Stephen William Wright v Barts Health NHS Trust

Case No: HQ14C04881

High Court of Justice Queen's Bench Division

26 July 2016

[2016] EWHC 1834 (QB)

2016 WL 03947559

Before: Mr Justice Edis

Date: 26/07/2016

Hearing dates: 6th July 2016

Representation

Frank Burton QC (instructed by Stewarts Law LLP) for the Claimant.

John Whitting QC (instructed by Clyde & Co) for the Defendant.

Approved Judgment

Mr. Justice Edis:

1 This is an application by the defendant in this clinical negligence action. The defendant seeks an order that the claim be struck out under CPR 3.4 or, in the alternative, that summary judgment be entered for the defendant under CPR 24 . It is submitted that the claim is an abuse of process because the claimant has already accepted settlement in another claim for the injuries which form the subject matter of this action. Alternatively, it is submitted that the settlement operates to extinguish the loss and therefore as a defence to the claim.

2 The facts in outline explain how the issue arises. The claimant was involved in an accident at work on 30th November 2011 when he fell through a skylight. He sustained multiple injuries, including a series of fractures at different levels of the spine as well as in the hip and pelvis. He was taken to the defendant's hospital for treatment. At the end of his treatment he had suffered a complete spinal cord injury at T7 level and was Frankel A paraplegic, that is to say he has no feeling or movement below the level of his injury, is wheelchair dependent and has no control over his bladder and bowels. A claim for the whole of loss was made against County Contract Roofing Limited (“CCRL”) and was set out in a Schedule at rather more than £3m. CCRL did not employ the claimant but had sub-contracted work to him or to a company of which he is a controlling mind.

3 The claim against CCRL was compromised before proceedings were issued by an agreement negotiated between the legal teams at a without prejudice meeting. A Memorandum of Agreement dated 3rd September 2014 recorded the agreement.

4 The claimant alleges that the medical outcome would have been very much better had he been competently treated by the defendant in 2011. His solicitors sent a letter of claim to the defendant on 9th April 2014 claiming damages for clinical negligence which, if proved, would render the defendant liable to pay damages to the claimant. The claim against the defendant was being advanced before the claim against CCRL was settled. It was contended that negligent treatment at the hospital had caused the outcome to have been very much worse than it should have been. This would not relieve CCRL of liability for the whole loss unless the negligence of the hospital was such as to break the chain of causation between the fall and the final outcome. It is uncommon for cases of this kind to be resolved on that basis, perhaps because, sadly, imperfect

medical treatment is a hazard of life. By causing injury which requires treatment a tortfeasor exposes the victim to that hazard. This view is supported by *Clerk & Lindsell* 21st Edition at 2–119 and in *Webb v. Barclays Bank and Portsmouth Hospitals NHS Trust [2001] EWCA Civ 1141* at [55] cited with approval a passage from the 18th Edition of that work which suggested that medical treatment would only break the chain of causation if it were "so grossly negligent as to be a completely inappropriate response to the injury inflicted by the defendant." No-one in this litigation has ever suggested that the negligence of the defendant was as bad as that. Whether or not CCRL ever sought to make such a suggestion in negotiations, I consider it highly unlikely that the claimant's advisers would have attached any real weight to it, and that if CCRL's advisers had advanced it at all they would have done so without any real confidence that it would ever succeed.

5 It is quite plain that the claim as advanced to CCRL was for the whole of the loss. The Schedule said that, and it was supported by evidence from Mr. B.P. Gardner, Consultant in Spinal Cord Injuries, which described the condition of the claimant as it was in December 2012. The care claim was supported by evidence from Maggie Sargent dated 9th November 2013. This report described the care needs of the claimant in his condition as it was at that date. No effort was made to identify within the loss caused by the accident any element which may have been avoided by better medical treatment. This was a proper way of advancing the claim. If negligence could be established against the hospital it would also be liable for the loss to the extent that it was attributable to that negligence. This means that the part of the loss which occurred after the negligence would be divided into two parts: (1) that which would have occurred even if the treatment had been careful, and (2) the additional loss suffered over and above the first part. Both the hospital and CCRL would be liable for this additional loss.

