IN THE COUNTY COURT AT CARDIFF

Case No: B02CF089

Cardiff Civil and Family Justice Centre
Park Street
Cardiff

25th November 2016

Before

DISTRICT JUDGE PHILLIPS

HAZEL BARR

(Claimant)

-v-

FRIMLEY HEALTH NHS FOUNDATION TRUST

(Defendant)

APPROVED JUDGMENT

APPEARANCES

For the Claimant: MR GRIFFITHS (Instructed by Leo Abse & Cohen)

For the Defendant: MR HODDER (Instructed by Acumension Ltd)

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HAZEL BARR -v- FRIMLEY HEALTH NHS FOUNDATION TRUST

25th November 2016

APPROVED JUDGMENT

JUDGE PHILLIPS:

1. I am dealing with the Defendant's request for an oral hearing, which is made pursuant to CPR 47.15(7), in relation to a provisional assessment of the Claimant's bill of costs in relation to her claim for damages for clinical negligence.

2. The hearing came before me on 4 November 2016, when Mr. Griffiths represented the Claimant and Mr. Hodder the Defendant. The hearing was listed in accordance with my order of 29 September, the Defendants wishing two items to be reviewed: firstly, proportionality; and, secondly, the ATE insurance premium that is being claimed.

3. The hearing on 4 November was taken up in hearing submissions in relation to the second of these issues, and before I could determine that issue I decided that I needed sight of the Claimant's file of papers. I, therefore, ordered the filing of the same at court, whereupon it was agreed that I would determine the reasonableness of taking out the ATE policy.

4. If the court considers it was unreasonable to take out the policy, then the premium, in its entirety, has to be disallowed. If the court considers it was reasonable to take out such a policy, then further submissions would be required in relation to the quantum of such premium.

5. I turn, briefly, to the circumstances of the case. This is a case where the Claimant was admitted to hospital for a planned hip replacement, the initial surgery taking place on 19 January 2015. On 26 January 2015, the Defendant's case is that the Claimant was told that a mistake had occurred during the operation, in that the incorrect femoral head size had been fitted.

6. Mr. Hodder (for the Defendant) told me that the Claimant's medical records recorded what is

defined as a ‘Never Event,’ something which he said in the ‘Points of Dispute’ is to be defined as ‘an incident that is considered unacceptable and eminently preventable.’ The ‘points of dispute’ suggest that liability will attach for all resulting damage to the patient, and this is not challenged in the ‘Points of Reply,’ although the Claimant does raise the issue of quantum not being entirely straightforward.

7. A second operation took place on 29 January 2015. A conditional fee agreement was entered into between the Claimant and her solicitors on 20 February 2015. The initial attendance by the solicitor on the Claimant, which is recorded in the bill of costs, took place on 26 February 2015, with the ATE policy being taken out on 25 February 2015.

8. It will be noted that the conditional fee agreement was entered into prior to the initial attendance on 26 February, as was the taking out of the ATE policy.

9. The Defendant’s submission is, in effect, that there was no need to take out the initial policy when it was taken out. Had the solicitor waited until they had attended the Claimant and taken full instructions, the solicitor would have been told by the Claimant what she had been told by the doctor and would have known that breach of duty would be established and that causation would be made out; the reason for the second surgery being to replace the incorrect implant. Further, had the Claimant’s solicitor applied for the medical records, he or she would have seen a reference to a ‘Never Event’ in the notes.

10. The medical records were reviewed by the solicitor on 8 April 2015 and, therefore, it is argued there would not have been any great delay, nor would there have been any need to review a large number of records.

11. Mr. Hodder submits the test to be applied is whether it was reasonable to take out the policy and, in his view, he submits it is not.

12. Mr. Griffiths (for the Claimant) took instructions from his instructing solicitor during the hearing – my adjourning for a short period of time – and he told me that he was told that the

solicitor was first contacted by the Claimant on 10 February 2015, when brief details were taken. During that conversation, the solicitor was told that a mistake had taken place in theatre and the wrong size ball fitted.

13. Thereafter, an agent was instructed to attend on the Claimant to sign the conditional fee agreement, and that took place on 20 February 2015 (before the first attendance that is charged for in the bill took place on 26 February 2015).

14. Mr. Griffiths submitted that even if breach is established, liability does not always follow, as causation is usually difficult to establish in clinical negligence cases.

15. This is a case, he said, where the Defendants chose to instruct Weightmans Solicitors to represent their interests. He referred to an email to the Claimant's solicitors, dated 20 October 2015, when they referred to an 'intention to obtain expert evidence to inform the Letter of Response'. However, Mr. Griffiths accepted that this postdated the taking out of the policy, and what was relevant was what was known to the solicitor at the time the policy was taken out, or perhaps should I say what should have been reasonably known to the solicitor.

