting changes, and confirming that no change had been made to the substance of the analysis or to the conclusions. It was forwarded on to Counsel in the course of the next week with an invitation to raise any other possible points of inconsistency or unclarity. The timetable for receiving comments was extended to 21st August to accommodate leave commitments, and both parties confirmed in due course that they had no further questions to raise on the draft.

5. Judgment was handed down at a short hearing on 26th September at which agreed consequential orders were confirmed, and the defendant sought permission to appeal the judgment. Ms Toogood's case for permission was set out on the basis of draft grounds of appeal and in oral submissions. Permission to appeal was refused at that hearing, with reasons to follow.

6. In setting out these reasons I have had regard to the guidance in sections 40.2.1.2 and 40.2.1.3 of the White Book. I have also given Counsel an opportunity to consider this statement of reasons in draft, and to indicate any respect in which they considered it

necessary or desirable for matters to be further addressed. A point of detail was raised on behalf of the defendant about one aspect of the treatment of the expert evidence, and addressed in brief observations. Neither party considered it necessary for the matter to be addressed in this statement. No other issue was raised on the draft.

Reasons

7. The application for permission proposed that an appeal would have a real prospect of success on the basis of (i) error in applying the line of authorities following *Keefe v Isle of Man Steam Packet Co* [2010] EWCA Civ 683; and (ii) a number of grounds which might be conveniently grouped under the heading of errors in evaluating expert evidence and/or in making findings insufficiently supported or explained by expert evidence or by pleadings. I did not consider that an appeal on these bases, individually or collectively, would have a real prospect of success for the following reasons.

General

8. The judgment is entirely an exercise in evaluating evidence, in particular in evaluating evidence given orally and tested under cross examination over a period of days. That is an exercise in which a range of outcomes and conclusions is always possible - as to the weight to be given to the testimony of one witness or another, and as to the relevance and relative importance of different facts and issues in all the circumstances. An appeal court cannot replicate that exercise. It is not able simply to disagree or come to a different evaluation. It can only look for material error or unfairness, sufficient to make it unjust not to disturb a trial judge's conclusions.

9. Of the three areas in which facts had to be found, only the first – the question of whether Mr Younas's heart condition was likely to have been subsisting at the relevant time – was a question of historical fact. I do not understand the judgment to be challenged in that respect. The other areas of fact-finding relate to hypothetical 'fact': not what did in fact happen, but what would likely have happened but for the negligent failure to refer. That is a distinctive exercise in evaluating (expert) opinion, including, necessarily, the relevance of any proposed comparators. There is no objectively true narrative to uncover; there are only competingly plausible theories to assemble and test on the basis of the evidence, as to which evaluation of expert testimony is all the more central, and an appeal court at the correspondingly greater disadvantage.

10. Counsel had a full and fair opportunity to raise issues relating to the drafting of this judgment, including as to the coherence of the expression of analysis and reasons, before it was finalised. To the extent that any point may now be sought to be taken about differences between the first and final versions, these were drafting changes made precisely to address any ambiguity that there might have been about which conclusions were and were not being drawn as to the (hypothetical) facts, and why. They were not changes of substance. In any event, the judgment as handed down sets out a final and considered analysis and conclusions, and there is no arguable basis for going behind it.

Authorities

11. Ms Toogood proposed that the judgment either discloses a novel and more extensive application of the concept of 'claimant benevolence' than appears from the authorities, or errs in applying benevolence not to the evidence and the fact-finding process, but to the claimant's case more generally.

12. The *Keefe* authorities emerged to help courts deal with the sometimes difficult task of evaluating evidence in situations where the best evidence is missing as a direct result of the defendant's fault. The concept of 'claimant benevolence' has been applied in decided cases to both historical and hypothetical fact-finding exercises.

13. Its relevance in this case was to the task of considering whether the claimant had made out his case that the hospital procedures would probably have been completed in time, and enabled his heart condition to have been identified and treated. These were questions of hypothetical fact. The task of resolving them had in turn to be supported by conclusions about the probable sequencing and timing of a number of individual stages making up those medical processes.

