Neutral Citation Number: [2023] EWHC 21 (KB)

Case No: F95YJ511

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2023

Before :

MR JUSTICE SWEETING

- -

Between :

Miss Martine Robinson — **Claimant**

-and-

Liverpool University Hospitals NHS Trust — **Defendant/ Respondent**

-and-

Mr Christopher Mercier — **Third Party/ Appellant**

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Nadia Whittaker (instructed by Mr. Joseph McCaughley, Solicitor for **Dental Protection**) for the **Third Party/Appellant**
Giles Colin (instructed by **Hill Dickinson LLP**) for the **Defendant/Respondent**

Hearing dates: 24 May 2022

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Approved Judgment

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MR JUSTICE SWEETING

Mr Justice Sweeting :

1. This is an Appeal against the Order of Recorder Hudson of 24 September 2021 ordering the Appellant to pay the sum of £50,543.85 to the Respondent by way of a Third Party Costs Order ("TPCO"). Permission to appeal was granted by Choudhury J.

2. Miss Robinson brought a claim alleging negligence against the Defendant (the Respondent) in respect of a dental extraction procedure which she underwent on 8 November 2016. The extraction was carried out by Mr Bajwa a Trainee in Oral and Maxillofacial Surgery employed by the Respondent.

3. The matter came for trial before the Recorder on 7 December 2020 and was heard as a hybrid trial with expert witnesses appearing remotely.

4. Mr Mercier was the medico-legal expert instructed by Miss Robinson. Following Mr Mercier's evidence at trial, counsel for Miss Robinson withdrew her claim. At that stage the Recorder had also heard the factual evidence in the case but the Respondent's expert, Mr Webster, had not given evidence. The Recorder was not told why the claim had been withdrawn. She did not give a judgment on the merits in those circumstances. Although she observed in her subsequent costs judgment that "I note that Dr. Mercier's statements are silent as to what conversations occurred with the legal team" there is no indication that privilege has been waived.

5. The Respondent asked the Recorder for 21 days to make an application for a TPCO against the Appellant. The application was made on 28 December 2020. The Appellant was joined as a party for the purposes of the TPCO application against him.

6. At the initial hearing on 18 May 2021 the Recorder adjourned the application, among other things, to enable the Appellant to obtain the transcript of the first day of the trial, when he had not been present. The application was relisted for 20 August 2021 and, following a day of submissions, judgment was reserved and handed down subsequently.

7. Mr Mercier graduated in 1996 from Manchester University as a Bachelor of Dental Surgery. In 2000 he became a member of the Faculty of General Dental Practitioners at The Royal College of Surgeons. In 2010 he completed a master's degree in Dental Implantology at Warwick University. He was a General Dental Officer in the Armed Forces between 1996 and 2000. He has been the principal dentist at his own dental practice since 2008.

8. By letter dated 15 March 2018 Mr Mercier was instructed to examine Miss Robinson and prepare a report. The "accident description" given to him was as follows:

> "Claimant attended for teeth to be removed on 08.11.2016 and the treating dentist reviewed an old X-Ray and failed to remove the correctly identified teeth for treatment and removal, leaving the damaged tooth and causing the need for the Claimant to attend again for the damage tooth to be removed which has caused increase in pain and suffering and also the Claimant has a severe phobia of the denist (sic)"

9. He was sent the medical records. They were not complete since they did not include all of the radiography, which he only saw at a later date.

10. The instructions sought a medical report in relation to breach of duty and causation as well as condition and prognosis. Mr Mercier prepared a report dated 16 May 2018, following an examination of Miss Robinson on 4 May 2018. He described this report, in his evidence, as relating only to condition and prognosis. The report was disclosed to the Respondent on 2 July 2018.

11. Proceedings were issued on 27 July 2019. An acknowledgement of service was filed on 12 August 2019. The defence was served on 22 August 2019.

12. Although Mr Mercier's report of 16 May 2018 made reference to "errors" it does not deal specifically with breach of duty. It was referred to in the Particulars of Claim solely under "Particulars of Injury" and was appended to the pleading together with a condition and prognosis report from a clinical psychologist, so complying with the requirements of the Practice Direction to CPR Part 16.

13. The allegations of negligence are set out at paragraph 6 of the Particulars of Claim as follows:

> "6. The failure to remove the upper left 2nd molar was caused by the negligence of the Defendant, Its servants or agents. Specifically:
>
> a. Failed to review the Claimant's dental records adequately or at all;
>
> b. Failed to take any, or any proper, account of the Claimant's consent form signed on the date of the surgery;
>
> c. Erroneously relied on out of date radiographs;
>
> d. Incorrectly identified upper left 2nd molar as being the upper left 1 " 1 molar;
>
> e. Failed to remove the upper left 2nd molar."