6 To the extent that CCRL was able to establish contributory negligence its liability would be reduced. That defence is not available to the hospital.

7 Mr. John Whitting QC, who appears for the defendant, submits that the compromise of the claim against CCRL renders it an abuse of process to proceed against the hospital because the claimant has already been compensated for his loss. Alternatively, that compromise operates as a defence to the claim because the claimant cannot now prove any loss. Pleadings in the case are long since closed and the matter is listed for trial in January 2017. The substantive defence which is the basis of the claim for summary judgment is not actually pleaded. Mr. Frank Burton QC, who appears for the claimant, does not take any technical point and resists the applications on the merits. He submits that the compromise did not in fact compensate the claimant for the whole of the loss for which he says the defendant is liable.

The compromise

8 The claimant operated as Steve Wright Contractors Limited and had been engaged by CCRL to carry out roofing work as a sub-contractor. CCRL had sub-contracted the whole of the work and had no presence on site. The nature of the relationship was such that an issue existed as to the extent of CCRL's duty to the claimant and also as to contributory negligence because the claimant was, in effect, the senior roofer on site and owed duties to workers whom he had engaged to assist him, and to himself. He was reviewing work done by others under his supervision when the accident occurred. There was an inadequacy in the risk assessment for the work and the method statement, but the claimant himself had been consulted about the risk assessment at the start of the works. A letter dated 8th March 2013 on behalf of CCRL rejected the claim on these grounds: he was not an employee and the accident was all his fault. Contributory negligence was conceded in a without prejudice letter from the claimant's solicitors dated 14th February 2014. A Part 36 Offer was made on 22nd April 2014 by the claimant offering to accept 40% of the full value of the claim which was accompanied by another Part 36 Offer to accept £1.2m.

9 At a joint settlement meeting on 3rd September 2014 agreement was reached whereby CCRL agreed to pay £400,000 plus £150,000 costs in full and final settlement of the claimants claim against it. The written Memorandum of Agreement recorded that this settlement was reached on the basis of a reduction of 80% for contributory negligence. I was told by Mr. Burton, who negotiated the agreement on behalf of the claimant, that actually the discount reflected risks as to liability and also a concern of the claimant that the claim against CCRL was causing family

tension because an issue arose as to who was at fault for the unsafe system, and the claimant's son had been involved in some discussions with CCRL before the accident. I suggested to him that the written term affirming that the contributory negligence discount was 80% was not true, and he agreed. A discount of 80% in a case of this kind would be very high to an extent that it is an unrealistic apportionment of liability. It is far more likely that the claim would fail altogether if the claimant was at fault to that extent. It is the practice for agreements to include a term as to the level of contributory negligence because that assists insurers in dealing with the NHS Recovery Scheme under which they pay the costs of treating those who have been injured by the fault of their policy holders. It is not necessary for me to comment about this practice or the decision to state that a discount of 80% had been agreed in this case. It is only necessary for me to say that I do accept that a substantial discount for contributory negligence was made in agreeing the settlement sum. It was not 80%. Not only had the issue been conceded in without prejudice correspondence, experience of this kind of claim suggests that some discount was virtually inevitable given the role of the claimant in this sub-contract.

10 The compromise did not include any reservation of the right by the claimant to proceed against the defendant, nor any agreement by the claimant to indemnify CCRL against any liability it may have to the defendant in any contribution proceedings. It contained no mention of the claim against the defendant at all.

11 On 12th November 2014 the claimant's solicitors told the defendant's solicitors that the personal injury action had been resolved with a significant reduction for contributory negligence. The defendant's solicitors responded asking for details of the settlement agreement “to ensure that there is no double recovery.” The figures were supplied as asked. Proceedings were issued on 24th November 2014. 18 months later, on 4th May 2016, the defendant's solicitors sent the present application to the claimant's solicitors. In the meantime both parties had expended substantial sums in costs in preparing for trial on liability. This is an unusual way to defend a claim to which there is a complete answer, as is now suggested.

