Neutral Citation Number: [2023] EWHC 2975 (KB)

Case No: QB-2021-001026

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 November 2023

Before:

DEXTER DIAS KC
(Sitting as a Deputy High Court Judge)

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Between:

CTQ	**Claimant**
- and –	
King's College Hospital NHS Foundation Trust	**Defendant**

- -
- -

Richard Cartwright (instructed by **Irwin Mitchell**) for the **Claimant**
Andrew Post KC (instructed by **Kennedys**) for the **Defendant**

Hearing date: 15 November 2023

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Approved Judgment

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DEXTER DIAS KC

Dexter Dias KC:

(Sitting as a Deputy High Court Judge)

1. This is the judgment of the court.

2. This is an application for the court to give its approval, pursuant to the court's inherent jurisdiction, to a settlement in a personal injury claim. This is a clinical negligence case. The claimant is represented by Mr Cartwright of counsel. The defendant is King's College Hospital NHS Foundation Trust. The defendant is represented by Mr Post KC.

3. On 28 March 2018, the claimant gave birth to her daughter at King's College Hospital in London, a medical facility operated by the defendant. At the time, the claimant was 37 years old. Her claim alleges a negligent breach of duty in the defendant's failure to administer intravenous fluids during spinal anaesthesia shortly after her daughter's birth. The claimant sustained cardiac arrest. This resulted in a period of hypoxic-ischaemia, where the brain experiences a serious decrease in oxygen and/or blood flow. This caused brain damage, specifically in a watershed distribution including the medial temporal lobe. The claimant was very substantially disabled in the immediate aftermath of her injury and was transferred to the hospital's neuro-rehabilitation unit.

4. Following discharge, permanent consequences of her brain injury began to emerge despite ongoing rehabilitation. There was a joint experts' conclusion in 2018 that the major functional consequences to the claimant caused by her brain injury have been areas of persisting cognitive deficits. The claimant is now 42 years old.

5. Essentially today, the court must consider two issues (1) the anonymity of the claimant; (2) whether it is appropriate to invoke the court's inherent jurisdiction to scrutinise settlements and compromises.

6. There has been no formal finding of lack of capacity. The claimant is not a protected party. But the question arises of whether she should *nevertheless* be treated as such, given difficulties with her cognitive functioning. This would trigger the court's inherent jurisdiction. Such an approach, while relatively rare, is to prevent difficulties that may emerge if it is later found that she did in fact lack capacity. Then the court is obliged deal with the "unravelling" of the situation as occurred in the *Dunhill v Burgin* case that went to the Supreme Court (*Dunhill v Burgin* [2014] UKSC 18). If such a future lack of capacity finding were made, the court's approval now would be valid for the purposes of CPR 21.10(1). That is the great virtue of this exercise – if justified on the evidence.

Anonymity

7. I have today granted an anonymity order in this case pursuant to rules 39.2(4), 5.4C and 5.4D of the Civil Procedure Rules and section 11 of the Contempt of Court Act 1981. I have done this because of my concerns, based on the evidence, about the claimant's capacity, a topic I address in the next section, combined with my concern

about the claimant's daughter, another entirely blameless person, whose entry into the world was an important and inadvertent context for the brain injury her mother sustained.

8. I am mindful of the decision of the Court of Appeal in *JXMX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96. In that case Moore Bick LJ enunciated a number of critical propositions:

(1) Approval hearings, as in other instances where the court exercises its overarching protective jurisdiction, lie squarely within the constitutional principle of open justice, itself fundamental to the rule of law. The evident tension between open justice and doing justice in the case mirrors the tension between the Article 8 rights of claimants and Article 10 rights of the press and the public. The constitutional importance of the principle of open justice, as recognised in the authorities, is such that any departure from it must be justified strictly on the grounds of necessity. The same may be said of the right to freedom of speech. In either case the test is one of necessity.