14. Mr Mercier was instructed to prepare a further report and did so on 3 October 2019, adding a section on breach of duty to his original report, which reads:

> "35 It was not possible to identify the treating oral surgeon on 8th November 2016 as the signature is illegible; however, the clinical records and history provided by Miss Robinson indicate that the oral surgeon who carried out the treatment did not adequately assess Miss Robinson either clinically or check the previous referral notes and radiographs satisfactorily in order to confirm which teeth were planned for removal. While there are two separate consent forms, one of which identifies the two lower 2nd molar teeth for removal the most up to date consent form which was signed on the 8th November 2016, which was the day of the general anaesthetic/extraction, indicates that Miss Robinson consented for lower right 2nd molar, lower left 2nd molar and upper left 2nd molar teeth to be removed. This treatment was not carried out by the

> oral surgeon and there was not an adequate explanation as to why the upper left 2nd molar was left.
>
> 36 There is reference within the clinical records to an old OPG having been assessed which led the oral surgeon to believe that the upper left 2nd molar tooth had been previously removed. It would appear from the records that the oral surgeon has mistaken the upper left 2nd molar tooth for the upper left 1st molar tooth. The upper left 1st molar tooth would appear to have been removed many years previously.
>
> 37 The oral surgeon failed to identify the upper left 2nd molar tooth and failed to carry out the planned and consented treatment, namely removal of this tooth.
>
> 38 This has resulted in the upper left 2nd molar tooth being retained. It has caused Miss Robinson considerable pain and discomfort and also significantly increased her anxiety and dental phobia to the point where she is now struggling to bring herself forward in order to have further dental treatment.
>
> 39 Clinical assessment of the upper left 2nd molar tooth confirms that it requires urgent removal and by being left in place for additional time frame up until and including the present date Miss Robinson has been left in a painful and distressed state.
>
> 40 The Oral Surgeon has breached their duty of care to the Claimant and the Oral Surgeon fell below the standard of a reasonably competent dentist/Maxillofacial Surgeon." (my emphasis)

15. Notwithstanding the terms of Mr Mercier's report an allegation that there had been a failure to carry out a proper examination was not made in the Particulars of Claim; however, the Reply to the Defence, dated 28 October 2022 contains the following:

> "On 8.11.16, as aforesaid, there was only one tooth present in upper left quadrant of the Claimant's mouth. If, as is seemingly averred by the Amended Defence, the Defendant's case is that UL7 did not require extraction this is inconsistent with the Claimant's consent being taken on the day of the index surgery for extraction of a tooth in the upper left quadrant. If the Defendant's case is that the treating surgeon was not to appreciate that UL 7 was the only remaining tooth in the upper left quadrant at the time consent was taken, he must not have examined the Claimant on 8.11.16 before taking her consent for the surgery he was about to perform. This represents a breach of duty and a failure to take informed consent from the Claimant." (my emphasis)

16. The history given by Miss Robinson was set out in the 3 October 2019 report:

> "4 On 5th November 2016 Miss Robinson had been referred to Aintree Hospital to have three teeth removed. Two teeth were planned for the lower right hand side, and one on the upper left hand side. On the day of the appointment, the appointment was cancelled and Miss Robinson was advised

> to attend the following day. When she attended the following day she was examined by the dentist who was due to remove her teeth. Miss Robinson was planned for a general anaesthesia extraction and she identified the three teeth to the treating dentist prior to the anaesthetic being administered.
>
> 5 When Miss Robinson came round following her general anaesthetic she realised very quickly that only two lower teeth had been removed and that the upper left molar had been left in place. While in recovery Miss Robinson advised the surgeon that the upper left tooth that had been left in place. The surgeon re-checked the x-ray and advised Miss Robinson that he had not realised that the x-ray that he had been using was a couple of years old. As such he had not identified the tooth that had required removal. He apologised to Miss Robinson and advised her that she had no other option to make a new appointment."

