



Neutral Citation Number: [2023] EWHC 963 (KB)

Case No: QB-2018-001794

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2023

Before:

DEXTER DIAS KC
(Sitting as a Deputy High Court Judge)

Between:

XX
(a protected party by YY, his mother
and Litigation Friend)
- and -
Barts Health Trust

Claimant

Defendant

Adrian Hopkins KC (instructed by **Mayo Wynne Baxter, Solicitors**) for the **Claimant**
Ms Charlotte Jones (instructed by **Kennedys LLP**) for the **Defendant**

Hearing dates: 26 April 2023

Approved Judgment

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DEXTER DIAS KC

Dexter Dias KC:

(Sitting as a Deputy High Court Judge)

1. This is the judgment of the court.
2. This is an approval hearing and I have extended an anonymity order in the case. A member of the press had been present in court (attending remotely) during the morning and made no contrary representations.
3. I recognise that such orders have a dehumanising effect and risk reducing the living, breathing human beings at the heart of this sad case, and who are all present at court before me today, to ciphers. The order has been granted and extended to protect the vital interests in the right to privacy of the child in question and his family. Therefore, as will be explained, the claimant will be known as XX and his litigation friend who is his mother as YY.

Introduction

4. The parties to these proceedings are as follows. XX is represented by Mr Hopkins KC, who is instructed by Mayo Wynne Baxter, Solicitors.
5. XX is now aged 19. He lacks capacity to litigate and to manage his property and affairs. He is a Protected Party. An anonymity order was made by Mrs Justice Collins Rice on 2 November 2020 in accordance with the principles set out by the Court of Appeal in *JX MX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96. I shall say more about this shortly. In any event, he requires a litigation friend to conduct proceedings (CPR 21.2(1) and see PD21). His mother acts in that capacity.
6. The defendant is Barts Health NHS Trust. The Trust is represented by Ms Jones of counsel, who is instructed by Kennedys LLP. I am grateful to both legal teams for the great care with which they have prepared this case and the obvious sensitivity with which they have presented it.
7. The central issue today is whether a settlement agreement in respect of XX should be approved by the court.
8. Liability was compromised on 2 November 2020. That compromise was approved by the court when by consent judgment was entered for 90 per cent of damages to be assessed on a full liability basis. The assessment of damages hearing was listed to commence on 18 April 2023. On 4 April 2023 parties reached agreement on damages, subject to the approval of the court.
9. Ms Claire Busutill of Mayo Wynne Baxter is XX's professional Deputy appointed by the Court of Protection. Both parents and the professional deputy on advice agree to the proposed settlement.
10. In brief, the background to the case is as follows. This clinical negligence action brought on behalf of a claimant who was born in 2004 at the Defendant's Royal London Hospital. He sustained a severe hypoxic ischaemic brain injury shortly before he was delivered by emergency caesarean section following rupture of his mother's uterus during labour. He has developed quadriplegic athetoid cerebral palsy,

with dyskinetic movements and involuntary dystonic muscle spasms. His case, as advanced through his mother, is that the injuries were caused by the defendant's clinical negligence in the antenatal period when counselling his mother about the mode of delivery, and by negligence during the delivery itself. However, in fairness to the defendant, it is essential for the court to emphasise that there is no admission about breach of duty and the settlement is a compromise without such concession. The matter has not been litigated to conclusion and no findings of fact have been made.

11. Today, Ms Jones most responsibly explained how the Trust is very pleased to reach a compromise that removed the stress and risk of litigation to XX and his parents. The defendant commends the family for their constructive approach to quantification of damages and their conduct has been, as Ms Jones said in terms, impeccable throughout. She also said, with complete accuracy for reasons I will come to, that this is a remarkable case.

Anonymity

12. An anonymity order has been granted by this court pursuant to rules 39.2(4), 5.4C and 5.4D of the Civil Procedure Rules and section 11 of the Contempt of Court Act 1981. I am mindful of the decision of the Court of Appeal in *JX MX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96. In that case, Moore Bick LJ enunciated a number of critical propositions ([33]-[35]):

- (1) Approval hearings, as in other instances where the court exercises its overarching protective jurisdiction, lie squarely within the constitutional principle of open justice, itself fundamental to the rule of law. The evident tension between open justice and doing justice in the case mirrors the tension between the Article 8 rights of claimants and Article 10 rights of the press and the public. The constitutional importance of the principle of open justice, as recognised in the authorities, is such that any departure from it must be justified strictly on the grounds of necessity. The same may be said of the right to freedom of speech. In either case the test is one of necessity.
- (2) However, the nature of the court's supervisory duty means that the public interest in seeing justice done can nonetheless be accomplished without disclosing a party's identity. Such hearings, although dealing with what is "essentially private business" (see [34]), should generally be in public, and anonymity will usually be sufficient to protect claimants. Such an order should be drawn in terms that prohibit publication of the name and address of the claimant and his or her immediate family and also (if not already covered) the name of his or her litigation friend.
- (3) The requirement to have settlements approved is peculiar to children and protected parties. Naturally, it is open to other litigants to settle claims in private. But children seeking such settlement have no such choice as the court must exercise its supervisory jurisdiction. However, by virtue of Article 14 ECHR children and protected litigants are entitled to the same respect for their Article 8 rights as other litigants. Article 14 provides, as material:

“The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights shall be secured without discrimination on any ground.”

Thus, withholding the name of child claimants mitigates to some extent the inevitable discrimination between different classes of litigants.

