Neutral Citation Number: [2021] EWHC 243 (QB)

Case No: QB-2017-007225

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th February 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

MR DANIEL PASS	**Claimant**
- and -	
MINISTRY OF DEFENCE	**Defendant**

- -
- -

Tim Meakin (instructed by HM Solicitors) for the **Claimant**
Bruno Gil (instructed by Government Legal Department) for the **Defendant**

Hearing date: 9.2.12

Judgment as delivered in open court at the hearing

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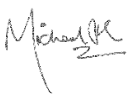
Approved Judgment

I direct that 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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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a pre-trial review relating to a five-day trial which has been fixed for 1 March 2021. Nobody is asking the court to adjourn the trial. Both sides are seeking to keep the trial in place, subject to their various positions on 3 applications which have arisen they concern what I will call 'new inputs' into the trial. Various orders have been made giving directions in this case. Most recently was the order of Master Thornett on 14 January 2021. The mode of hearing for this pre-trial review was a remote hearing by Microsoft teams which I am satisfied was necessary, appropriate and proportionate and involved no prejudice to the interests of either party. The open justice principle was secured through the publication on the cause list of this hearing, together with its start time together and an email address usable by any member of the press or public who wished to observe this hearing, as indeed some have done. The claim is for damages for personal injury and loss arising out of what the claimant says was the negligent delay in the diagnosis and treatment of a spinal tumour whilst he was a serving soldier with the defendant. He alleges that he suffered permanent disability as well as loss of his career in the armed forces due to that delay in diagnosis and treatment. Breach of duty was accepted by the defendant but all issues relating to causation and quantum of loss and damage, should it arise, are contested and it is those issues which will be the subject of the five-day trial next month. There is an impressive array of expert reports and expert joint statements dealing with causation (from neuroradiologists and neurosurgeons) and dealing with condition, prognosis and quantum (from neurosurgeons, neuro-rehabilitation experts, orthotics experts, care and occupational therapy experts, and employment experts).

Particular directions

2. It proved possible to resolve a number of aspects of the case during this morning in a manner which, as both Counsel agree, does not call for any reasoned ruling. I therefore record the following. (1) As to the joint statement outstanding from the neuro-rehabilitation experts I formally extend time to 4pm on 4 February 2021 which was the date at which that joint statement was produced. (2) As to the joint statement on condition prognosis and quantum of the neurosurgeons I extend time to 4pm on 15 February 2021. (3) So far as concerns the claimant's schedule of loss and defendant's counter-schedule I will direct the claimant's schedule by 4pm on 11 February 2021 and the defendant's counter-schedule by 4pm on 17 February 2021. In one respect the contents of those documents will materially be affected by a topic to which I will need to return below. (4) I will be making appropriate directions relating to a trial bundle compliant with the current Protocol on electronic PDF bundles, that bundle to be provided by 4pm on 22 February 2021. It is to be accompanied by a document entitled "Envisaged Trial Timetable" which sets out the proposed use of the 5 days following liaison between the parties. (5) I will direct skeleton arguments by 4pm on 23 February 2021. (6) I will also be making directions for the five-day trial to be a fully remote hearing much the same as this one has been, with nobody needing to travel to or be present in a court room. Neither party has sought to persuade me that an in-person hearing, or a hybrid hearing where some are in the courtroom, is necessary or justified in the present case in the context of the pandemic. I turn then to the 3 'new input' points. I have already indicated to the parties the way in which I intend to deal with the first of them.

Specific disclosure

3. The first of the three 'new input' matters concerns an application for specific disclosure, to elicit further documents. As I have indicated during the hearing, I will order as follows, by reference to 7 listed items in a draft schedule, all of which are species of military training and fitness test records, but also by reference to a limited period of time (September 2011 to February 2014). I will order that by 4pm on 16 February 2021 the defendant shall have (a) disclosed those documents for that period or (b) filed a witness statement from (i) a currently-unnamed but identified 'captain' (who will need to be named for the purposes of the court order) or (ii) a proper officer of the Army Personnel Centre giving reasons why the defendant has failed to do so. It is obvious from the materials before the Court that on the claimant's side there is an anxious concern to obtain those materials; but also on the defendant's side that proper and diligent steps have been underway in seeking to track them down including a written request last Friday to the 'captain' having had a response from the Army Personnel Centre. In the event, when I put this solution to him, Mr Meakin did not seek to persuade me that any more than this was appropriate or necessary. Equally, Mr Gil for his part did not oppose a specific, tailored order in the terms I have just described. I will as part of the order give liberty to apply lest something arise out of the witness statement should there be a failure to produce those documents. It goes without saying, but I will say it, that: it is very much to be hoped that in the light of ventilation of this issue today, and the order that I will be making, this matter can speedily and satisfactorily be resolved. If the documents exist they must be found and disclosed. The trial of this case must not be derailed by any inertia.