17. This account was consistent with Miss Robinson's later statement of 1 April 2020 and the evidence she gave at trial.

18. The origin of the confusion as to what was to be extracted was summarised by the judge in her judgment on the costs application:

> "3. In September 2015 Ms. Robinson attended at her general dental practitioner whereupon significant decay to a number of teeth was identified. Her GDP referred her to Aintree Hospital for extraction of the LL7, LR7 and UL7 teeth. It is the latter of those teeth that caused the dispute between the parties. Having been referred for those three teeth, Ms. Robinson did not attend for extraction. In December 2015 one of her UL molars (UL8) was removed due to pain, as an emergency procedure under local anaesthetic. In making a rereferral her dentist noted that her UL7 had been removed (presumably in December) and therefore she was referred on this second occasion solely for the removal of the two lower molars. It is clear that a number of practitioners have referred to the removed tooth as UL7 when in fact it was UL8. Although there was a wealth of discussion as to which tooth was in fact originally referred, it was in my judgment clear that the tooth that was originally referred was probably the same tooth as was extracted in December 2015 – UL8.
>
> 4. An attempt was made to remove these two lower teeth in August 2016 but because the procedure listed utilised local anaesthetic only, Ms. Robinson became so distressed that the dentist felt it inappropriate to continue, and referred her on for the procedure under general anaesthetic. It is not disputed that Dr. Sweet had intended to remove only the two lower teeth in August and that it was his intention for only the two lower teeth to be extracted on the next occasion.
>
> 5. On the day of the operation – 8th November 2016 – it was agreed that the oral surgeon erroneously had before him the referral of September 2015 rather than August 2016. It was further agreed that no note of an examination of Ms. Robinson was made, prior to her consent being taken. It was agreed that this is a breach of duty. It was not agreed that there was no examination by Mr.

Bajwa – the oral and maxillofacial surgeon - on the 8th November 2016 nor was it agreed that any examination was inadequate. This is a central issue in the application before me. Not having the second referral before him, it is agreed that Mr. Bajwa was also not privy to the pre-op consent signed in August 2016 for the removal of the lower molars. In taking consent from Ms. Robinson, Mr. Bajwa then followed the referral in his possession and took consent for the removal of three teeth – the bottom two molars, and UL7.

19. The matter came before the Court for directions on 13 January 2020 when permission was given to rely on an expert report from the Appellant in relation to breach of duty and causation. It was to be served by 1 May 2020. He was described as "Dentist". The Respondent was permitted to rely on expert evidence from Mr Webster, "Consultant Maxillofacial Surgeon".

20. There is no indication that either the court or any of the legal representatives considered that Mr Mercier's professional discipline did not qualify him to give expert evidence on the issues raised in the case.

21. Mr Mercier and Mr Webster met and produced a joint report dated 30 September 2020.

    i) In answer to questions as to what the clinical records showed the experts identified, amongst other things, the following;

        a) 25. 10. 16 Day case assessment, following clinical examination, recommend extraction UL7 LL7 LR7, teeth recorded as carious listed for removal under general anaesthetic. (this was consistent with Miss Robinson's evidence at trial when she said *"But within that time period I was having trouble with the top tooth in question and was asked if I could have it removed when I had the other two removed"*)

        b) 08.11.16 Consent taken and signed for removal of UL7 LL7 LR7 due to poor prognosis.

        c) Surgery undertaken the clinical records state the patient consented for removal UL7 LR7 LL7 but only LL7 LR7 removed as UL7 had already been removed (old OPG).

        d) Following the operation, the clinical records state that during examination under general anaesthetic it was noted that the UL6 was present and the UL7 had been removed previously, UL6 was restorable on X ray.

    ii) In answer to a question as to which x-rays were available prior to surgery and what was present;

        a) On the balance of probabilities, the OPG dated 24.09.15 was sent to Aintree via the PACS system (electronic transfer between hospital X ray departments).

b) The treating clinician refers to "old OPG" being used during surgery. This is likely to be the OPG dated 24.09.15 that was sent via PACs from St Helen's to Aintree.

c) UL7 was the only molar tooth present in the upper left jaw at the time of surgery.

22. The central areas of disagreement were dealt with as follows:

i) Mr Mercier states: At time of both consent and surgery, only one tooth was present namely UL7. Based upon the OPG dated 24 09 15 the UL7 was unrestorable and should have been removed.

ii) Mr Webster states: At that time the clinician thought that the tooth present was UL6 and didn't require removal. This was on the basis that they felt the tooth requiring extraction in the upper left jaw had already been removed.

iii) Mr Mercier states: Tooth was unrestorable based upon OPG reports as dated 24 09 15. Incorrectly identified by treating clinician as UL6 rather than UL7. Patient was referred for and consented for removal of UL7.

iv) Mr Webster states: That this single tooth did not need to be removed as it was restorable. Mr Webster opines that the UL7 requested for extraction in the GDP referral letter was an upper left eight and annotated incorrectly by the GDP and maxillofacial clinicians.