14. Two things were agreed by both parties about this. First, benevolence cannot operate to reverse the burden of proof on the claimant to establish the probability of an event occurring within a specific range of outcomes. Second, if a range is properly established, but there are no other means of resolving more precisely where in that range an event occurred, then benevolence should operate to produce the finding within that range which was the most favourable to the claimant's case.

15. On the question of whether the hospital procedures more probably than not would have been undertaken in time (that is before 24th January 2014), the judgment sets out findings of fact, and evidence-base, on sequencing and on the relevant ranges of dates within key events would probably have fallen. Considerable evidence, cross examination and argument had been addressed to all of these issues. Claimant benevolence then fell to be applied to such resolution of the more precise timing of events, within the ranges, as was necessary to make the overall findings on causation. So much appears uncontroversial.

16. The claimant's case was originally advanced as to sequence and timetable on a basis of everything happening as soon and as quickly as possible. The judgment sets out the basis on which it reached conclusions which differ from some of the propositions of 'urgency' advanced by the claimant. Consistently with those findings, on the question of resolving overall timetable it is obvious that claimant benevolence applied to residual uncertainty will in general favour a finding at the shortest possible end of each established range.

17. Doing so in this case, on all the ranges as I had found them, would have pointed to a composite finding on timetable that comfortably made the claimant's overall case in the second area of fact-finding (timetable). Viewed from the perspective of the third area of fact-finding (diagnosis), however, findings at the shortest end of each timetable range would not necessarily have favoured the claimant and given him the full benefit of the doubt. That is because I had accepted evidence suggesting that the closer an ECG test is taken to a symptomatic episode in a patient with intermittent AV block, the more likely it is to reveal the condition. This, as noted below, was based on agreed expert evidence. On that basis, proper application of the benefit of the doubt required more sophisticated evaluation than just settling on the *earliest* date within

each established range, since it also pointed to the *latest* date for the ECG consistent with maintaining the findings for the claimant on sequence and overall timetable.

18. This is all set out in full on the face of the judgment. Supported findings of fact are made as to sequence, and as to a range of dates within which each event would probably have fallen. Descending to further levels of calendar detail was not necessary to resolve the case and would have been inappropriate to an exercise in finding hypothetical facts.

19. Objection appears to be being made (including by reference to the word 'recalibrated' at paragraph 59) that one set of findings of fact were in effect made to reach conclusions on timetable, and then another inconsistent set on diagnosis; or alternatively that the judgment simply 'works backwards' from a conclusion favourable to the claimant without proper regard to the evidence at all. Such objections cannot in my view be maintained with a real prospect of success. Findings on *range* are made in each case on an explicit evaluation of evidence; findings on *points* within each range are made by giving the claimant the benefit of any residual doubt. On the particular facts of this case, what exactly it meant to give him the 'benefit' had to be looked at from more than one perspective.

20. That is an orthodox application of the authorities. The concept of claimant benevolence is not in itself a difficult one, but its application is highly fact-specific and therefore not necessarily simple to perform in practice. It is all, however, an exercise in evaluating evidence. Ms Toogood suggested that it needed to have been done in this case on a strictly chronological basis, crystallising out each component finding of fact in isolation before considering the next component in the sequence of events. That may be a good approach to establishing interdependent historical facts, but this was an exercise in establishing hypothetical facts where doubts about each step in the hypothesis necessarily contained potential to be resolved in ways which were more fair or less fair to the claimant. The application of the benefit of the doubt had to be considered not just piecemeal, but overall, cumulatively, and with some care, before conclusions on fact could properly be reached. That may have required thinking both forwards and backwards in terms of chronology, but that is not the same thing at all as 'working backwards' from a conclusion to an analysis.

Expert evidence

21. Ms Toogood seeks permission to raise objections under this heading which appear to go to the basis on which the judgment concludes that a 72 hour ECG would more likely than not have revealed Mr Younas's intermittent AV block (diagnosis). More specifically, these objections appear to go to the weight the judgment places on the evidence that the closer the test is taken to a symptomatic episode such as Mr Younas experienced on 24th January 2014, the more probable it is that an (asymptomatic) irregularity in heartbeat would be detected in this way. For brevity, I refer to this as the 'proximity' point.