Discussion and decision

12 The law relied upon by the defendant appears in *Jameson v. CEGB [2000] 1 AC 455* and *Heaton and others v. AXA Equity and Law Life Assurance Society plc and another [2002] 2 AC 329* . Jameson decided that settlement of a claim against one tortfeasor in a claim for mesothelioma discharged the claim against the other concurrent tortfeasors and barred a subsequent claim against one of them. Heaton considered and explained the decision in Jameson . In my judgment the key passages in Heaton are in the speech of Lord Bingham. Lords Mackay and Rodger delivered their own judgments and did not express disagreement with Lord Bingham. Lord Steyn agreed with Lord Bingham and Lord Mackay. Lord Hope (who gave the principal speech in Jameson) agreed with all three substantive speeches. This suggests, as appears to me to be the case, that all of those speeches are to the same effect at least so far as they are material to what I have to decide. Although passages from the speeches of Lords Mackay and Lord Rodger were drawn to my attention in submissions, it is not necessary to cite them in this judgment.

13 Lord Bingham defined the issues on the appeal in Heaton at [3]-[5]. In doing so he explained the proper approach to a compromise as opposed to a judgment of the court at [5]. He refers (for present purposes) to the claimant as A, to CCRL as B, and to the defendant as C. He said this

> “Where a sum is agreed which makes a discount for the risk of failure or for a possible finding of contributory negligence or for any other hazard of litigation, the compromise sum may nevertheless be regarded as the full measure of B's liability. But A may agree to settle with B for £x not because either party regards that sum as the full measure of A's loss but for many other reasons: it may be known that B is uninsured and £x represents the limit of his ability to pay; or A may wish to pocket a small sum in order to finance litigation against other parties; or it may be that A is old and ill and prefers to accept a small sum now rather than a larger sum years later; or it may be that there is a contractual or other limitation on B's liability to A. While it is just that A should be precluded from recovering substantial damages against C in a case where he has accepted a sum representing the full measure of his estimated loss, it is unjust that A should be so precluded where he has not.”

14 At [8] Lord Bingham identified the effect of the decision in Jameson and at [9] he explained the proper approach to a compromise case. He said that the primary focus of attention should be the construction of the agreement in its appropriate factual context. He said that the release of one concurrent tortfeasor does not have in law the effect of releasing another concurrent tortfeasor. The absence of a reservation of a right by A to sue C is of lesser and perhaps no significance since there is no need for A to reserve a right to do that which he is entitled to do without any such reservation.

15 The present case concerns concurrent tortfeasors, that is parties who commit separate tortious acts which cause or contribute to the same damage. Heaton is clear that the rule which provides that the release of one joint tortfeasor (parties jointly and severally liable for the same tortious act) operates as a release for all does not apply to concurrent tortfeasors.

16 Mr. Burton cited *Webb v. Barclays Bank Plc, Portsmouth Hospitals NHS Trust [2001] EWCA Civ 1141* . In that case the claimant settled a claim against her employers, the Bank, for the full value of her loss caused by an accident at work, including an amputation which had been unnecessarily done at the hospital. The Bank then issued contribution proceedings against the hospital which had treated the claimant negligently, increasing her loss and its liability to her. The loss attributable to the clinical negligence was apportioned as to 75% against the hospital and 25% against the employer as between themselves but they were both liable for the whole of the loss as against the claimant. There was no contributory negligence in that case capable of reducing the liability of the Bank. The success of the contribution proceedings required a finding that the Bank and the hospital were “liable in the same damage”, see s.1(1) of the Civil Liability (Contribution) Act 1978 and the judgment at [58].