Accommodation expert evidence

4. The next topic concerns an accommodation expert report. In this case, one element of the claimed loss and damage, throughout, has been future losses and expenses relating to accommodation. That head of future loss and damage was clearly set out in an initial claimant's schedule of loss dated 20 January 2020, more than a year ago. With counsel's assistance I have needed to grapple today with the question of how the trial next month would deal with that issue, were it to arise. How would the Court quantify that aspect of the claim?

5. Mr Gil's submission for the defendant is that it is "far too late" for the claimant now to have permission to adduce an expert report dealing with cost of accommodation. He put before the Court two possibilities, each involving the trial proceeding, including on this aspect, and no report being relied on by the claimant. The first was that the Court would, as he put it, "do its best on the material that it has". The second was that the claimant would fail on this aspect of the claim, because the onus is on the claimant to make good his case and, absent evidence, he would fail on this aspect of loss. I was not persuaded that the first of those, in the circumstances of the present case, could be an appropriate way of approaching this issue. Mr Gil emphasised that the figures contemplated on the claimant's side, so far as recovery of this head of loss is concerned, are very considerable. That is a point which, in my judgment, serves to emphasise how inappropriate it would be for the Court to "do its best" with no material. The second possibility, in my judgment and in the circumstances of this case, would be fundamentally unfair to the claimant, with his claim failing on this head through lack of evidence.

6. It is clear, and the White Book commentary emphasises, that it is important wherever possible that the position on as to the ability to rely on expert reports be resolved at the earliest possible stage in proceedings. The reasons for that are obvious. I find myself dealing with this issue 20 days before the trial is due to begin. It is not necessary to engage on a dig into the archaeology of how that has come to be. But it is right to record that the claimant's team have previously pursued this category of expert report as being one on which reliance was and would be sought, and for which the court's permission was being sought. It is also clear that the defendant has, throughout, contested permission to rely on such a report. At a hearing by telephone involving counsel on both sides on 7 December 2020 an application dated 23 October 2020 was before Master Thornett and was adjourned with directions for the claimant to have permission to restore it (and in effect that is what subsequently happened).

7. There is now a draft accommodation expert report on which the claimant wishes to have the court's permission to rely in these proceedings. As it seems to me the most significant 'expert opinion' elements of that report – which may in due course come to assist a court should it come to quantify this element of the claim – relates in particular to adaptation works and the scale of those is put at £150,000. My attention has also been drawn in particular to another element of the expert analysis relating to 'the value of reversionary interest'. As it was explained to me, that 'reversionary interest' is an evaluation of an appropriate deduction to avoid a windfall for the claimant.

8. Mr Gil submitted that, were permission for this report to be given at this late stage by the court, and were this issue of quantum of future accommodation costs to be before the trial judge next month, that would be fundamentally unfair to the defendant and in those circumstances he would be urging an adjournment of the trial. Mr Meakin's primary position was that the defendant has 'brought that position on itself' through resistance throughout to something to which it ought to have acceded and with which it could have been making plans of its own to deal. Questions that I need to evaluate (in accordance with the White Book commentary at Volume 1 page 1170 §35.4.2) include: whether the expert evidence meets a necessity test; if not, whether it is reasonably required; and as to the latter question considerations of proportionality; always having regard to the overriding objective; and in particular having regard to whether the trial date would be lost.

