

TRANSCRIPT OF PROCEEDINGS

Ref. HQ17P00164

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION**

7 Rolls Building
Fetter Lane
London

Before MASTER DAVISON

SAMANTHA MUSTARD (Claimant)

- v -

JAMIE/STEPHEN FLOWER & DIRECT LINE INSURANCE (Defendants)

MR M GRANT appeared on behalf of the Claimant

MR WILLIAM appeared on behalf of the Defendants

JUDGMENT

**1st NOVEMBER 2019
(AS APPROVED)**

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MASTER DAVISON:

1. These are the brief reasons why I have decided to grant the defendant's application for permission to substitute the neuro-psychological medical evidence of Dr Torrens for evidence from an alternative neuro-psychological expert.
2. The first question is whether there is good reason for the defendant's application. It seems to me that the answer to that is, resoundingly, that there is good reason for it. There has been criticism, (I might call it trenchant criticism), of Dr Torrens' professionalism by Professor Morris, the neuropsychologist instructed by the claimant, and there is plainly substance in that criticism. Obviously, I make no finding that the criticism is justified. I simply observe that it is criticism which appears to have a valid basis.
3. It is not, however, simply the fact that there is a well-arguable case that Dr Torrens administered the neuropsychological testing in a sub-standard way. It is also the fact that she has expressed criticisms of the claimant in language which, in my view, is intemperate and inappropriate in the context of an expert's report in personal injury litigation. I would, on present material, expect that a trial judge would have serious reservations about Dr Torrens' evidence and I can, therefore, entirely credit that the defendant has lost confidence in her as an expert.
4. I turn then to the conduct of the party who is seeking to instruct a fresh expert, which is the defendant. There is force in the point that Mr Grant has made arising out of the fact that the defendant initially sought to exclude the covert recordings, which have formed the basis of Professor Morris' criticisms of Dr Torrens. It can be said that, in those circumstances, the defendant should have to live with the outcome of that application. But this point is, at least to some extent, met by two countervailing considerations. First, it seems to me understandable that the defendant took that stance when the claimant's conduct was, (as I have found), reprehensible, in that she recorded the examinations covertly and the doctors themselves sought directions and guidance from the court. Second, I think it is right to take into account the fact that Mr Audland was candid in saying, during the course of that application, that the defendant would have to consider whether to continue with Dr Torrens if the application to exclude the covert recordings was unsuccessful.
5. Turning then to prejudice and the balance of prejudice, it seems to me there would be great prejudice to the defendant if I were to refuse the application. That would leave

the defendant, effectively, with no neuropsychological evidence, or none worth having. Conversely, there is little prejudice to the claimant. It is true that she will have to undergo another examination by a freshly instructed neuropsychologist, and that, I can well credit, will be unwelcome to her. But there will be no invasive testing involved and, in the context of the fact that she is bringing a very large claim, on which neuropsychological evidence is absolutely critical, she must expect to have to undergo examinations.

6. It seems to me that Mr Audland had a fair point when he said that, if the boot were on the other foot, she would have to undergo an examination by another expert instructed on her side and would presumably do so without complaint. Mr Audland had another fair point when he submitted that she would actually benefit from an examination by an expert who can be expected not to repeat Dr Torrens' mistakes, (if they were mistakes), and in circumstances where no question of tainting of the examination by a covert recording can arise.

7. It seems to me that there is no, or no substantial prejudice, in terms of delay or cost. The overall timescale to an ultimate resolution of this claim, i.e. the overall timescale to trial, will not be affected and the defendant accepts that it must pay all the costs thrown away by the exercise. These are capable of being calculated, even if that is not a particularly easy task. I do not accept that Dr Torrens' evidence, or the ghost of it, will influence the existing experts. The analogy is with judge and jury. A judge can put out of mind what a jury might find difficult to. Likewise a professional medical expert.

8. Turning then, lastly, to the interests of justice. It seems to me that these are best served by both sides having experts in whom they have confidence and whose evidence bears no taint of lack of professionalism. The interests of justice are also served by the court having evidence which is in no way compromised by the potentially adverse influence, or unwanted dynamic, of covert recording. And I repeat that it was, of course, the claimant who was responsible for that in the first place. So, for those reasons I grant the defendant's application.

(There followed proceedings – please see separate transcript)

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge