Neutral Citation Number: [2015] EWHC 867 (QB)

Case No: HQ13X05526
TLQ/14/0710

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2015

Before:

MR JUSTICE FOSKETT

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Between :

ABIGAIL DUFFY **Claimant**
(A PROTECTED PARTY BY HER MOTHER &
LITIGATION FRIEND, SHELLEY DUFFY)

- and –

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SECRETARY OF STATE FOR HEALTH **Defendant**

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Henry Witcomb (instructed by **Henmans Freeth**) for the **Claimant**
Margaret Bowron QC (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 26 March 2015

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RULING ON APPLICATION FOR ADJOURNMENT

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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Mr Justice Foskett :

1. Yesterday I had before me an application made on behalf of the Claimant in this action to adjourn the trial of the issue of liability currently fixed for 5 days to commence during a 5-day window beginning on 20 April – in other words during the first full week of next term.

2. The Defendant consented to the application but the consent of the parties will not, of course, bind the court to agreeing that there should be an adjournment. Ever since the Woolf reforms were implemented, fixed trial dates have been regarded as immovable save in the most exceptional and compelling circumstances. Leaving aside the impact that adjournments have on the parties directly involved in a case, any adjournment has an impact on other cases waiting to be heard.

3. A request for the adjournment first came before me as Judge in Charge of the Queen's Bench Civil List on paper on 17 March and for reasons I will summarise shortly I indicated that I was not minded at that stage to grant the application.

4. The action itself is brought on behalf of a female claimant who is now aged 21 who is severely physically and mentally disabled. She is a "protected party" and brings this claim through her mother as her "Litigation Friend". The case advanced on her behalf is that her disabilities were caused or materially contributed to by the negligence of the staff of the John Radcliffe Hospital in Oxford where she was born and the community midwives who were responsible for checking on her progress after discharge from the hospital. In short, it is alleged that early signs of hypoglycaemia (abnormally low blood sugar levels) were missed or not acted upon at the hospital and subsequently leading to an epileptic encephalopathy which was the cause of her disabilities. Various breaches of duty have been admitted on behalf of the Defendant, but causation is denied. The Defendant's case is that there is no evidence of neo-natal hypoglycaemia and the likely cause of her disabilities was a genetic cause or the result of some developmental problem that affected her brain development and function. That case is supported by two well-known and experienced experts, Dr Neil Thomas, Consultant Paediatric Neurologist, and Dr Janet Rennie, Consultant in Neonatal medicine.

5. The Claimant's case is supported by Dr Jane Hawdon, Consultant Neonatologist and Dr Colin Ferrie, Consultant Paediatric Neurologist.

6. It is the suggested inability of Dr Ferrie to take part in the trial that has given rise to the present application. The circumstances of Dr Ferrie's suggested unavailability are well known. He was the subject of a report in a Sunday newspaper on 4 January this year apparently taking cocaine. As a result he reported himself to the GMC and has subsequently been suspended pending an investigation by the GMC.

7. When the matter was before me on paper, all I was told was that he was unavailable and that the Defendant consented to the application. I did not have the issues in the case explained or any of the expert reports to hand. I indicated that I was not at that stage minded to grant the application because Dr Ferrie's difficulties were known about in January and no information was given as to what steps, if any, had been taken to obtain a different expert if Dr Ferrie's evidence could not be taken in writing.

8. Some further information has been given since then to which I will refer below. I will deal first with what Dr Ferrie has said. The episode has, he says, had a marked effect on his health. In response, I imagine, to my indication of reluctance to adjourn the case, a witness statement has been obtained from him dated 20 March, the material parts of which I quote as follows:

> "4. My health has suffered. I have been advised that I am suffering from an adjustment disorder and depression both of which affect my ability to concentrate.
>
> 5. I feel that if I were called as a witness in Court I would not be able to concentrate upon the issues in hand particularly since the press are likely to become aware of my appearance in Court and the focus would be upon me rather than the issues to be raised at trial.
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> 6. The attention of the press is likely to further affect my concentration and in the circumstances I feel that I would be unable to give evidence or to concentrate cogently upon the matters in hand.
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> 7. I understand that I am not insured to appear in Court in any event as following my suspension the Medical Defence Union withdrew my membership.
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> 8. I am aware of my duty to the Court and before this problem arose I had been summonsed as a witness and was prepared to give evidence.
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> 9. However, in my present psychological state I feel that I could not concentrate on the issues and would not be able to advise and assist the Court appropriately upon the issues raised.
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> 10. At the time I prepared this Statement my General Practitioner has issued me with a certificate stating that I am unfit to undertake any work."

9. The GP's certificate to which Dr Ferrie refers in the statement was not attached to the statement and, whilst it is said that it says that Dr Ferrie is "unfit to undertake any work", it does not apparently say specifically that he would be unable either to attend a court hearing to give evidence on the issues in question or to do so by video link.

10. I have to say that, as presently advised, I do not find the medical reasons for Dr Ferrie's non-availability as a witness very persuasive. I very much doubt whether, had that material been put before me to excuse the attendance of a witness either in person or by video link, I would have agreed to excusing the witness. It is, of course, understandable that someone unused to media interest might find any such interest unwelcome and difficult. However, since I cannot believe that the circumstances of the report in the Sunday newspaper would have any bearing on any issue that could arise in a trial of this nature (or indeed in any of the kind of issues with which Dr Ferrie's expertise is concerned), I would be surprised if any court would permit

questions to be asked about those circumstances if any party sought to do so: the whole focus would simply be upon matters within his undoubted expertise. He has given evidence in the past, both on behalf of claimants and defendants, and his evidence has been accorded respect and has often been accepted. In a case in which he was due to appear in January this year which I tried, another well-known consultant paediatric consultant neurologist, Dr Lewis Rosenbloom, demonstrated his respect for Dr Ferrie's views even if, as occurred in that case, he did not agree with them.