9. In my judgment there is a path which: resolves all the imperatives; achieves fairness; is in accordance with the overriding objective; and secures that the question – should it be reached – of quantifying future accommodation costs will be addressed by a court having the material that it reasonably required; all of which can be achieved without losing the 5 day trial date. That solution, which I adopt, is this. I will give the claimant permission under rule 35.4(1) to adduce the expert accommodation evidence. I will leave all further and consequential directions to the trial judge. But I will direct today that the issue of quantification of future accommodation costs is to be removed from the trial next month. I emphasise that it is only that question, of quantum of future accommodation costs, that will be off the agenda for the hearing. All issues of causation and recoverability in principle will be before the Court. It is only the question of quantum which would be the subject and would reasonably require the evidence. Both counsel accepted, in my judgment rightly, that that issue of quantum of future accommodation costs could, in principle, be removed from the trial without

any adverse knock-on effect for the consideration of the other issues. Neither counsel submitted that there was an inter-linkage with other issues which made that removal of one aspect impossible, unfair or unworkable. By removing that one quantification issue from the trial the consequences are as follows. Firstly, the claimant avoids being put in the position where this issue would be resolved with him being unable to rely on the report. Secondly, the defendant avoids being in the position where it would have to deal at a hearing next month with an issue without having had time to adduce expert evidence in response. Thirdly, the trial is well able to proceed and resolve all other issues and in particular all of the issues which engage the array of expert reports and joint statements to which I have referred. I am quite satisfied that that course is not only fair to both parties but it is the course which in all the circumstances is necessary. There is one point to add. So far as proportionality is concerned Mr Gil reminded me that, depending on how the trial judge resolves the issues of causation, it may be that the question of quantifying future loss of accommodation would not arise. My order does not impose on the defendant any duty today to expend resources on an expert report in response in relation to future cost of accommodation. The next steps can properly be considered with the trial judge, to the extent that it arises.

Amendment of the particulars of claim

10. The third 'new input' into the proceedings is the question of proposed amendment of the particulars of claim. Those proposed amendments engage two features of the case. The first feature is what I will call a "seedling tumour" detected in an MRI scan in February 2014, alongside what I will call the "main tumour" (an intra-spinal tumour which was surgically removed the following month). The second feature is a remedial option for the Court namely whether to grant "provisional damages" pursuant to section 32A of the Senior Courts Act 1981. Provisional damages is a remedial response which a Court concerned with damages can give, if pleaded in the particulars of claim (CPR 41.2(1)(a)). If ordered, it gives permission to the claimant to return to court should an identified deterioration occur in future so that a court can, at that future stage and in those circumstances, address the compensatory implications of that development. Provisional damages in that way provide an alternative to the Court otherwise seeking to quantify future risks of possible future deterioration, as being built into the present quantification of a compensatory sum. The purpose and function of the proposed amendments to the particulars of claim, as both counsel accept, are to place on the agenda for the trial judge the remedial option of provisional damages, should the Court consider such a remedy to be relevant in the light of its other findings and justified in all the circumstances.

11. For the claimant, Mr Meakin emphasises that both the seedling tumour and the issue of risk of serious future deterioration are matters which are present and visible in the case. He emphasises that those are topics featuring conspicuously in the analysis of the relevant experts on both sides. As he points out, the issue of deterioration has been clearly present in the consideration of the experts since expert evidence in this case was first adduced in March 2018. At that stage the claimant's consultant neurosurgeon expert was discussing the chances of deterioration and describing a 5% chance of recurrence so far as concerned the main tumour. Mr Meakin emphasises that the expert evidence deals with the seedling tumour and indeed the most recent joint expert statement of the neurosurgeon experts (20 January 2021) expresses a view with a "proviso" depending on what a future MRI scan shows in relation to "other

metastatic disease". Mr Meakin submits that, having regard to the overriding objective, in all the circumstances of this case fairness requires that the claimant be able to put the option of provisional damages before the Court.

12. That application as opposed and I will deal with the various strands of resistance that Mr Gil has put forward. Essentially, he makes three points. The first is to focus on the test that would need to be satisfied under section 32A before provisional damages could be appropriate. He sought to show me by reference to the evidence that there was no realistic prospect that that test could be met. He submitted that a passage in the same neurosurgeon experts' joint statement indicates that the 5% risk previously identified is in fact recognised by both experts as being, in effect (and this is my phrase), 'purely speculative'. The problem with that first line of objection, in my judgment, is twofold. In the first place, if Mr Gil is right that the threshold on the evidence is not met for a section 31A order of provisional damages then he will prevail at trial on that very issue. I am in no position to decide pre-emptively that question today, still less to foreclose on or predict with confidence how it would be addressed by the trial judge. In the second place, there is a difficulty in my judgment with the submission made by Mr Gil about the experts' joint statement. The question that the experts were considering in the passage on which Mr Gil relies was a causation question about whether the claimant's "current 5% risk of recurrence" was avoidable if other steps had been taken. I do not read that passage as beginning to undermine the premise of the question – whether there is a "current 5% risk of recurrence" – or to involve any agreed expert position as to what that "current … risk of recurrence" is. But, as I have emphasised, these are all issues for the judge to consider on the evidence. They do not, in my judgment, constitute a good reason for refusing permission to amend the particulars of claim.

