



Neutral Citation Number: [2020] EWHC 1543 (QB)

Case No: QB-2017-001742

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2020

Before:

MR JUSTICE JAY

Between:

TOBY CHAPLIN (by his mother and litigation friend, Diane Chaplin) **Claimant**

- and -

(1) BEN PISTOL
(2) ALLIANZ INSURANCE PLC **Defendants**

Robert Weir QC (instructed by Stewarts LLP) for the Claimant
Benjamin Browne QC (instructed by BLM) for the Defendants

Hearing date: 10th June 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 16th June 2020 at 10.00am.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. On 9th October 2016 Mr Toby Chaplin (“the Claimant”) sustained catastrophic injuries in a road traffic accident caused by the negligent driving of Mr Ben Pistol, insured by Allianz Insurance Plc (“the Defendant”). The Claimant, who was aged 28 at the time, suffered a very severe traumatic brain injury with tetraplegia, and is wholly dependent on others for his care needs. His life expectancy has been significantly reduced.
2. By an Application Notice dated 21st May 2020 the Defendant applies for permission to rely on the evidence of two further experts, namely (1) Mr Gary Derwent (assistive technology) and (2) Professor David Strauss (statistics/life expectancy). The application in relation to Mr Derwent’s evidence is not opposed, and the focus of this hearing has been Professor Strauss’ proposed evidence. The parties are not in agreement as to the extent of the diminution in the Claimant’s life expectancy although their existing experts are not far apart. The Claimant’s care needs will likely be met by a periodical payments order, in respect of which his life expectancy is irrelevant, but other important components of his claim will be calculated using traditional multipliers. I accept the Defendant’s submission, as did Master Eastman, that a seven figure sum rides on this issue.
3. On 18th July 2019 there was a second CMC before Master Eastman. The Defendant applied for permission to rely on expert evidence in the field of statistics, perhaps more precisely medical statistics, in the form of a report co-authored by Professor Strauss and Dr Jordan Brooks dated 28th June 2019. Master Eastman refused the application and there was no appeal. I will be returning to what happened at that hearing in due course.
4. The parties have, on my understanding, complied with the timetable ordered by Master Eastman at this CMC. Experts’ joint statements are due on 11th June, the Claimant’s Schedule on 18th June, the Defendant’s Counter-Schedule on 9th July, and the parties have agreed 14th July as the date for a joint settlement meeting. The trial is listed for 10 days in a window starting on 12th October 2020.

Neurological Evidence

5. As matters stand, the issue of life expectancy has been addressed in the neurological or neurorehabilitation evidence of Dr Clarence Liu for the Claimant and Professor Christine Collin for the Defendant. Both these experts have prepared a number of reports which I have considered carefully. Until recently, it was common ground that the Claimant has a prolonged disorder of consciousness (“PDOC”) and is in a minimally conscious state (“MCS”) which therefore places him towards the upper end of the PDOC category.
6. In Dr Liu’s first report dated 5th November 2018, he considered that the Claimant’s life expectancy lay in the range of 30-35% of normal, the upper boundary reflecting the possibility of some improvement in his condition. Dr Liu referred to three

publications from members of the Californian Life Project: *Life Expectancy of Children in Vegetative and Minimally Conscious States*, Strauss et al (2000); *Life Expectancy* (chapter 17 in *Brain Injury Medicine*), Shavelle et al (2007); and *Long Term Survival after Traumatic Brain Injury*, Brooks et al (2015). Dr Liu's analysis was that the Claimant's case fell somewhere between the cohort of vegetative state patients considered in the 2007 book chapter and the "does not walk, fed by others" cohort in the 2015 paper, although was closer to the former. The "does not walk, fed by others" group was the lowest functioning category in the 2015 paper and vegetative state patients, to whom MCS patients were more closely approximated, were not included.

