

JERSEY / JUDGMENT

Young v Greaves [2019] JRC 234 (05 December 2019)

[2019] JRC 234

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judgment

the MASTER:

Introduction

1. This judgment contains my reasons for permitting the plaintiff to adduce expert evidence from a psychologist on certain terms as to costs. Background and Submissions 2. The proceedings concern a claim by the plaintiff for damages for personal injury following a road traffic accident that took place in June 2015. 3. Proceedings were issued before expiry of the limitation period by way of an order of justice dated 18 th May, 2018. The order of justice at paragraph 16 describes the physical injuries alleged to have been suffered by the plaintiff as a consequence of the accident. The pleading did not contain any reference to any psychological injury. 4. Liability was admitted in respect of the claim with the plaintiff otherwise being put to proof of the extent of her injuries. 5. On 22 nd October, 2018, I issued various directions including directions in relation to the provision of witness statements from factual witnesses and expert evidence. Expert evidence was permitted in the fields of orthopaedics and otorhinolaryngology. 6. The witness statement of the plaintiff produced pursuant to these directions dated th December, 2018 stated at paragraphs 24-26:- "24. Since the accident, I do not feel as confident whilst driving. I still worry when I pass the scene of the crash. I feel that every car that comes towards me now is a possible risk. I am worried that there are so many drivers on the road that perhaps should not be, but that does not change the way I feel when I get into my car to drive now.
25. I feel apprehensive and my confidence has really been knocked since the car accident. There is never a day now that I do not think about the car crash. I get flashbacks and feelings of "if only" or "what if".
26. I use to be a very confident driver having driven for 30 years but now I have lost that feeling. I watch other motorist's actions more closely since the accident." 7. The witness statement also referred to the plaintiff being involved in another accident whilst driving in 2017 as a result of another driver driving into the rear of the plaintiff's vehicle. 8. In relation to expert evidence relied on by the plaintiff, an orthopaedic report was initially obtained from Mr

Patrick Armstrong dated 11 th February, 2016 following the examination of the plaintiff in December 2015. Paragraph 4.5. stated:- "The claimant can drive. She was very nervous initially but has managed to get back to normal." 9. In Mr Armstrong's second report dated 17 th December, 2018 at paragraph 4.5 he stated:- "The claimant said she managed to get back to normal when I previously met her. She says over time she has actually become more nervous. She thinks about the accident every time she goes out driving and she is very nervous, particularly driving around the area where the accident happened." 10. At paragraph 11 of Mr Armstrong's second report, Mr Armstrong recommended that the plaintiff saw a clinical psychologist. The defendant's orthopaedic expert's report dated 11 th February, 2019 at paragraph 69 agreed with this recommendation. 11. I was also shown during the hearing extracts from the plaintiff's GP's records which indicated that the plaintiff had been treated for anxiety for a number of years. In addition on 12 th June, 2018 she was referred to Jersey Talking Therapies at the Clinical Psychology Department. The covering letter referred to anxieties relating to the car crash in 2017. 12. Advocate Boothman therefore contended that because the issue of the plaintiff suffering anxiety had been raised it had to be explored. He could not say what the impact was on the amount of damages claimed until he received the psychologist's report. He also argued there was no prejudice to the defendant because no trial dates had been fixed and this was an issue that could be dealt with. 13. In terms of why the issue was not raised earlier, Advocate Boothman candidly and fairly accepted this was due to pressure of work. 14. Advocate Corbel argued that the value of the proposed additional head of claim was likely to be limited because it was clear from the existing medical records of the plaintiff that she had been treated for anxiety for a number of years. There were many reasons for this which either pre-dated or did not relate to the car accident in 2015. The only express reference to anxiety about driving followed the accident in 2017 when the plaintiff was referred to Talking Therapies in June 2018 for anxiety as a result of this later accident. 15. The defendant's position was therefore that it would be impossible for a psychologist to be able to assess whether any anxiety the plaintiff was suffering was due to the 2015 car accident or was due to other causes. The costs of analysing her medical records and any other relevant material retained would be significant and yet the likely increase in value, should the Royal Court be satisfied that any anxiety was due to or in part due to the accident, would be limited. She therefore argued that in deciding whether or not to permit an additional expert, I was entitled to look at the strength of the claim and put the plaintiff to the proof of the injuries suffered. Decision 16. The starting point for my decision was Practice Direction RC 17/05 on directions hearings. Paragraph 9 of this practice direction states as follows:- "1. In relation to the hearing of any application for directions it is the duty of the parties to:- a. consider what directions are required for the matters in issue; b. endeavour to agree appropriate directions for the management of the case; c. submit any agreed directions to the relevant judge for approval." 17. Paragraph 19 of the same Practice Direction also contains the following statement:- "19. It is essential that any party who wishes to vary a direction takes steps to do so as soon as soon as possible and in particular before any time limit for compliance with the direction has expired." 18. In my judgment the issue of the plaintiff suffering anxiety should have been raised at the latest by