23. Mr Webster had not examined Miss Robinson. Mr Mercier's observations as to his examination of her, as recorded in the joint report, were "Clinical examination on 04 05 18. UL7 was present, causing pain and was tender to pressure. UL7 was unrestorable. No other molar teeth were present in the upper left quadrant."

24. The experts agreed:

> "There is no evidence in the clinical records that an examination was, or, was not, carried out by the treating clinicians prior to the consent being completed.
>
> Both experts agree that a reasonable body of practitioners would carry out and record the results of an examination prior to the consent being completed."

25. In his witness statement Mr Bajwa said:

> "6. Prior to surgery, I would have met the Claimant in Surgical Forward Wait B where I would have spoken about the planned procedure, carried out a basic pre-operative examination and taken consent. It is usual practice to take consent in the outpatient clinic prior to the day of surgery and confirm consent on the day of surgery. However, on this occasion there was no consent form from the outpatient clinic filed in the notes, therefore a new consent form was written and signed by myself and the patient on the day of surgery. It is my routine practice to confirm which teeth require extraction with the patient and to confirm the presence of a dental x-ray.

> 7. Both the referral letter from the General Dental Practitioner, Ms Gupta dated 08.09.2015 and the first clinic letter of Mr Farooq at St Helens & Knowsley Hospital dated 24.09.2015 stated that all three teeth: Lower Right 7 (LR7), Lower Left 7 (LL7) and Upper Left 7 (UL7) were grossly carious and warranted dental extraction. Only these two letters were filed in the notes for me to review before surgery. Therefore, on that basis, I included all three teeth in the new consent form. I was not corrected by the patient regarding this treatment plan during the new consent process. I would not have been able to reliably confirm or deny the presence of dental caries prior to the surgery as facilities to carry out a thorough dental examination in Surgical Forward Wait B are limited.
>
> 8. An OPG dental xray was available to view on the computer dated 24.09.2015 which is the same day as Mr Farooq listed the patient for surgical extraction of LR7, LL7 and UL7. Whilst clearly demonstrating the LR7 and LL7 teeth as being grossly carious, it also showed a tooth that was numerically the seventh tooth in the upper left quadrant that had gross caries but had the anatomical appearance of an Upper Left 8 tooth (UL8). The tooth that was numerically sixth in the upper left quadrant had the anatomical appearance of an UL7 tooth and a metal filling but was not grossly carious.

26. The witness statement did not deal with whether or not there was an examination as part of the consent process. That raised an obvious question as to why Mr Bajwa had not established that there was only one upper left molar rather than the two shown on the x-ray, whatever their designation. At trial he was asked about this in cross examination:

> "Q. Looking at this OPG do you accept (and leave aside what people have named them for a moment) two teeth are present of UL6, UL7 and UL8?
>
> A. Yes.
>
> Q. Okay, so why having looked in her mouth and saw only one was present and she is saying, "Take this one out", you turn and look at the X-ray and see there are two present on the Xray, do you not do something about it and say to her, "Oh wait a moment, what's gone on here? There's two teeth on your X-ray; one tooth in your mouth?"
>
> A. Yes, I mean I guess that would be where I've made a mistake.
>
> Q. Okay.
>
> A. Because the correlation between what was in her mouth and the X-ray has not been as good as it should have been at that moment in time.
>
> Q. Do you accept that is something you should have noticed?
>
> A. Yes.

> Q. So after you look at the X-rays is the next thing to sign the consent form?
>
> A. Yes."

27. Expert evidence is invariably required in clinical negligence cases, not least because the nature of the negligence test set out in the leading case of *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 583 (as modified by *Bolitho v City and Hackney Health Authority* [1998] AC 232 is focused on accepted practice in the clinical area concerned.

28. There will often be a divergence of opinions in a contested case. Experts may have to provide their own interpretation of source material as well speaking to whether treatment falls short of accepted practice and standards. The outcome of the litigation may turn on what expert evidence is accepted or rejected but equally it may involve the resolution of factual issues on which such opinions are contingent, or both. Experts do not control how the legal issues in cases are formulated and presented. Their function is to assist the court with matters within their expertise; their duties are set out in CPR PD35 paragraph 2:

> 2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
>
> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
>
> 2.3 Experts should consider all material facts, including those which might detract from their opinions.
>
> 2.4 Experts should make it clear— (a) when a question or issue falls outside their expertise; and (b) when they are not able to reach a definite opinion, for example because they have insufficient information.
>
> 2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court

29. The decision of the House of Lords in *Aiden Shipping Co Limited v Interbulk Limited* [1986] 1 AC corrected the assumption that it was not possible to make a costs order against a non-party. The exercise of the power to do so was considered by the Court of Appeal in *Symphony Group Plc v Hodgson* [1994] QB 179 but not in the context of expert witnesses specifically. The court gave guidance which now requires consideration in the context of the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (Costs) [2004] UKPC 39; [2004] 1 W.L.R. 280; in particular "Although costs orders against non-parties are "exceptional", exceptional means only that the case is outside the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense. The ultimate question in any such exceptional case is whether in all the circumstances it is just to make the order. Inevitably this will be fact specific to some extent."