17 The position in this case is that CCRL and the defendant are liable in the same damage, but that damage is only part of the claimant's loss. There is a pre-clinical negligence element for which only CCRL is liable. That element includes the loss which occurred after the clinical negligence but which would have occurred anyway. CCRL is liable for this, but the defendant is not. After the clinical negligence there is the additional loss which would not have occurred but for the clinical negligence. The hospital is liable for this, as also is CCRL. CCRL is only liable for the proportion of this part of the loss which remains due after the reduction for clinical negligence. The hospital is liable for all of it. It follows that if one action had been initiated against both tortfeasors and if judgment had been given against them both, those judgments would have been in different sums. This is because each made a contribution to that part of the loss by a different tortious act in breach of different duties to the claimant. They are concurrent tortfeasors, not joint tortfeasors.

18 Mr. Burton relied upon a decision of Nelson J in *Appleby v. Northern Devon Healthcare NHS Trust [2012] EWHC 4356 (QB)* in which he decided the same issue which is before me. In very similar circumstances to the present case he declined to enter summary judgment for the hospital. Mr. Whitting argues that it was wrongly decided and invites me not to follow it. Nelson J held that the test to be applied in considering the claim against the hospital is whether the compromise agreement represented the full measure of the claimant's estimated loss. The argument which was raised in that case about abuse of process was based on the conduct of the claimant's lawyers and is not advanced in the present case. There is a suggestion that it is an abuse of process to start proceedings against the hospital after the settlement with CCRL, but it is not easy to identify what that abuse might be. A collateral attack on a compromise is not an abuse of process. A collateral attack even on a judgment in civil proceedings is not necessarily an abuse of process, although it may be: *Arthur JS Hall v. Simons [2002] 1 AC 615* at 702F-703D. In any event, on the facts of this case an assertion that substantial sums remain due from the defendant to the claimant does not mean that the claimant settled his claim against CCRL for too little. The real basis of the defendant's application is that the compromise operates as a defence to the claim because the claimant has been fully compensated by it for his loss. Procedurally this could find its expression either as an order striking out the statement of case under CPR 3.4(2)(a) as disclosing no reasonable ground to bring the claim, or an order for summary judgment for the defendant under CPR 24.2 . In substance, as Lord Bingham said in Heaton this involves a focus on the agreement and the circumstances in which it was concluded.

19 The short answer is that he has not been fully compensated for his loss. CCRL was not liable to compensate the claimant for the whole of the loss for which both tortfeasors were liable because of the contributory negligence discount. The defendant is liable to compensate the claimant for the whole of that loss if his current claim succeeds. The defendant is not liable for

the part of the loss which was not caused by the alleged clinical negligence. CCRL has neither paid nor purported to pay the whole loss caused by the hospital (on the assumption that the claim against it succeeds on the merits). It is, it seems to me, impossible to construe that agreement in its true factual context as providing full compensation for the loss which is claimed against the hospital. The fact is that the settlement did not pay 100% of the loss for which both tortfeasors are said to be liable. In fact, on its face, it paid only 20% of that claim as it did of the claim for the rest of the loss. Although I have not accepted that this is an accurate figure, I have accepted that a substantial discount for contributory negligence was allowed in the settlement. That is a sufficient basis for this decision, but I regard the facts of this case as illustrating a general principle which is that a settlement with one concurrent tortfeasor does not release the others unless it is clear that it was intended to have that effect, or unless the payment clearly satisfies the whole claim (which is what happened when the Bank settled Webb's case referred to above, see [13]).

20 It is clear that the rule in Heaton was aimed against the avoidance of injustice which would occur if the claimant recovered twice for the same loss. There is no such risk in this case. The claimant agrees that credit must be given “as appropriate” for the sum received from CCRL. It may not be altogether easy to calculate how much credit should be given in these circumstances, but that is not something I have to decide.

21 I consider that Nelson J was right on Appleby for the reasons which he gave. In my judgment these applications fail and are dismissed.

22 If the defendant wishes to pursue these arguments in the light of the failure of this applications, it will have to secure leave to amend the Defence and a variation of the directions to permit evidence to be adduced enabling the court to decide the question on real, rather than assumed, facts. Any such application would have to overcome the lateness of the stage at which it would be made, and the absence, as it seems to me, of any real merit in the proposed amendment. However, I have resolved these applications on the basis on which they were advanced and that is all I have done.