

IN THE COUNTY COURT SITTING AT MANCHESTER

THIRD PARTY COSTS APPLICATION

Before :

HER HONOUR JUDGE CLAIRE EVANS

Between :

MRS SAMANTHA THIMMAYA

Claimant

AND

LANCASHIRE NHS FOUNDATION TRUST

Defendant

AND

MR FIRAS JAMIL

Third Party Costs

*Giles Colin, instructed by Hempsons, Manchester for the Defendant Trust
Paul Kirtley, instructed by Slater Gordon, Manchester, for Mr Jamil*

Hearing date: 30th January 2020

APPROVED JUDGMENT

I direct that copies of this version of the judgment may be treated as authentic.

Her Honour Judge Claire Evans:

1. This is a highly unusual case in which the Lancashire NHS Foundation Trust, which was the Defendant to clinical negligence proceedings brought by Mrs Samantha Thimmaya, seeks a third party costs order against Mr Jamil, Consultant Spinal Surgeon, who was the Claimant's expert witness in those proceedings.

2. It arises because in the course of being cross-examined at the trial before me in Preston on 11th and 12th March 2019, Mr Jamil was wholly unable to articulate the test to be applied in determining breach of duty in a clinical negligence case. He was given a number of opportunities to explain it; he was asked the question in different ways; that did not assist him. In the end, he stated that he did not know the test to be applied. The Claimant then had no real choice but to discontinue her claim, he being the only expert upon whom she relied.
3. The Defendant now seeks a costs order against Mr Jamil. The Defendant's criticism goes wider than his performance in the trial. The Defendant asserts that he was not generally competent as an expert. He was not competent to be an expert in this particular case (which involved surgery he had carried out himself only twice), nor was he competent to be an expert in any case given that he was not aware of the legal test for breach of duty. The Defendant also asserts that Mr Jamil was not fit to be giving expert evidence, whether written or oral, at the relevant time because he was suffering from psychiatric difficulties which culminated in his being off sick from his clinical work (though not his medico-legal work) from November 2017 and then retiring from clinical practice in 2018.
4. The Defendant asserts that pursuant to the GMC Guidance on Good Medical Practice, and the duties owed to the Court under Part 35 of the Civil Procedure Rules, Mr Jamil should have realised that he was not competent to act as an expert witness for all of the reasons set out above, and should not ever have been involved in the claim. It seeks the entirety of the costs of defending the Claimant's claim.
5. Mr Jamil, in his witness statement of January 2020, accepts with hindsight that he was not fit at the time of the trial to give expert evidence, due to his mental health problems. He says that he was having cognitive difficulties, problems with his memory and concentration, and had not appreciated that he was unfit to give evidence. He does not accept that he was, or is, unaware of the *Bolam/Bolitho* test for breach of duty. He gives evidence of having been involved in numerous medico-legal cases for many years as an expert. He says that the reason he was unable to articulate the test on the day of trial is because he had an adverse psychiatric reaction to the questioning of Counsel for the Defendant who resembled and reminded him of an interrogator who had previously interrogated him in Iraq.
6. I will not go through all of the documents in the hearing bundle. They are lengthy. I will say that Mr Jamil's reports are not particularly well written, nor well argued. It is clear from the documentation disclosed by the Claimant's solicitors that at various stages counsel and the solicitors were concerned as to whether Mr Jamil was a suitable expert, not least because they asked him in 2017 to confirm his suitability to report.
7. The gateway to it unfolding that Mr Jamil was not aware of the test for breach of duty arose from his choice of wording in the Joint Statement he prepared with Mr Allibone, Consultation Orthopaedic Surgeon instructed by the Defendant, in May 2018. Mr Jamil referred in the joint statement to "*best practice*". Of course, best practice is not what is required of a doctor so as to avoid being found to have been negligent.
8. Mr Jamil may well have been able to report having proper regard to the *Bolam/Bolitho* test in previous cases. He may well have understood the test and been able to fulfil his

duty to the Court in previous cases. This is not a case about what Mr Jamil has, or has not, done before. The question for me is whether in this particular claim, at the relevant times, he had a proper understanding of the test to be applied in giving an opinion as to whether a clinician had been negligent. And plainly by the time of the trial he did not.

