Neutral Citation Number: [2020] EWHC 839 (QB)

Case No: HQ16C00506

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

Before:
Deputy High Court Judge Simeon Maskrey QC

- -

Between:
NKX

(By his mother and litigation friend NMK) **Claimant**

- and -
BARTS HEALTH NHS TRUST **Defendant**

- -
- -

Angus Moon QC and Eleanor Morrison (instructed by **Leigh Day**) for the **Claimant**
Dominic Nolan QC (instructed by **Kennedy's**) for the **Defendant**

Hearing dates: 18 February - 2 March

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY HIGH COURT JUDGE SIMEON MASKREY QC ON ANCILLARY MATTERS INCLUDING COSTS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 8 April 2020.

Simeon Maskrey QC, sitting as a Deputy High Court Judge:

Introduction

1. Following judgment in the substantive claim a number of applications are made:

    i) the Defendant seeks permission to appeal and a stay pending the determination of that appeal;

    ii) the Claimant seeks his costs on a standard basis. The Defendant does not object in principle but contends that there should be a 25% deduction from the Claimant's costs.

    iii) the Claimant seeks an interim payment of damages and a payment on account of costs.

2. I shall deal with each application in turn.

Permission to appeal

3. There is one ground of appeal and that is that I was not entitled on the evidence to find that delivery would probably have been achieved by 01.31 hours but for the breaches of duty on the part of the Defendant.

4. I reject the application for permission. The evidence permitting me to so find was as follows:

    i) By 01.00 hours there would have been 10 minutes of atypical decelerations of the fetal heart rate in a high risk labour;

    ii) in addition there would have been a complaint of pain between contractions, a classical feature of uterine rupture;

    iii) in such circumstances Ms Helleur, the expert midwife reporting on behalf of the Defendant, considered that an obstetrician would have been called immediately;

    iv) when Midwife Bigwood called for assistance she knew only that there was a deceleration that did not recover over the very short period that she was auscultating: 4 heartbeats or so. Thus, whilst in retrospect she was listening to a terminal bradycardia she did not know that when she called for assistance;

    v) as a matter of fact the obstetrician arrived very quickly and took the decision (again, without the benefit of CFM confirming a terminal bradycardia) that there should have been an immediate transfer to theatre; she did so without knowing that there was also a complaint of pain between contractions;

    vi) Mr Tuffnell, the expert obstetrician reporting on behalf of the Defendant, accepted that in circumstances where there was evidence that the rupture had occurred at or by 01.00 hours and auscultation was being performed one simply took what actually happened and brought it forwards by 10 minutes. He also said that the interval between recognising that there had been or might have been a rupture to delivery was 30 minutes. My finding was that urgent obstetric help

should have been sought at 01.00 hours. What I then did was utilise the time that in fact it took to achieve delivery from recognition of an emergency (31 minutes) and concluded that the same timescale would have occurred if the call had been made at 01.00 hours. Thus, I found that delivery would probably have been achieved, but for the Defendants' breaches of duty, by 01.31 hours. I was justified in so doing by the evidence of what in fact occurred when Midwife Bigwood thought there was an emergency and by Mr Tuffnell's acceptance that a 30 minute interval was reasonable between recognition that there was or might have been a rupture and delivery.

5. I was entitled on the evidence to reach that finding and I do not consider that there is a realistic prospect of persuading the Court of Appeal that I should not have done so.

Application for costs

6. The Defendant argues that there should be a 25% reduction in the Claimant's costs to reflect the fact that [i] the allegation that there was inadequate antenatal counselling was rejected and [ii] the Claimant only succeeded in proving that some brain damage was the consequence of the breaches of duty whereas it had been his case until the start of the trial that *all* of the brain damage was caused by the breaches of duty.

7. Costs are within my discretion. I make it clear that my starting point is that the Claimant is the successful party and that as the successful party should normally be entitled to a costs order in his favour. I then take account of the factors set out in CPR 44.3(4) and all of the circumstances of the case. I then exercise my discretion in a way that affords justice to both parties.

8. The Claimant did indeed fail to establish that the antenatal counselling was inadequate. However, it would have been necessary for the factual evidence to have been led at trial in any event in order to establish:

   i) the Claimant's mother's state of mind when attending hospital in labour;

   ii) what counselling was necessary when she was in labour and whether appropriate counselling would have led to her accepting CFM.

9. The determination of success or failure in respect of the antenatal counselling is more nuanced than Mr Nolan would have me accept. Whilst the Claimant did not establish that the counselling was inadequate, the Defendant did not establish that the Claimant's mother was fixated on labour with IA alone or that her mind was closed to CFM. This was of importance when determining what her reaction would probably have been if appropriate counselling had taken place when she was in labour.

10. I consider, therefore, that the unsuccessful allegations relating to antenatal counselling have not resulted in a significant increase in costs, were necessary issues to consider in order to determine the consequences of my finding that there were breaches of duty in respect of the counselling in labour and that on important issues relating to the antenatal counselling the Claimant was successful. I therefore do not deduct any costs consequent upon the Claimant having failed to prove the allegations made in respect of the antenatal counselling.

11. Mr Nolan is of course correct that the Claimant did not establish that the standard Myers *et al* construct should be applied to causation in this case. I found in favour of the Defendant on this issue and found that the extended Myers construct advanced on behalf of the Defendant was correct.