13. The second strand in Mr Gil's resistance was his submission that it is "far, far too late" for the claimant's team now to attempt to amend the particulars of claim. He says that this should have been done long ago. He points out that, so far as the seedling tumour is concerned, that was identified in the 2014 MRI and therefore discussed in the subsequent experts' analysis, having regard to that MRI. He points out that the issue of future determination was squarely raised in the expert report to which I have referred of 6 March 2018 which is where the "5% chance of recurrence" was expressly described. Mr Gil says that no good explanation has been given as to why now, in 2021, this belated application is being advanced. In my judgment there is some force in the objection based on delay, depending on the question of prejudice. But it is not, in my judgment, as simple as saying that a March 2018 report clearly flagged up something well-known and which could have been reflected throughout in the particulars of claim. In my judgment, this is not simply a question of a 'stale' point being 'freshened-up' by reference to claims relating to 'subsequent developments'. It is, in my judgment, of particular note that the prospect of future deterioration has continued as a theme addressed within the various expert reports. There is moreover, in my judgment, force in Mr Meakin's point about the agreed neurosurgeon experts' position (January 2021) in relation to metastasis and their express proviso regarding the future. Subject to the question of prejudice, to which I will come, there is in my judgment a sufficient reason for the claimant now seeking to ensure that the trial judge is not constrained so far as the options for damages are concerned. It would not in my judgment, subject to the question of prejudice, be in the interests of justice for a judge faced with this expert evidence – including the recent

reference to the agreed express "proviso" regarding future developments – to be hamstrung by being unable even to consider provisional damages and moreover unable to do so in circumstances where the claimant has been seeking permission to amend the particulars of claim to enable this option to be before the judge.

14. I turn to the third strand which is the question of prejudice. Mr Gil submitted that it would be prejudicial for provisional damages now to enter the fray as an option available to the Court. He submitted that issues relevant to deterioration, future risk and the nature of any future deterioration are not matters which have fairly been on the agenda for experts to address in their reports and joint statements. He submits that, in those circumstances, it would be unfair and prejudicial for provisional damages belatedly to be introduced. I cannot accept that submission. In my judgment, the issues – relevant to risk, the future, deterioration, the nature of the future deterioration, the risks related to the prospects of such deterioration including in percentage terms, and the issues relevant to what is known and unknown including as regards metastasis and the seedling tumour – all of these issues are conspicuously present within the expert evaluative reports and statements that are before the Court. In my judgment the position can be tested by taking provisional damages as a remedial option out of the equation and considering the remedial alternative: a judge at the trial seeking to quantify future risk and the prospect of deterioration so as to include these aspects within a quantum assessment of damages, presently assessed. There is no doubt that that exercise would be a proper one for the Court to address, were the question of quantum to be reached. There is no doubt, in my judgment, that the expert reports would provide the Court – and will have been designed to provide the Court – with the information that the parties wish to adduce to assist the Court in that quantification. I was not persuaded by Mr Gil that there is some special feature of provisional damages that introduces a series of questions, relating to deterioration risk or the future, that would not otherwise have been addressed in the expert reports. As I have already said, in my judgment the expert reports prepared by the parties do as a clear theme grapple with precisely these issues. But even if that were wrong and there was something in the nature of the amendment to the pleading which made it relevant to revisit with an expert or experts what, precisely, they are saying to the Court, there is in my judgment absolutely no reason why that could not be done and done effectively for the hearing and at the hearing next month.

15. For all those reasons I am persuaded that it is necessary and appropriate, having regard to the interests of justice in this case and the overriding objective, that the claimant should have permission to amend the particulars of claim. I will direct that the particulars may be amended in the terms that are currently before the court and I will direct that the defendant have an appropriate timeframe to file an amended defence if so advised. I will discuss with both counsel the precise terms of the order.

9.2.21