30. Section 51(1) of the Senior Courts Act 1981 is the source of the Court's jurisdiction to determine costs in civil proceedings. Subsection 51(6) expressly provides for jurisdiction to make a wasted costs order against legal representatives where costs have been incurred "as a result of any improper, unreasonable or negligent act or omission" on their part. Whilst this does not apply to expert witnesses it may throw some light on the appropriate threshold for ordering costs against an expert witness who is also performing a professional function within the litigation. The terms of section 51 expressly require proof of causation (see *Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48 per Lord Briggs JSC at paragraph 80).

31. In *Phillips v Symes* [2004] EWHC 2330 the issue was whether the expert should be joined for the purpose of an application for costs. There was no determination of whether he should, in fact, pay costs. Mr Justice Peter Smith analysed a great deal of the jurisprudence, including the jurisdiction to make costs orders against non-parties and legal representatives, before reaching a conclusion at paragraphs 93-96:

> "93. It seems to me that I should approach the matter along the principles (for example) set out in the Stanton case. Do expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice? Alternatively, is it against the administration of justice principles not to allow a costs application of the type envisaged by the Administrators to be brought against Dr Zamar?
>
> 94. In my judgment, that question should be looked at in the light of modern developments of the law in relation to litigation. Thus, wasted costs applications against advocates have been decoupled from the immunity. The immunity has been destroyed as regards advocates. In neither of those cases did the Courts accept submissions that the immunity inhibited advocates fearlessly representing their clients. Indeed they rejected them. As regards experts in Stanton the Court of Appeal equally was dismissive of the belief that Experts would be deterred from giving proper reports because of a potential action against them.
>
> 95. It seems to me that in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD 35, it would be quite wrong of the Court to remove from itself the power to make a costs order in appropriate against an Expert who, by his evidence, causes significant expense to be incurred, and does so <u>in flagrant reckless disregard of his duties to the Court</u>.
>
> 96. I do not regard the other available sanctions as being either effective or anything other than blunt instruments. The proper sanction is the ability to compensate a person who has suffered loss by reason of that evidence. This flows from the Myers case applied to Experts. I do not accept that Experts will, by reason of this potential exposure, be inhibited from fulfilling their duties. That is a crie de cour often made by professionals, but I cannot believe that an expert would be deterred, because a costs order might be made against him in the event that <u>his evidence is given recklessly in flagrant disregard for his duties</u>. The high level of proof required to establish the breach cannot be

> ignored. The floodgates argument failed as regards lawyers and is often the court of last resort."
>
> (my emphasis)

32. This language might be regarded as setting the bar somewhat higher than that set out in subsection 51(6) of the Senior Courts Act 1981 in relation to wasted costs although in *Thimmaya v Lancashire NHS Foundation Trust* [2020] PNLR 12, where a TPCO was made against an expert, it was agreed between the parties that the test for such an order was the same as that applying to wasted costs against legal representatives.

33. In that case the expert became unfit to give expert evidence as a result of a medical condition affecting his cognitive functions. In making an order that he pay the defendant's costs from the date at which he should have withdrawn from the case the judge observed that the jurisdiction to make a wasted costs order is one to be exercised exceptionally. The judge's comments indicate that she plainly had in mind that experts are often challenged as to their degree of familiarity and expertise in relation to particular medical procedures or practice areas. She rejected such a criticism of the expert on the facts as a basis for a wider award of costs against him.

34. In *Walker and another v TUI UK Ltd* [2021] 1 WLUK 398, the court refused the defendant's application to join a single joint expert into the proceedings for the purposes of obtaining a costs order against him.

35. The District Judge observed:

> "Peter Smith J in *Phillips v Symes* set the threshold test for an applicant to surmount as a high one and said that a high level of proof would be needed to establish gross dereliction of duty or recklessness. I agree with him. Experts can sometimes breach their duties to the court and can also be criticised by the court. But if every time either occurred, the test was, "no more than outside the ordinary run of cases" then that has the potential to lead to satellite litigation and perhaps a plethora of applications for joinder for section 51 costs. That cannot, in my opinion, be right or what was intended by the use of the word, "exceptional"."