12. It is the case that if the Claimant had accepted the extended Myers construct it would have been unnecessary for 4 of the medical experts to have attended trial. There would thus have been a saving of costs. I also accept that the Claimant was seeking damages on the basis that the Defendant was responsible for *all* the brain damage sustained and did not amend his case to argue as an alternative that the Defendant was liable for *some* brain damage until trial. However, whilst these are factors I must weigh in the balance when exercising my discretion there are a number of other factors.

    i) The Defendant did not plead in its Defence the assertion that if delivery took place prior to 01.46 hours the Claimant would still have sustained some brain damage. The Defendant simply put the Claimant to proof in paragraph 54 of the Defence that delivery would in fact have been earlier. The first indication that the Defendant might allege that delivery earlier than 01.46 hours might result in different degrees of brain damage came in Dr Smith's report dated September 2019. His position was revised in the meeting of causation experts in November 2019 and rather than asserting that brain damage commenced at 01.23 hours (paragraph 35 of his report) he asserted that it commenced at 01.28 hours (Q10 of the Claimant's agenda). It is noteworthy that Dr Emmerson did not endorse Dr Smith's approach in his report. He did so at the joint meeting of causation experts. It follows that all of the costs incurred on behalf of the Claimant in obtaining expert causation evidence were necessarily incurred up to and including November 2019.

    ii) Dr Dear, the expert Neonatologist reporting on behalf of the Claimant was, on my findings, misled by his initial belief that the fetal heart rate in theatre rose on occasion to 135 bpm. That information came from the Defendant's documentation and it was not apparent to me that at any point prior to trial the Defendant pointed out that this was wrong.

    iii) The Defendant could have protected its position after November 2019 by offering to settle the case on the basis that it accepted liability for all but 'mild' brain damage; or that upon proof of a breach of duty it accepted liability for all but 'mild' brain damage. It chose not to do so.

    iv) It was wholly reasonable for the Claimant to litigate the issue of whether the standard or extended construct was appropriate in the context of the facts of this case. The difficulties experienced by Dr Smith when giving evidence and his acceptance that the position taken by the Claimant's experts was reasonable make that clear.

    v) I would have been reluctant to accept the Defendant's extended construct without hearing at least some evidence on the issue. It was unclear before trial why it should be accepted and for large parts of Dr Emmerson's evidence it remained unclear. It is at least arguable that if the Rennie and Rosenbloom paper had been discussed in detail before trial agreement may have been reached. As it was, it was first known by the Claimant's advisors that it would be relied upon

by the Defendant when it was disclosed along with a substantial body of other material on the 5th February 2020.

13. It follows that whilst I accept there would have been a saving in costs (probably restricted to the expert fees for trial and 1 ½ days of evidence) if the Claimant had accepted the extended Myers construct before trial, I exercise my discretion not to deprive the Claimant of any portion of his reasonable costs.

Application for an interim payment

14. In principle the Claimant is entitled to an interim payment and a payment on account of costs. In his supplemental written submissions Mr Nolan did not suggest otherwise. Nor did he suggest that on the basis of *Cobham Hire Services Ltd v Eeles* [2009] EWCA Civ 204 the sum of £572,990.25 (including the CRU payment) was an inappropriate figure for the interim payment or the sum of £500,000 was an inappropriate figure of the payment on account of costs.

15. It is thus necessary for me to say no more than that I consider these are appropriate sums to Order, that I approve the interim payment and that it should be apportioned as follows:

    i) £22,990.25 in respect of the Defendant's liability to the Department of Work and Pensions (CRU).

    ii) £50,000 to the Claimant's parents in respect of past care provided and expenses incurred.

    iii) £500,000 to be paid to the Claimant's solicitors pending appointment of a Deputy, to be held in an interest bearing account and used solely for the Claimant's immediate needs. The balance remaining and any interest accrued shall be paid immediately into the Deputy's account once the Deputy has been appointed and without the need for a further Order.

16. Mr Nolan, however, argues that it is his intention to seek permission to appeal. In those circumstances I should not make the Order set out above but should instead stay all ancillary orders pending determination of the appeal.

17. Whilst I am attracted to Mr Moon's submission that the Claimant has been successful and that as a consequence he should receive the benefit of the judgment now, and whilst I appreciate that he is a protected party with significant vulnerability, I consider that it is inevitable that the Claimant's solicitors would not spend any or any significant proportion of the interim payment whilst waiting for an application for permission to appeal to be determined.

18. Accordingly what I propose to do is order that there be an interim payment in the sum sought, to be apportioned as set out above, and that there should be a payment on account of costs in the sum sought. However, I shall order that the sum of £500,000 to be paid to the Claimant's solicitors shall not be paid until 14 days after the determination of any appeal, whether by the Defendant not renewing its application for permission, permission not being granted or the appeal being abandoned or dismissed. The payment of £50,000 I order to be made to the Claimant's parents within 14 days of

the date of the Order on the basis that it will be within the ability of the Claimant's parents to make repayment in the event that any appeal were to be successful.

19. I order that the Defendant shall make a payment on account of costs in the sum of £500,000 also to be payable within 14 days of the date of the Order and again on the basis that it will be within the ability of the Claimant's solicitors to make repayment in the event that any appeal were to be successful.

20. I shall leave it to the parties to agree an Order based upon this Judgment.