the second directions hearing in April, 2019 because it had been referred to in the plaintiff's orthopaedic expert reports and in the plaintiff's witness statement. I say at the latest because for personal injury claims which are considered to be of a lower value, all injuries complained of, whether physical or psychological, should be set out as far as possible in any pre-action communication and in the order of justice. To raise such allegations at a later date means that cases become more costly and expensive to determine for the parties. 19. In this case, while the evidence of anxiety did not emerge until 2018, there was no valid reason advanced as to why the issue was not raised with the defendant in April 2019. The only explanation offered by Advocate Boothman was that it was not raised in April 2019 due to pressure of work. However, such an explanation is not an appropriate justification (see *Newman v De Lima*

[2018] JRC 155 at paragraph 53). 20. In reaching my decision I was also concerned about the likely impact of expert evidence from a psychologist on the value of the claim and whether this justified the cost of permitting such evidence. Rule 1/6(6)(h) of the Royal Court Rules 2004, as amended, requires me to consider this factor as one of the factors listed when actively managing cases. 21. However, I ultimately concluded that I did not possess sufficient evidence to reach a view about the value of the claim for anxiety as a result of the accident without a report from a psychologist. The claim was not fanciful or improbable even if there were evidential challenges. Depending on the conclusions reached it might affect the value of the claim to a degree that is sufficiently material from the plaintiff's perspective. On this occasion I therefore gave the plaintiff the benefit of the doubt but in future cases I will want a financial assessment of the impact of any additional claims. My decision does not mean however that in future that cases may not arise where such an application is just too late. This could arise for example where trial dates might have to be vacated or where there was no evidence to support the head of loss relied upon. . 22. This decision however was subject to the plaintiff paying the costs of the directions hearing on an indemnity basis. I made this order because the claim for anxiety should have been pleaded in the order of justice and certainly should have been raised with the defendant and the court by the time of the further directions hearing on 18 th April, 2019. The approach of the plaintiff has not assisted in the active management of this case to enable it to reach an orderly conclusion within an appropriate time frame. This not only justifies a costs order but also justifies indemnity costs. 23. The approach of the plaintiff will also put the defendant to further expense because the defendant will have to review discovery already provided in the context of additional discovery to see what references there are about anxiety and the causes of that anxiety. The plaintiff should therefore pay the wasted costs of this exercise albeit on the standard basis. 24. In addition, if at trial the plaintiff either fails to prove any psychological injury as alleged, or if the effect of any psychological injuries suffered turns out to be limited, the defendant is of course free to seek an appropriate costs order. Whether one will be granted is of course a matter for the trial judge, and will depend on all the evidence before the trial court, and any conclusions reached by the Jurats. The possibility of seeking such a costs order however is further

protection in addition to the costs orders I have already made against the plaintiff for seeking to introduce this additional head of claim at this stage. 25. Finally, if the relevant opinion does set out a case for claiming psychological injury, the plaintiff's order of justice will need to be amended, but it is hoped this can be dealt with by agreement. 26. I also gave certain indications during the hearing in relation to the scope of the discovery required but it is not necessary to set these out in this judgment. 27. Following provision of discovery and any report from a psychologist retained by the plaintiff, I also stayed the matter to enable the parties to explore settlement again. If settlement was not concluded, I made it clear that a further directions hearing would take place to enable all relevant directions to be issued for a trial of the claim. Authorities Practice Direction RC 17/05.

Newman v De Lima

[2018] JRC 155 . Royal Court Rules 2004 Page Last Updated: 13 Dec 2019 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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