36. On the first day of the trial there was a discussion between the judge and Miss Robinson's counsel in an attempt to define the central issue in the case. That issue was then articulated as whether or not a reasonable body of dental surgeons would have concluded, during the course of the surgery, that the tooth was restorable based on the information that Mr Bajwa had.

37. Framed in this way, what lay at the heart of the case was the decision taken during the surgical procedure not to extract the tooth. The appellant argues that this was not a matter on which he had expressed a view directly in his report and mischaracterises the breach of duty which he had identified and on which he and Mr Webster were essentially agreed. In the course of his evidence he conceded that in the situation in which Mr Bajwa found himself it was not unreasonable to err on the side of caution and leave the tooth in situ, indeed he acknowledged that decisions about surgery were not within his expertise.

38. The basis of the Respondent's application for costs in the present case was that Mr Mercier was simply the wrong expert to give expert evidence and should have appreciated that, either at the outset or during the course of litigation. As it was put in the Respondent's skeleton argument "...it would, and should, have been obvious to Dr Mercier that as a General Dental Practitioner, he should not have been expressing an expert opinion on the standard of care afforded to the Claimant by a Maxillofacial Surgeon."

39. Although there were specific criticisms of Mr Mercier's approach to the case they were relied upon as being illustrative of the central assertion that he was in no position to express an opinion.

40. At paragraph 46 of her judgment the judge identified the issue which she had to decide in similar terms:

> "The application before me is predicated on the specific assertion that it should have been obvious to Dr. Mercier at the outset, and at various stages throughout the proceedings, that he was not the appropriate expert to opine on the management, and treatment afforded to the Claimant on 8th November 2016. In the circumstances of this application therefore I confine myself to the nature of Dr. Mercier's expertise."

41. Whether the fact that Mr Mercier was not a maxillofacial surgeon disqualified him from giving expert evidence requires careful examination in the circumstances of the present case. The relevant considerations appear to me to be as follows:

42. Mr Webster was qualified as a dentist as was Mr Bajwa. Mr Webster had gone on to qualify as a maxillofacial surgeon and Mr Bajwa was in the course of doing so.

43. Miss Robinson was having an extraction under general anaesthesia because of her morbid fear of dental procedures. Mr Bajwa agreed in his evidence that if not for this phobia her extraction would have been carried out by a general dental practitioner. Mr Webster's evidence in his report was to the same effect. A number of Miss Robinson's extractions had been carried out by general dental practitioners.

44. There was no suggestion that it was not within the competence and scope of the clinical practice of a general practitioner dentist to carry out extractions and to take and report on x-rays for that purpose.

45. The ability of a general dental practitioner to assess the viability of a tooth and to determine whether it required extraction was also not in issue. The referrals had been made by general dental practitioners because they assess teeth as unrestorable.

46. It follows that Mr Mercier did not need to be a maxillofacial surgeon to express an opinion on these topics.

47. The experts identified a failure to record a pre-operative examination as falling below the standard to be expected of a reasonable body of "practitioners". They also agreed that an examination was required prior to an extraction. They did not draw any distinction for this purpose between an extraction performed by a general dental practitioner under local anaesthetic or a surgical extraction under general anaesthetic.

The purpose of the examination was limited, but important, and was, amongst other things, to check which tooth required extraction. Although there was questioning at trial directed to the facilities available at the hospital to carry out a full examination there was no suggestion from the experts that the examination they were referring to could not have been carried out by Mr Bajwa when he saw Miss Robinson, or on Mr Webster's part, that any different standard applied to an examination by him as opposed to a general dentist performing an examination prior to an extraction.

48. It is instructive to consider what an examination would have demonstrated if it had been recorded. It is difficult to see how, if carried out properly, it could not have indicated that there was only one upper left molar rather than the two shown in the x-ray available to Mr Bajwa. In fairness to Mr Bajwa, he appears to have accepted this in the course of his evidence (as set out above) and to have acknowledged that this was a mistake on his part and that this was "something he should have noticed". Had the x-ray in fact conformed to what was in the patient's mouth then it seems implicit in his evidence that he may have extracted a tooth in the position of UL7. His assessment of the state of the single tooth that he found appears to be a consequence of the fact that he concluded that UL7 was not present. In any event and against the background of this evidence the train of events would arguably have been very different if Mr Bajwa had discovered that the x-ray was not accurate prior to operating.

49. The records indicate that Mr Bajwa identified the tooth during surgery as UL6. This was itself wrong; as the experts agreed the only upper left molar present was UL7.