7. Having arrived at his bracket of 30-35%, Dr Liu then applied the Expectation of Life or Ogden Tables in order to extrapolate a figure for the Claimant's life expectancy in terms of years and months. These tables are predicated on projected life expectancy which, until recently, has increased in line with medical and societal advances. By contrast, the National Life Tables, UK are predicated on actual life expectancy as at the date of publication, and yield lower figures.
8. In Dr Liu's subsequent reports, it would be fair to say that the underlying methodology has not substantially changed. Dr Liu has revised his figures slightly in order to reflect his clinical assessment that the Claimant has emerged into full consciousness. In his opinion, the Claimant's life expectancy is now 35-40% of normal.
9. In her first report dated 22nd November 2018, Professor Collin assessed that the Claimant was in MCS. Her broad-brush estimate of life expectancy was in the range of 25-45% of normal. By 20th March 2019, Professor Collin's assessment was that the Claimant was at an emergent or upper end of MCS. Her evaluation of life expectancy was based on the Shavelle et al, 2007 book chapter and the Brooks et al, 2015 paper. Her bracket of 30-44% reflected both publications. As for the 2007 tables, Professor Collin pointed out that the data for vegetative state patients should be revised upwards for the Claimant's MCS. As for the 2015 tables, Professor Collin stated without express comment that the lowest category was, as I have said, "does not walk, fed by others". Finally, Professor Collin briefly explained why the National Life Tables were more appropriate than the Expectation of Life Tables, relying on the Brooks et al, 2015 paper. Her point was that the life expectancy of patients with traumatic brain injury has not increased in line with the general population over the last 20 years.
10. In her report dated 12th May 2020, Professor Collin's assessment was that there had been no material change in the Claimant's condition. He remained in MCS towards the upper end and he had not emerged into full consciousness. Her conclusion was that the Claimant's life expectancy was in the range of 30-35% of normal. Her reasoning in support of that conclusion was as follows:

"The question concerning his life expectancy is where does he fit in the categories of survivors described in the Californian Life Expectancy Project? I am very familiar with their published survival data in those with enduring impairment and disability after brain injury, but the categories are quite large, and include a wide range of abilities. This Claimant is clearly rather better than those in Vegetative State described in their

2007 publication, but he has not fully emerged from PDOC, and thus does not quite fit the next category, “immobile and fed by others” described in both the 2007 and 2015 publication. In the updated publication in 2015 people in PDOC were not included, and “immobile and fed by others” was their lowest category. These people, “immobile and fed by others” though severely disabled, are awake and aware, and this category, at its upper end, includes those who can talk, those who can make meaningful choices, can assist with their own care needs, can roll over in bed, follow commands, perhaps even do standing transfers with aids or assistance. Toby cannot do any of these.

I think his life expectancy falls between the two groups. These two groups span a wide range of disability and survival. If the Court requires an accurate estimate based on more detailed stratification of the survival data, then it would be extremely helpful if the Life Expectancy Project authors, Professor David Strauss or colleague Jordan Brooks, could be approached to provide this greater detail.”

(The 2007 and 2015 publications do not use the word “immobile” but nothing turns on this.)

11. In arriving at her range of 30-35%, Professor Collin identified the positive and negative features of the Claimant’s case which in her view enabled it to be calibrated along the appropriate spectrum. It is clear that she had not altered her opinion that the Claimant’s condition was better than those of the vegetative state patients considered in Shavelle et al, 2007. As for the 44% figure, which was derived from the lowest category within the 2015 dataset, Professor Collin explained that in March 2019 “it was inherently still possible for Toby to emerge fully from PDOC”. Given the time that has elapsed since the accident, “it is now unreasonable to suggest that he may soon fit the descriptor of ‘immobile and fed by others’”.
12. It may therefore be seen that, whereas Dr Liu was also prepared to place the Claimant’s case somewhere between the 2007 and 2015 tables, Professor Collin’s March 2019 opinion reflected the possibility that he might enter the “does not walk, fed by others” group – hence the 44% figure for the upper limit of her range. For the reasons that she has explained, she has now come down to 35% but has not altered the figure for the lower limit of her range. Dr Liu, on the other hand, has shifted his bracket by 5% to reflect his assessment that the Claimant has emerged into full consciousness.
13. In their joint report dated 9th June 2020 these experts stated as

follows: “**Life expectancy and epilepsy**

The experts find that their estimates are quite close, with Professor Collin suggesting 30 - 35% of normal life expectancy, and Dr Liu suggesting 35 - 40% of normal life expectancy, and they have decided to refer the Court to their individual reports and predictions. Professor Collin’s

predictions span a range of 14.4 years (Collin; National Life tables) to 19 years (Collin; Ogden) and Dr Liu's span a range of 19 – 23 years. (Liu; Ogden) They agree the risk of seizure continues to diminish, currently about 8%, reducing to 2% at ten years and continuing to fall slowly.”