22. The question of what the ECG would have shown – that is, whether the signature pattern of intermittent AV block would have appeared on a 72 hour continuous trace – was plainly central to the case from the outset. Extensive cross-examination and argument were addressed to this issue at trial.

23. The claimant's case on diagnosis was clearly, and indeed necessarily, founded on proximity from the outset. It was the consistent, repeated evidence of the claimant's expert, Dr Cripps, that the fact, known in hindsight, that the claimant was destined to suffer syncope (fainting) due to intermittent AV block *within a short time* of the ECG test was crucial. My conclusions on the evidence about sequencing, which in significant respects preferred the defendant's expert evidence, placed the ECG later in the hospital proceedings than the claimant had originally contended. That had the collateral effect of strengthening Dr Cripps's evidence on proximity in any event.

24. The defendant's expert, Prof Myerson, agreed that proximity *increases the chances* of detection. His opinion on diagnosis, however, differed from Dr Cripps's principally because his starting point was his interpretation of data contained in a relatively small number of studies reported in professional literature. The defence's case was heavily reliant on this literature. The relevance of the studies contained in it was strongly contested, and this contest featured very fully in the cross examination of both experts, and the developed arguments of both parties. The experts were in agreement that none of the studies was directly on point, so the issue was one of degree of relevance or otherwise. The claimant's case was that the facts of the studies in question were distinguishable from the present case on a number of significant grounds (to do with the characteristics and history of the patients, and the technology involved), and in any event incapable of bearing real weight because of limitations in sample size and other features of methodology. I agreed, and the judgment concludes that the literature provided limited assistance. It therefore provided correspondingly little support to Prof Myerson's conclusions, or indeed to his starting point.

25. The defendant's submissions on this point were also highly focused on a challenge to the credibility of Dr Cripps, directed in general to demeanour and in particular to a small number of inconsistencies or discrepancies in his evidence upon which he was cross-examined and gave explanations. The judgment addresses the respective status of the experts in general terms at paragraph 41 and subsequently on an issue by issue basis. If it does not expressly confirm that I was satisfied with Dr Cripps's explanations of what I viewed as essentially rhetorical slips, and that I had allowed for diversity in style and temperament between the two experts without prejudice to either, then it does so by necessary implication.

26. The judgment sets out that, absent any literature directly on point or persuasively relevant (which was not, for the reasons given, surprising in an exercise in finding hypothetical fact), the opinion evidence of the experts fell to be weighed on its respective merits, supported by such of their own relevant knowledge and experience as they chose to rely on. It sets out the basis on which I took account of such differences of opinion between them as appeared relevant to my conclusions. It also sets out a conclusion that they were to a degree addressing themselves at cross purposes: Prof Myerson to the question of the later diagnosis of undiagnosed patients in professional practice, and Dr Cripps to the necessary hypothesis of a diagnosed patient and the specifics of Mr Younas's history. The latter was the more apposite to the task in hand, and I accepted Dr Cripps's emphatic evidence, supported by reference to his expertise and experience, about the conclusions properly to be drawn from the proximity of the test to the full-blown episode of symptomatic heart disease a (very) short while later. I considered that evidence consistent with so much as was agreed by the experts about the detection of intermittent AV block by ambulatory

ECG testing, and with such uncontroversial evidence as was available about the specific course of Mr Younas's own heart condition.

27. The experts remained very far apart on the issue of diagnosis. I concluded that Prof Myerson's evidence had been highly influenced by some studies of the significant relevance of which I was not persuaded, and which had led him to a starting place and conclusions which were not directed clearly enough to the specific facts of Mr Younas's case. I preferred the evidence of Dr Cripps in these respects.

28. A judgment is necessarily selective as to the relevance of matters arising at trial and as to economy or elaboration of reasoning. The objections Ms Toogood seeks to make now on this score do not appear to add up to a case capable of being argued with a real prospect of success that findings of fact have been insufficiently explained or evidenced so as to render the judgment defective, or are otherwise unfairly arrived at.

Conclusion

29. Permission to appeal may be given only where a court considers that an appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. For the reasons set out, I do not consider either test is met. Permission was refused accordingly.

30. A further application for permission to appeal may be made to the Court of Appeal within 21 days of the date of this statement of reasons.