50. The post-operative recovery notes indicate that the explanation given to Miss Robinson was that UL7 had already been removed (again this is incorrect).

51. It can have been no part of Mr Bajwa's thinking that there had been a referral in respect of the lower molars alone because, as the judge commented, he did not have that referral.

52. In commenting on Mr Mercier's report of 3 October 2019 the judge observed:

> "In that document he refers to the failure to adequately assess Ms. Robinson on the 8th November 2016. He thereafter notes the inconsistency between all of the documentation, but for some unfathomable reason concludes that Mr. Bajwa should have accepted the unsupportable consent form of the 8th November 2016 which he is said to have created without proper review or examination, over the other documentation prepared properly previously."

53. This was of course the consent form which Mr Bajwa himself completed. Whatever the confusion about documents, he had taken consent for the removal of a tooth in the Upper Left Quadrant. There was only one tooth in that location which he identified on the consent form as the "upper left second molar", presumably on the basis of what was shown on the x-ray. The test for informed consent following *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 is that a doctor is under a duty to take reasonable care to ensure that the patient is made aware of any material risks involved in treatment and of any reasonable alternative or variant treatments. On Mr Mercier's evidence the failure to properly assess and examine fed into the consent process with

the result that the issue of whether to remove the tooth had to be confronted intra-operatively rather than with the patient in the course of obtaining her consent.

54. At paragraph 44 of her judgement the judge said:

> "It is right that he acknowledged in his evidence that on the information available to Mr. Bajwa in surgery he would have been entitled to conclude that the tooth was restorable. It is unclear to me why if he would be entitled to conclude that it was restorable with that information, he would not have been entitled to conclude that it was restorable after an additional chat with Ms. Robinson, particularly if she did not complain of pain"

55. It might be said that the question raised by the judge contains within it the answer. By the time Mr Bajwa was in surgery the information that he had available to him was limited and could not include any discussion with Miss Robinson about whether or not she was in pain from the tooth or why the x-ray provided to him was inaccurate. It might not have proved possible to resolve matters on the day but Miss Robinson's operation had already been postponed on the previous day and she would have been in a position to choose whether to go ahead with the removal of the lower teeth only or wait for a further operation in which, if necessary, the upper molar could be removed at the same time. There was psychological evidence about the effect on her mental health of dental treatment.

56. The out-of-date x-ray which Mr Bajwa looked at prior to the operation showed two upper left molars. When he operated and saw only one he was on the horns of a dilemma. He had a patient under general anaesthetic to whom he could not talk. He chose not to extract given the uncertainty at that stage as to which tooth was present and the appearance of the tooth.

57. Mr Mercier's opinion was, in effect, that this was a dilemma of his own making because he had failed to carry out a proper examination prior to the operation to identify that there was only one tooth left rather than the two shown on the x-ray, or he had simply not looked properly at the x-ray. Had he done so then that would necessarily have prompted further investigation and a conversation with the patient as part of the consent process. The judge took the view that the breach of duty in failing to carry out an examination on the day of the extraction had not been pleaded. Whether that is right or not such a breach had been identified by Mr Mercier in his report.

58. Though the surgeon could hardly be held responsible for the errors and omissions in the documentation which had been forwarded to him, the lack of a proper and documented clinical examination was the central failing identified by Mr Mercier in his expert report. He did not give a view as to what a surgeon should have done in the circumstances that confronted him during the operation; his opinion was that this state of affairs should not have arisen in the first place.

59. Whatever the basis for the earlier referrals, Miss Robinson expected to have three teeth removed, including her remaining and painful upper left molar. She consented to that procedure. The contemporaneous documents supported her case. She immediately queried why all three teeth had not been extracted when she came round after her operation. That remained her position at trial. She said that the molar was

causing pain and that she had asked whether it could be removed at the same time as the lower molars. According to the expert joint report, where the records were reviewed, she had attended a day case assessment on 25 October 2016 when extraction of all three teeth had been recommended. She contacted her NHS dental practice the day after the operation to complain that the upper molar had not been removed.

60. Had the discrepancy been raised with Miss Robinson at the consent stage she would it appears, on her evidence, have asked for the tooth to be removed, given the pain it was causing her. She understood this was to be the procedure carried out during the operation to which she had consented.