The CMC before Master Eastman

14. As I have said, at the CMC before Master Eastman on 18th July 2019 the Defendant sought the court’s permission to rely on the joint report of Professor Strauss and Dr Brooks dated 28th June 2019. Mr Benjamin Browne QC for the Defendant subjected this report to close analysis, for which I am grateful.
15. The joint report states that the Shavelle et al, 2007 dataset is no longer considered to be reliable. The Brooks et al, 2015 dataset is more robust and is based on both the Californian database (“CDDS”) and the National database for the US National Brain Injury Model Systems (“TBIMS”). The CDDS gives a figure of 44% for the “does not walk, fed by others group” which the joint report states is too high for the Claimant. It is said that recent, unpublished data gives a figure of 27% for the Claimant, taking into account a number of specific features of his case. The joint authors also rely on other recent papers which are said to support a figure in the region of 27%.
16. The joint report also explains why the National Life tables are more appropriate than the Ogden tables. In my view, it does not materially add to Professor Collin’s opinion although Mr Browne points out that the source is more authoritative.
17. It should also be noted that the joint report is somewhat critical of Professor Collin whom the authors believe has been overly generous to the Claimant:

“Here Professor Collin refers to the estimates of life expectancy for persons in vegetative state given in our 2007 publication. Although these estimates still have some relevance, our current preference is to work with the low-functioning group defined on page 4 above. This has the advantages of (i) being based on a more up-to-date research database and (ii) of not requiring any assumptions about whether the patient is technically in the VS, the MCS, or neither. Regarding the “does not walk, fed by others” group: in our opinion this has little relevance to a patient such as Mr. Chaplin with extremely severe disabilities, except perhaps to provide a gross overestimate of his life expectancy ...”

18. It is clear from the attendance note of the hearing before Master Eastman that the basis of the application to adduce this statistical evidence was that it was capable of providing greater evidential certainty as where the Claimant’s case should be located on the appropriate spectrum. The point was squarely made by counsel for the Defendant that the additional data indicated that both experts had over-estimated the Claimant’s life expectancy, and that the lower end of both their brackets (30-35% for Dr Liu; 30-44% for Professor Collin) should be reduced by 3 percentage points. Contrary to the Defendant’s case summary prepared for the purposes of the CMC, it seems to me that the purpose of adducing this evidence was not to “augment the

evidence of the neurorehabilitation experts on life expectancy” but rather to contradict it.

19. The Claimant’s solicitor’s note of Master Eastman’s reasons for refusing the application reads as follows:

“In relation to life expectancy experts requests by the defendant he is not prepared to allow that. He cannot see that the evidence in spite of the persuasive arguments of the defendant add to what Professor Collin and Dr Liu have to say on analysing the statistics. Neither experts seek to defer their opinion to anyone else and the evidence is not necessarily appropriate. He does not see where it takes us and so he disallows the permission for these experts.”

20. There was no appeal.

The Defendant’s Application

21. Mr Browne submitted that matters have moved on since the case was before Master Eastman. At that stage, while the methodology was agreed, the difficulty of applying these data with the necessary degree of precision had not been addressed by the experts. The Californian Life Expectancy project provided the best database and was therefore the best guide for the estimation of life expectancy. The Claimant’s case did not fit neatly into any of the relevant cohorts, and recent unpublished data was now capable of lending a degree of accuracy to this case that had previously been lacking. Professor Collin had expressly referred to the utility of having regard to the more detailed stratification data, and this aspect of her opinion was not contradicted by Dr Liu. In essence, the experts were not in agreement as to the correct approach to the statistical data.
22. Mr Browne did not accept that this application had come late in the day. He submitted that the Defendant had acted promptly once it had seen Professor Collin’s report dated 12th May 2020 referring to the desirability of obtaining statistical evidence of this nature. Furthermore, Professor Strauss’ report would be made available by 2nd July which would not jeopardise either the JSM or the trial date. Given that everyone relies on the Californian database, Mr Browne queried whether any evidence could in practice be obtained in effective rebuttal of Professor Strauss.

Discussion

23. Mr Browne’s point of departure, quite understandably, was that Professor Strauss could give relevant and authoritative evidence on an important issue in this case, and that on analysis the Claimant was not prejudiced by the timing of this application. As I have made clear, Mr Browne also submitted that there had been a significant change of circumstances. Mr Robert Weir QC for the Claimant took a rather different starting-point: the Defendant did not appeal Master Eastman’s order, and whether that was right or not (he did not put it that way) there has been no relevant or sufficient change in circumstances.

24. Unless I start from the right place there is a high risk that I will arrive at the wrong destination. I am entirely satisfied that Mr Weir's submission is correct. He drew my attention to CPR 29PD6 which provides in material part as follows:

"Variation of directions

6.1 This paragraph deals with the procedure to be adopted:

(1) where a party is dissatisfied with a direction given by the court,

...

(3) where a party wishes to apply to vary a direction.

6.2

(1) It is essential that any party who wishes to have a direction varied takes steps to do so as soon as possible.