11. Equally, the medical appraisal of his condition (which, of course, I accept might lead to concentration difficulties) is second-hand and not given from a level of expertise in the specialist area concerned to be persuasive.

12. I should say that both Mr Henry Witcomb and Miss Margaret Bowron QC, who appeared before me on this application each of whom have immense experience in this field of litigation and for whose assistance I express my appreciation, told me that their various sources of information do suggest that Dr Ferrie's current medical status is understood to be a cause of concern to those who know him well. Naturally, I respect what they told me and I am, of course, prepared to accept that it may well be accurate. However, the somewhat anecdotal nature of the information is not the same as having a report from an acknowledged expert in the field who has examined Dr Ferrie and who has given a full and informed opinion.

13. The other matter to which Dr Ferrie's statement gives rise is the question of his continued status to give expert evidence. I am unsure to what extent the apparent continued lack of insurance would have a bearing on that, but it would be something about which, if presented with this question again, I would need much greater information.

14. At the moment there seems to be a widespread assumption that all the work for which Dr Ferrie was responsible prior to 4 January this year will have to be re-distributed amongst other experts. I should say that I do not see that as necessarily so. As I have already indicated, I have myself tried a case in the last month or so in which Dr Ferrie was due to give evidence. That case started on or around 13 January and thus very shortly after the Sunday newspaper report and I had to proceed on the basis that Dr Ferrie was simply not available. The Claimant, for whom he had reported on the issue of life expectancy, wanted the case to go ahead without Dr Ferrie giving oral evidence; the Defendant wanted him present so that he could be cross-examined. I decided that the case should proceed and indeed it did: see [2015] EWHC 247 (QB). The absence of Dr Ferrie made resolution of the life expectancy issue more difficult, though not impossible. There will plainly be other cases where a similar approach can be adopted. I did not consider in that case that the inability of the Defendant to cross-examine Dr Ferrie prejudiced its position.

15. Notwithstanding what Mr Witcomb and Miss Bowron have told me, I repeat that, as things stand on the evidence before me in this case, I would not find Dr Ferrie's reasons for not giving expert evidence on an issue very much within his area of expertise as compelling. A general GP's note (which I have not seen) is hardly sufficient to justify a continuing absence from the witness box for months even if, for this purpose, "witness box" means one some distance away from the courtroom at the

end of a video link. I am, as I have said, unsure about his professional status for this purpose and whether that truly has a bearing on the position.

16. The difficulty in this case is that I have had to deal with this application just over three weeks before the trial date, with the Easter holiday intervening. But for that, I may well have given some directions that would enabled me to make a more direct assessment of Dr Ferrie's ability or inability to give evidence, including calling him before me either in person or, more likely, via video link, doubtless with the assistance of his advisers, in the context of case managing the present case to trial. Unfortunately, there is just not the time to do that satisfactorily in this case.

17. I have looked very carefully at the issues in this case now that I have had the advantage of seeing the expert reports and the joint statement of the experts. I am not going to spell them out for the purposes of this ruling save to say that this is a very difficult case that raises complex causation issues. That is not, of course, to say that it presents the Claimant with insuperable obstacles: it does not. However, Dr Ferrie has given a very careful and thorough appraisal of the background to her case and is supportive of it. As will be apparent, for my part, I would wish to have been truly satisfied that Dr Ferrie could not give evidence to support it at the forthcoming trial but, as I have said, time is too short for me to make that assessment. But because of the difficult nature of the case and Dr Ferrie's close analysis of it, it seems to me that it would in the particular circumstances be wrong for me to insist that the Claimant goes ahead with, as it stands, an apparently reluctant expert witness on a matter that is so important to her. His oral articulation of his supportive view would be important in this case. Unfortunately, the new expert to be instructed is unlikely to be able to give attention to the case for 12 months and, of course, there is no guarantee that he will be as supportive as Dr Ferrie, but that is doubtless a risk that her advisers have in mind. In the circumstances and reluctant as I am to do so, I can see no alternative but to grant the application.

18. Although that is the conclusion I have arrived at in this case, I am not prepared for anyone to think that an adjournment will always be granted in any case in which Dr Ferrie has been involved or in which his absence means that he cannot be cross-examined. In my view, that latter reason would not have been a satisfactory reason in this case: the Defendant has two very experienced experts upon whom he can rely and I could see that this case could proceed without prejudice to the Defendant.

19. As I have indicated, this decision is not to be seen as a green light for further applications. Every such application, if made, will be dealt with on a case to case basis. However, the purpose of giving this fairly detailed ruling on the present application is to enable parties who might be contemplating making such an application in respect of a case listed in the QB Civil List in London (for which I am responsible) to be aware of the sort of issues that I will have in mind when considering such an application, the kind of detailed material I will want to see and, in particular, the detailed material I will need to see about Dr Ferrie's medical and professional situation before arriving at a decision. It is not the intention of this ruling to cause additional problems for Dr Ferrie. All I would observe is that, if he is asked by a solicitor acting for a client for whom he has prepared a report to submit himself to an appropriate medical examination, it would be very much in his interests to do so.

20. Cases involving those who have sustained serious brain damage are always difficult and sensitive cases and those involved, on either side, have often waited a long time for the case to get to court. That is one reason why the court is very unwilling to grant an adjournment except in compelling circumstances.