61. Mr Mercier's assessment of whether the tooth was restorable was based on his examination of Miss Robinson, albeit some 18 months after the operation. Then, in addition, on his conclusions from the radiography in the form of the OPG dated 24 September 2015, which was used by Mr Bajwa before and during the operation, and which in Mr Mercier's view demonstrates that UL7 was unrestorable due to caries present under the filling and severe bone loss. Although Mr Mercier was criticised by the judge for his approach to assessing the viability of the tooth, Mr Webster had taken the same course, as is implicit in the judge's comment at paragraph 6 of her judgment:

> "Dr. Mercier for the Claimant argued that no reasonable dental surgeon could have concluded that the UL7 was restorable as at that date (although he accepted in oral evidence that it did not match the written description given). Mr. Webster for the Defendant disagreed as to restorability. He argued that in fact the tooth would have been restorable as at the date of surgery and it would have been negligent to have removed it. Neither expert having met Ms. Robinson prior to 2018, the dispute therefore came down to what could be determined from the image taken in September 2015 and what I made of the evidence of Mr. Bajwa."

62. The judge went on at paragraph 43 of her judgement to comment on the fact that Mr Mercier's reports were prepared prior to him receiving the September 2015 radiographs. The reports were nevertheless based upon his own clinical examination of the claimant. Whether the interval of 18 months between the operation and that examination invalidated his opinion was undoubtedly a matter which could be explored in the evidence but the judge went much further saying that any allegation of negligence based on the examination demonstrated a flagrant, reckless disregard of his duty to the court.

63. It was a necessary part of the case that causation was considered. Mr Mercier had been asked to do so and, as discussed above, there is no reason to conclude that it is not within the expertise of a general dental practitioner to express an opinion on the viability of a tooth. Whether a tooth could be restored was clearly a matter on which Mr Mercier was able to give an opinion. He could only do so on the basis of his own examination of the claimant and the x-rays.

64. Mr Mercier was not present on the first day of the trial and his answers to questions, particularly under cross examination, should, it was submitted, be read on the basis that he was unaware of the central issue which had been identified at the outset and

which was not aligned with the breach of duty he had identified (and which the judge regarded as not having been pleaded). This was part of the more general submission that the obligation to ensure that the case advanced reflected the expert opinion obtained and, indeed, whether it was supported by it was a matter for Miss Robinson's legal representatives.

65. That may well be part of the explanation for why the judge concluded that Mr Mercier was not providing assistance to the court but I doubt that it is the entire explanation. He was effectively cross examined and concedes in his witness statements that he found the experience difficult. The judge was well placed to assess the way in which he gave evidence even if her views were expressed somewhat trenchantly in her judgment. However, the issue on the application, as she acknowledged given the way it was framed, was whether he was qualified to express an opinion at all.

66. Mr Mercier was asked to identify breaches of duty. He was not specifically directed to failures in the conduct of the operation itself. He identified a breach of duty in relation to the clinical examination as part of the consent process prior to the extraction. There was nothing illogical or (as the judge appeared to suggest) partisan about his conclusions. They were supported, in part at least, by the Respondent's expert. Mr Bajwa acknowledged an error on his part. If the extraction had then been performed by a general dental practitioner the challenge to his standing to express an expert opinion on these matters would fall away. Both experts and Mr Bajwa were dentists. In the circumstances of this case there could be no sensible suggestion that any different standard applied to the examination of the patient's teeth and the x-rays to confirm which required extraction as between a surgeon dentist and a general practitioner.

67. A failure to carry out a proper examination had an arguable consequence in relation to consent if, absent the error, it would have led to a discussion with the patient in relation to the scope of the extraction procedure she was about to have.

68. Mr Mercier was qualified to give an opinion in relation to the viability of a tooth and whether its condition was such that it required extraction. Both he and Mr Webster gave their opinions on the point given that it went directly to causation.

69. For these reasons the judge was wrong, in my view, to conclude that Mr Mercier had stepped outside the boundary of his expertise in giving his opinion about breach of duty and causation in relation to the examination carried out prior to extraction or the viability of the tooth which Miss Robinson expected to be removed but which was not. There may well have been grounds to criticise Mr Mercier's performance as an expert witness and to attack his conclusions, but this was not an exceptional case and did not involve a flagrant or reckless disregard of an expert's duty to the court. On the facts of this case it would not be just to make a costs order against him in any amount. The appeal is therefore allowed.

70. In reaching the conclusion set out above I have made observations about the way in which the case was advanced and the allegations of breach of duty which were made against Mr Bajwa. As I have set out, he was candid in accepting that he made a mistake. However, nothing in this judgment involves a finding of a breach of any professional duty on his part. The case was abandoned part way through, the expert who was to be called by the respondent did not give evidence and the court did not

hear argument. I am not in a position to reach any concluded view about the merits; neither was the Recorder.