(2) The court will assume for the purposes of any later application that a party who did not appeal, and who made no application to vary within 14 days of service of the order containing the directions, was content that they were correct in the circumstances then existing.

6.3

(1) Where a party is dissatisfied with a direction given or other order made by the court he may appeal or apply to the court for it to reconsider its decision.

(2) Unless paragraph 6.4 applies, a party should appeal if the direction was given or the order was made at a hearing at which he was present, or of which he had due notice.

(3) In any other case he should apply to the court to reconsider its decision.

(4) If an application is made for the court to reconsider its decision:

(a) it will usually be heard by the judge who gave the directions or another judge of the same level,

(b) the court will give all parties at least 3 days notice of the hearing, and

(c) the court may confirm its directions or make a different order.

6.4 Where there has been a change in the circumstances since the order was made the court may set aside or vary a direction it has given. It may do so on application or on its own initiative.”

25. In the light of these provisions, which reflect no more than the basic principle that a party aggrieved by a court order must either appeal it or demonstrate a change in circumstances since it was made, Mr Weir submitted that it is incumbent on the Defendant to show a “relevant and sufficient” change in circumstances since July 2019. I accept that formulation.
26. Dr Liu’s position has always been that the Claimant’s case falls somewhere between the cohorts considered by the Californian group in 2007 and 2015. Professor Collin’s position has always been that the Claimant’s condition was better than the 2007 cohort. In March 2019, without making the point explicit, she was prepared to accept the possibility that the Claimant’s condition might improve to the extent that he fell within the “does not walk, fed by others” cohort considered in 2015, but by May 2020 she had concluded that this would not happen. Her final position is that the Claimant’s case falls somewhere between the two cohorts. It was submitted before Master Eastman that the difference between the ranges given by the neurological experts is explicable on the basis that their clinical judgments vary as to the Claimant’s current condition. In my judgment, that was indeed the main reason for this divergence but the possibility cannot be excluded that the experts have interpreted the relevant Californian papers slightly differently. If that be the case, however, it was as much the case in July 2019 as it is now.
27. Professor Collin now says that “if the Court requires an accurate estimate based on more detailed stratification etc.” then Professor Strauss et al could be approached to provide it. Mr Weir makes the point that Professor Collin could have written exactly the same words in March 2019, or by way of letter before the July 2019 CMC, and in my judgment that must be right. Nothing has changed since last year, and Professor Collin must have been aware of the existence of the unpublished data even if she was not shown a copy of the Strauss/Brooks June 2019 report.
28. In fact, the Strauss/Brooks joint report takes a rather different approach from the neurologists. Instead of seeking to calibrate the Claimant’s case on a notional scale between the 2007 and 2015 cohorts, it effectively abandons the continuing saliency of the Shavelle et al paper and draws attention to further unpublished material which should be read in conjunction with the 2015 paper. This material does not impact on the vegetative state data; rather, it serves to bring the 44% figure right down to 27%. Furthermore, there are other recent papers which point in a similar direction.
29. It follows, in my judgment, that the large measure of methodological consensus achieved by the neurological experts would have been fundamentally and radically upset by the Strauss/Brooks joint report, assuming that it was admitted. In fact, this was not the reason for Master Eastman refusing the Defendant’s application. To my mind, that is not a factor capable of availing the Defendant on its current application. In any case, Master Eastman cannot be criticised for analysing the issues as joined between the neurological experts and concluding that the differences between them were largely explicable in terms of different clinical judgments.

30. The same essential reasoning applies to the life expectancy tables. Professor Collin has always favoured the period life tables and has explained why; Dr Liu has always favoured the projected life tables although he has not, as yet, explained why. Master Eastman was aware in July 2019 that the Strauss/Brooks joint report supported Professor Collin, and nothing has changed since then.
31. These reasons are sufficient to dispose of the Defendant's application, but in deference to Counsels' detailed and able submissions I should address the question of whether, if this matter had come before me shorn of any antecedent judicial decision, Professor Strauss' evidence should be understood as reasonably required for the purposes of CPR r.35.1.
32. Evidence from a medical statistician is, in principle, admissible although ordinarily it should be seen as the starting-point for the clinical judgments made by medical witnesses: see *The Royal Victoria Infirmary & Associated Hospitals NHS Trust v B (A Child)* [2002] EWCA Civ 348, at paras 20 and 39 in particular. In my experience medical experts are usually well able to apply and interpret quite complex statistical evidence which can be admitted as hearsay (particularly if set out in a published paper which has been peer-reviewed) without the need to call probative or explanatory evidence.
33. At para 19 of his judgment in *Dodds v Arif* [2019] EWHC 1512 (QB), Master Davison summarised the effect of the authorities, in my view accurately, as follows:

“For these reasons, it seems to me that bespoke life expectancy evidence from an expert in that field should be confined to cases where the relevant clinical experts cannot offer an opinion at all or state that they require specific input from a life expectancy expert (see e.g. *Mays v Drive Force (UK) Limited* [2019] EWHC 5), or where they deploy, or wish to deploy statistical material, but disagree on the correct approach to it. This case does not, or does not yet, fall into any of these categories.”