9. I note what Mr Jamil says in his witness statement about the reasons for him being unable to deal in cross-examination with the questions about breach of duty. Mr Jamil was, however, also unable to explain the test for breach of duty in the subsequent case of *ZZZ v Yeovil District Hospital NHS Foundation Trust* [2019] EWHC 1642 (QBD); and when he was asked in *ZZZ* (paragraphs 87 to 89) about what happened in the case with which I am concerned, he did not give the explanation about counsel resembling a previous interrogator. Instead he gave an explanation of having had a “mental block”, which explanation was rejected by Mr Justice Garnham as “palpable nonsense”. Nor did he give the explanation relating to counsel and the interrogator to Dr Vandenabeele, Consultant Psychiatrist, who reported in September 2019 in respect of Mr Jamil’s capacity.
10. I should say that I have not heard oral evidence from Mr Jamil, and that I am not in any way characterising his evidence as dishonest or deliberately misleading. It may well be that, looking back, he now believes that his failures in cross-examination arose because of counsel resembling his previous interrogator. But the fact that he did not give that as an explanation to me at the time, nor to Mr Justice Garnham in *ZZZ*, nor to Dr Vandenabeele, leads me to discount it as the correct explanation.
11. On the balance of probabilities, the reason that Mr Jamil could not answer the questions in cross-examination as to the test for breach of duty was because he did not know, was unable to recall, or could not apply the legal test, perhaps because of his general cognitive difficulties caused by his mental health problems.
12. In any event, whether he did or did not know the legal test, or whether he would or would not have been able to state the test on a different day, he was suffering from psychiatric problems and cognitive problems such that he was unable to concentrate and unable to engage properly with cross-examination. He should not have continued to act as an expert witness, whether in court or in writing or in conference, at a time when he was unable to work in his clinical practice due to his mental health problems. He should have taken sick leave from his medico-legal practice at the same time as he did from his clinical practice, in November 2017. As it was, he did not even inform the Claimant or her advisers of his medical condition.
13. Those are all significant failings which amount in my judgment to improper, unreasonable, or negligent conduct, such that the jurisdiction to make a costs order against Mr Jamil (which is, both parties agree, essentially to be exercised on the same basis as a wasted costs order) is engaged.
14. I must also consider whether Mr Jamil should have agreed to act as an expert at all in this case, and the content of his reports and advice to the Claimant and her solicitors. I do not find that his conduct and engagement was improper, unreasonable, or negligent from the very outset of his involvement in the case, or until November 2017. Mr Jamil was not, on my reading of his reports and the file notes of the Claimant’s solicitors, a very good expert. Whilst he did not have a great deal of expertise in carrying out this

particular operation, having only done in twice (and then under supervision), he explained to the Claimant's solicitors that he was able to give an opinion as he had treated a lot of patients recovering from this procedure. There are plenty of not very good experts around. There are plenty of cases where an expert gives an opinion where they are not particularly experienced in the operation concerned. Not all of those experts find themselves liable to pay wasted costs. The jurisdiction to make wasted costs orders is one to be exercised exceptionally. I cannot find a failing sufficiently exceptional on Mr Jamil's part before November 2017.

15. The next issue then is whether Mr Jamil's conduct in continuing to act as an expert after November 2017 has caused the Defendant to incur unnecessary costs. Mr Kirtley, on behalf of Mr Jamil, says that if he had stopped acting in November 2017 the Claimant would simply have engaged another expert, and the case would have continued to trial, and the Defendant would have been in no better position than it is now.
16. But I have no evidence that any other expert would have given positive evidence for the Claimant. It might very well have been that no other expert would have supported the claim, at which point she would have discontinued the claim against the Defendant, and the Defendant would not have incurred costs thereafter. Whilst it is not my function to try the claim on its merits today, I can say that on my initial reading of the trial bundles my view was that the Claimant was unlikely to succeed in her claim.
17. On the balance of probabilities I find that the conduct of Mr Jamil in continuing to act as an expert in this case caused the Defendant to incur all of its costs after November 2017.
18. I have then to consider all of the circumstances of the case and whether it is just to order Mr Jamil to pay all or some of those costs. Mr Kirtley quite properly reminds me that the jurisdiction to make wasted costs orders is not intended as a punitive jurisdiction. I am not to fine Mr Jamil to mark the Court's displeasure at his conduct.
19. But Mr Jamil owed important, and significant, duties to the Court. He failed comprehensively in those duties from November 2017 onwards. As a result, a public body has incurred significant unnecessary costs. Whilst it would not be right to use him as an example to send a message to experts, it is right that experts should all understand the importance of their duties to the Court and the potential consequences if they fail in them. The consequence for the Claimant was that she lost her entitlement to have her case tried on its merits. A considerable amount of court time has been wasted. And there were significant consequences to the NHS in terms of costs.
20. I have sympathy for Mr Jamil's personal position – it is clear from reading about his personal circumstances and his psychiatric difficulties that he has had a very difficult time. But the balance comes down firmly in favour of the Defendant.
21. I order therefore that Mr Jamil pay the Defendant's costs from November 2017 in the sum of £88,801.68, and the Defendant's costs of this application.