- (4) The court must also recognise, however, that the public and the press have a legitimate interest both in observing the proceedings and making and receiving a report of them. Accordingly, the press should be given an opportunity to make submissions before any order is made restricting publication of a report of the proceedings.
13. In accordance with this Court of Appeal guidance at [35], I gave the press the opportunity to be heard in the application. As indicated, no contrary submissions were made. While it is clear that the court should normally make an anonymity order, and although it is something of a default position in modern practice for such cases (there is a need for “consistency” (ibid. [33]), I nevertheless carefully examined the facts of this case. It must “depend on the facts of the individual case” (ibid.). On the particular facts, I find that the necessity test is made out to protect XX and his family and there must be a derogation from the principle of open justice.
14. The claimant shall be referred to as XX in any publication of these proceedings. His mother, who acts as his litigation friend, is to be referred to as YY.

Approval

15. The purpose of today's hearing is for the court to consider whether the proposed settlement of damages agreed between parties is in the best interests of the claimant.
16. The court is required to approve the terms of settlement in this particular case as XX is a protected party. It is an elementary proposition that court approval engages questions of judgment. It must act in the interests of justice and the best interests of the protected person and have regard to the overriding objective. As stated by Lady Hale in *Dunhill v Burgin* [2014] UKSC 18, the purpose of approval hearings in accordance with CPR 21.10(1) is
- “to impose an external check on the propriety of the settlement.”
17. Part 21 of the CPR includes rule 21.10. Its subheading is “Compromise etc. by or on behalf of a child or protected party”. The rule provides insofar as it is material:

21.10

(1) Where a claim is made –

(a) by or on behalf of a child or protected party;

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to

the claim by, on behalf of or against the child or protected party, without the approval of the court.

18. Mr Hopkins' confidential advice dated April 2023 is an invaluable and comprehensive document. It sets out with great clarity and precision why the settlement is considered by XX's legal team to be appropriate, by reference to an assessment of the quantum of recoverable loss, weighing the risks and uncertainties of litigation and the strengths and weaknesses of the evidence.
19. I have also read the detailed and complex expert reports that speak to this case. I am satisfied that the settlement figure overall is suitable, fair and appropriate in all the circumstances.
20. The structure of the settlement is as follows:
 - i) A lump sum of £6.5 million gross plus periodical payments for care and case management;
 - ii) That is inclusive of CRU benefits (£16,780.30) and interim payments (£250,000) and pro rata care and case management up to 14 December 2023, and interest up to 28 days of the approval hearing and court order.
 - iii) The overall the capitalised value of the offer with a life-expectancy of 63 (the multiplier being 46) is £17,185,985.
21. Ms Davies-Kay concludes in her financial viability report that the split between lump sum and periodical payments (as opposed to a lump sum only settlement) is the optimal solution from a mathematical standpoint because this has the lowest required rate of return on the residual sum to be invested and therefore the least amount of risk to the Claimant to cover his future expenditure. Furthermore, the periodical payments are without risk, unlike the risks on investment return (see §77, p.27).
22. I agree that this is a sensible settlement arrangement from XX's point of view. A lump sum payment is entirely appropriate in the circumstances when supplemented by periodical payments which can be index-linked. I find that this settlement is in XX's best interests. On that basis I approve the settlement under CPR 21.10.
23. To conclude, I would like to say something about what XX is like. He is a very active person and can presently hoist himself up. He can use a computer keyboard with his right hand and uses his fingers to operate the controls of his wheelchair. He gave the court a demonstration of his remarkable facility in manoeuvring the wheelchair, which he can turn on its axis like a London taxi. He was very proud to show off just how skilful he is. He engaged fully with the court hearing and richly demonstrated what is said on his behalf that despite his severe difficulties, he has not withdrawn into his shell but is outgoing. He has a passion for cars, especially Range Rovers and Mercedes, and thus he has somewhat expensive tastes. He likes playing computer games and especially those involving football, racing and boxing. He loves football itself and supports Chelsea, but like many Chelsea supporters is at a loss to explain their current performances. He likes going on holidays abroad.

24. Despite his cognitive function being impaired, he has been attending college and completed an art GCSE with the aid of a teaching assistant. That speaks volumes about his great determination and tenacity. He currently attends a Social Studies course on a daily basis. He does not find it easy physically and what would be routine and unremarkable for most people, he finds a great strain. Due to cognitive impairment, severe physical disability, severe communication problems and fatigue, it is highly unlikely that he will secure or maintain paid employment.
25. He cannot walk but is physically active. He can crawl on his knees which is his current preferred mode of mobility within his home, which causes calluses on his knees. His mobility will become progressively worse and from the age of 45 he will need hoisting for all transfers. His care needs will correspondingly increase. He has insight into his condition which at times causes him distress.
26. All this has unquestionably been a tremendous strain on XX and his family. That XX has progressed in the way he has, is without question a testament to the devotion and years of sacrifice these parents have made because of their deep love for their son.
27. The court conveys to XX and his family – his mother, father and siblings - that it appreciates that no amount of money can turn back the clock and put their family in the position they would have been had the injury to XX not occurred. Money cannot do that. It is simply the best we can do. A proxy for the quantification of the pain and suffering caused. But I do hope that the end of these proceedings will be a relief and this long-awaited financial settlement will make life a little easier for all of them and their son.
28. I have emphasised to XX and his parents that this judgment will be published to the National Archives so that a copy will always be available to XX - this is his case. I wish all his family, and XX especially, the very best for the future.
29. That is my judgment.