34. Both neurological experts have expressed themselves able, without qualification or equivocation, to proffer evidence on life expectancy in this case. The recent joint report makes that clear, as it does the relatively narrow gap between them – explained, in the main, by their different clinical assessments of the Claimant. Mr Weir has commented on Professor Collin's use of the conjunction “if” in her May 2020 report, and he is entitled to submit that she does not say in terms that specific input is required. On my reading of this paragraph, she is saying that this input is desirable because it would give court greater confidence in its conclusions. However, courts are well used to deciding cases on the basis of evidence which is adequate but not optimal, and I have to say that a strong countervailing consideration in the instant case is the one to which I have already alluded: Professor Strauss' evidence, assuming that it does not depart materially from the June 2019 joint report, would fundamentally undermine both parties' neurological evidence. If the Defendant wishes to proceed in this manner, I consider that this path should have been staked out at a much earlier stage in the litigation so that the medical experts could have addressed this radical evidence before committing themselves to their conclusions.

35. Furthermore, it is unclear whether Professor Strauss would be prepared to disclose his group's unpublished data within the context of these proceedings. I note that these data have not been peer-reviewed and were not appended to last year's joint report. There would be an obvious unfairness inherent in one party's expert relying on data which the opposing party is unable to examine.
36. Mr Browne submitted that the neurologists are not in agreement as to the correct approach to the statistical evidence. The answer to this submission is that they are in substantial agreement provided one excludes from consideration the unpublished data. To the extent that there may be differences of nuance or emphasis, I consider that both experts are well-qualified to explain their respective positions to the court without the need for formal evidence from a statistician. That is a course that has been followed without difficulty in numerous cases of this sort.
37. Had the matter come before me with a notional clean slate in, say, July 2019, I would have concluded that evidence from Professor Strauss was not reasonably required for the purposes of CPR r.35.1.
38. The final question is whether this evidence should in any event be excluded in the exercise of my discretion as coming too late in the day.
39. As Stewart J explained in *Taleb v Imperial College Healthcare NHS Trust* [2020] EWHC 1147 (QB), applications of this nature fall to be determined in line with the overriding objective rather than the principles governing relief from sanctions.
40. The premise for my consideration of the overriding objective must be made explicit. I should proceed on the basis that I am wrong in my conclusion that the Defendant has failed to show a relevant and sufficient change in circumstances. If the position were otherwise, it would be unnecessary to address this point.
41. There are powerful reasons in preserving the October 2020 trial date. I am told that the Claimant's mother and litigation friend has lost her husband to cancer and is devoted to her son. I agree that any adjournment would be intolerable. If Professor Strauss' report were admitted, I cannot accept Mr Browne's submission that the Claimant would and should have little option but to accept it as authoritative and reliable. Assuming that new data were provided, the Claimant would be entitled to have it subjected to appropriate scrutiny by an expert in medical statistics; it would not have to be taken as Gospel. I agree with Mr Weir that the identification and instruction of such an expert would take time, that the dates for the Schedules and Counter-Schedules would be put back (if necessary, the Claimant could always serve an amended Schedule, but that would occasion delay), that the JSM would have to be adjourned, and that there would be an unacceptable jeopardy to the trial date. The Claimant could of course avoid that risk by agreeing Professor Strauss' evidence, but there is no good reason why those advising him should be placed in that position.

Disposal

42. This application for permission to rely on expert evidence from Professor Strauss is refused.

ORDER

BEFORE MR JUSTICE JAY sitting remotely and hearing the case by telephone in light of Covid 19

UPON READING the defendants' application dated 21 May 2020

AND UPON HEARING leading counsel for the claimant and leading counsel for the defendants at the hearing on 10 June 2020

IT IS ORDERED that:

1. The defendants have permission to rely at trial on the expert report of Gary Derwent in assistive technology dated May 2020.
2. The defendants' application to rely on an expert report of Professor David Strauss on life expectancy is dismissed.
3. Costs in the case.