16. Mr. Griffiths also submitted that any admission made by the doctor would not necessarily bind the Defendant hospital. It was, he argued, therefore a situation which was a difficult one for the Claimant's solicitor.

17. He also submitted that, with Part 36 offers being likely, the Claimant could still be exposed to a liability for costs in relation to the obtaining of further medical reports if the Defendant's Part 36 offer or offers were not beaten, and he referred me to the provisions of the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No.2) Regulation 2013.

18. Upon my asking him whether he accepted the policy could have been taken out at any time, Mr. Griffiths agreed that this was correct. But most solicitors, he said, would take out the policy early and, from a client care perspective, it was preferable the solicitor could reassure

the Claimant as to any exposure for costs.

19. It can be appreciated why I felt I needed to see the Claimant's file of papers before making a decision. I now understand that, in fact, a copy of the file had been filed at court the day prior to the hearing (3 November). I have now had an opportunity of looking at the documentation filed.

20. It is trite law to say that what is relevant is the information known to the solicitor (or which should be reasonably known to the solicitor) at the time of taking out the policy. It is also trite law to say that any additional liability can only be recovered if the court is satisfied it was reasonable to incur such liability.

21. This is a case where the Claimant first spoke to the solicitor on either 10 or 11 February 2015. I say this because one document, headed 'Follow Around Sheet Ringing Out', refers an enquiry date of 10 February 2015, but a document headed 'LAC Clinical Negligence: Initial Enquiry' refers to a date of 11 February 2015. That note records the following:

> "On 17 January 2015 I had a fall, where I slipped on ice. I was taken to Wrexham Park Hospital, where they said I would need surgery as I had broken my hip. They didn't operate until 19 January 2015, as they said they had other, urgent cases that needed to go ahead with more elderly patients. From the surgery, I had to stay in for a week for recovery. While I was waiting to be discharged on 26 January 2015 the surgeon who carried out the procedure came to see me. He went on to apologise, as there had been a mistake during theatre. I was told that when they carried out the whole replacement on 19 January 2015 they put in the wrong size ball; this was smaller than what I should have had. If I were sent home, then my hip could have dislocated at any time. This meant more surgery was needed to correct the issue.

> I had my second surgery on 29 January 2015. When the top consultant did it (a procedure on the 29th), I questioned to find out if any form of checks are in place when things like this happen. He responded, explaining that he didn't know what went wrong. However, he would do a review on this to find out why it happened. Once he gets the answers, then he would let me know. So far, I've had no response.
> In the meantime, I'm recovering at home. I have follow-up appointments coming up in the next few weeks to check progress, physiotherapy on 25 February and a follow-up with the surgeon on 11 March."

22. The next document on file is a clinical negligence questionnaire, signed and dated 20 February 2015, the same date as the conditional fee agreement, but five days prior to taking out the ATE policy.

23. In answer to the question 'What happened and why do you feel the hospital healthcare provider were negligent?' the Claimant, having described the circumstances of her fall and being taken to hospital, says this:

> "They didn't operate until 19 January, as they said they had other, urgent cases that needed to go ahead with more elderly patients. From the surgery, I had to stay in for a week for recovery and was told everything looked okay.
> While I was waiting to be discharged on 26 January 2015 the surgeon who carried out the procedure came to see me. I was told, out of the blue, that there had been a mistake during theatre and I had been fitted with a wrong sized hip: it was two millimetres too small, and would need to be changed. If I were sent home, then my hip could have

> dislocated at any time. This meant more surgery was needed to correct the issue. I was told I could go home that day. And revision surgery was carried out at Heatherwood Hospital.
>
> I had my second surgery on 29 January 2015 and was discharged on 1 February 2015. I asked the surgeon who performed the second surgery if any form of checks are in place when things like this happened. He responded, explaining that he didn't know what went wrong but he would carry out a review on this to find out what had happened. Once he had the answers, he would let me know. So far, I've had no response."

24. There are then on file copies of signed forms of authorities addressed to Wrexham Park Hospital, Heathwood Hospital, King Edward VII Hospital and a Dr. Bailey (whom I presume is the Claimant's GP). Whilst undated, I assume they were signed at the same time as the conditional fee agreement, firstly, because of their location on the file and, secondly, because in a letter from the Claimant's solicitor to the Claimant dated 26 February 2015 there is reference to various documents, including 'Form of Authority'. That letter describes the prospects of success as reasonable and that the claim should be pursued.

25. In relation to insurance, the letter says this:

> "I'm continuing to make enquiries in relation to the potential Before the Event insurers. I have given them 28 days in which to come back to me. If they do not come back to us within that time, then we will proceed in any event on the basis of the conditional fee agreement unless you do not wish to us do so. If the Before the Event insurer authorises us to act, we will confirm to you and proceed with your claim. If you have Before the Event insurance and they will not allow

us to act, then we will inform you of the position, but you have already instructed us to continue dealing with your claim on the basis of the CFA and we'll proceed on that basis.

We would go back to the insurers and ask them to indemnify you at the issue of proceedings, if necessary. I do feel that you need to obtain other After the Event legal expenses insurance in your case at this stage.

If you have Before the Event insurance and we have to issue court proceedings in your case, then we will cancel that insurance upon starting court proceedings, provided the BTE insurers agree to indemnify you in relation to the claim. In the event you wish to cancel your claim with us, please return the cancellation notice."

26. The next document worth noting is an attendance note of 8 April 2015, when the instructing solicitor says this:

"This looks like a fairly straightforward claim resulting in further unnecessary surgery. GP records are in awaiting hospital ones.

Can you deal with it with from now on, please? It's on Masterblaster in my name, so just do the fee earner fix and reshuffle to the YAKMG section rather than give her a further new fee earner?"

27. A file note dated 26 May 2015 summarises the hospital records and says in relation to the error:

"30 January 2015, Mr. Kucheria (consultant orthopaedic surgeon) confirmation of the mistake. NJR form was submitted. The software would not accept the form or there was a mismatch of the component. The notes were then reviewed, x-rays reviewed, which confirmed that

> there was a mismatch in the liner and the head size (the liner being 32 and the head 28). Patient notified. Patient went home for two to three days before revision procedure. Admitted to hospital on 30 January 2015 for revision procedure.
>
> Pre-op met with patient to explain mistake, namely wrong prostheses had been inserted due to failure of a team process of checking the implant prior to implantation. This was described as a 'Never Event', which never should have happened. Will investigate and feedback problem to patient. Increase of infection, as will need to open the head up. Increased risk of DVT, PE, aesthetics, bleeding, and other complications of hip surgery."

28. Then an entry for 11 March 2015:

> "Claimant reviewed by Mr. Kucheria. Again referred to the 'Never Event' of the mismatched components. Confirms in letter to Bill Dewsbury, HMW Park Hospital Trust, that an effort should be made to feed back to the patient the results of investigation into the mistake. Mr. Kucheria requested a copy form(sic) Mr. Dewsbury which he says that he would then forward on to the patient."

29. And so to return to the issue I have to determine (namely was it reasonable for the Claimant's solicitor to take out the ATE policy when she did), this is a case where the solicitor was told on the phone by the Claimant some two weeks before taking out the policy that the hospital had made a mistake and that she had been given (as the Claimant describes it) the wrong size ball during her hip replacement surgery. The Claimant also told the solicitor that she had undergone a second operation on 29 January 2015.

30. The solicitor, in my judgment, would have expected these matters to be recorded in the

medical records. This is also a case where, prior to attending the Claimant on 26 February 2015 (when full instructions could be taken), the solicitor had taken out an ATE policy the previous day. I suspect the solicitor would have known the likely cost of such policies. They tend to be expensive. In this case it was a total £5,841. As Regional Costs Judge, this is the sort of figure I regularly see, and I suspect would have been a figure well known to the Claimant's solicitor (her working for a firm specialising in clinical negligence cases).

31. Taking everything into account, I cannot conclude that it was reasonable to take the policy out on 25 February 2015. Whilst I accept that causation is often a difficult issue in clinical negligence cases, this is not always the case. In my judgment, having regard to the circumstances of this case, the Claimant's solicitors should have waited until she had attended the Claimant and obtained the medical records prior to taking out any ATE policy. Had she done so (and as the solicitors file note reveals), she would have seen the reference to the 'Never Event'.

32. In my judgment, it is difficult to see how the hospital could not accept liability, and at least some causation, having regard to the circumstances of this case. The solicitor would also have been in a better position to form a preliminary view as to the potential value of the claim.

33. Mr. Griffiths (for the Claimant) accepts that the policy could have been taken out at any time, and there's no evidence before me that had there been any delay in taking out the policy it would either have been more expensive or more difficult to take out.

34. The other relevant consideration in this case is that when the policy was taken out the solicitor had not established whether there was any suitable BTE insurance that could be relied upon. That fact alone makes the taking out of the ATE policy on 25 February 2015 unreasonable.

35. Finally, I remind myself of the overriding objective and the fact that the parties are required to

help the court further the overriding objective; that is to enable the court to deal with cases not only justly but at proportionate cost. The Claimant's solicitor should have had this in mind when acting as she did.

36. So, for all these reasons, therefore, my conclusion is that it was not reasonable for the Claimant's solicitor to take out the After the Event insurance policy on 25 February 2015, and the cost of such policy is, therefore, irrecoverable.

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37. On hearing the representatives of both parties, upon the court handing down its reserved judgment, upon the court deciding that the ATE policy premium is not recoverable, and upon the Defendant not pursuing its second objection, it is ordered that the Claimant pay the Defendant's costs, summarily assessed at £2,300, by 16 December 2016.