(2) However, the nature of the court's supervisory duty means that the public interest in seeing justice done can nonetheless be accomplished without disclosing a party's identity. Such hearings, although dealing with what is "essentially private business" (see [34]), should generally be in public, and anonymity will usually be sufficient to protect claimants. Such an order should be drawn in terms that prohibit publication of the name and address of the claimant and his or her immediate family and also (if not already covered) the name of his or her litigation friend.

(3) The requirement to have settlements approved is peculiar to children and protected parties. Naturally, it is open to other litigants to settle claims in private. But children seeking such settlement have no such choice as the court must exercise its supervisory jurisdiction. However, by virtue of Article 14 ECHR children and protected litigants are entitled to the same respect for their Article 8 rights as other litigants. Article 14 provides, as material:

> "The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights shall be secured without discrimination on any ground"

Thus, withholding the name of child and protected claimants mitigates to some extent the inevitable discrimination between different classes of litigants.

(4) The court must also recognise, however, that the public and the press have a legitimate interest both in observing the proceedings and making and receiving a report of them. Accordingly, the press should be given an opportunity to make submissions before any order is made restricting publication of a report of the proceedings.

9. Today the court enquired whether any member of the press wished to make representations. There was none, but such an opportunity was granted in accordance with the Court of Appeal guidance in *JXMX* at [35]. While it is clear that the court should normally make an anonymity order in the case of a protected party, I here

carefully examined the facts of this case. I find that the necessity test is made out to protect the claimant and her family.

10. Therefore, the claimant will be known as CTQ. I recognise that anonymity orders have a dehumanising effect and risk reducing the living, breathing human beings at the heart of this sad case, some of whom are present at court before me today, to ciphers. While acknowledging the vital importance of the open justice principle and the "public watchdog" function of the press (*Thoma v Luxembourg* [2001] ECHR 240 at [5]), I judge that the Article 8 ECHR right to privacy and private life imperatives here significantly outweigh the Article 10 ECHR freedom of expression rights of the press and public.

Inherent jurisdiction

11. Turning to the second question, should the court exercise its inherent jurisdiction and approve or not approve this compromised claim at all? The joint position of the Bar is that the court should. Counsel submit that the test is a "low" one: whether "a potential concern about the claimant's capacity" exists.

12. Since the claimant suffered brain injury in 2018, a recurrent issue in the case has been whether she has recovered sufficiently from that injury to dispense with the need for a litigation friend. If she were a protected party, CPR 21.2(1) requires proceedings to be conducted on her behalf by a litigation friend. She does not appear by one today. Thus, she conducts proceedings on her own behalf supported by an experienced and professional legal team. The purpose of the approval application is to be vigilant against the risk that the claimant be judged in future to have lacked capacity today. Naturally, where issues of capacity arise, and they frequently do, the court is well-equipped to determine them. However, in a case where all issues aside from capacity have been resolved, the question is whether a discrete and dedicated trial of the capacity issue is a necessary and proportionate step.

13. This forensic problem was considered by this court in *Grimshaw v Hudson* [2021] EWHC 425 (QB) ("*Grimshaw*"). In that case, Fordham J said at [1]:

> 'the purpose and intention is that any approval given by this Court pursuant to its inherent jurisdiction would stand for the future as an approval for the purposes of CPR 21.10 were it to transpire at some subsequent stage that the Claimant had lacked capacity as at today to conduct the proceedings'

14. The claimant's capacity to manage her award would unquestionably have been an issue the court would have considered when assessing damages. I now detail some of the evidence before the court in respect of her mental capacity. Professor Schapira, a neurologist instructed on behalf of the claimant, states that the claimant:

> "retains sufficient cognitive function to be able to manage her legal and financial affairs with support." (B157)

Further, the claimant is:

> "capable of managing her legal affairs and limited finances with support from professionals and parents. However she will benefit from any large sum being managed by a personal injury trust." (B176)

15. Neuropsychologist Daniel Friedland states (B344):

> "as long as [the claimant] has support from her legal team and family she retains capacity to litigate but she will require a high level of support."

16. Dr Friedman, a psychiatrist instructed on behalf of the defendant, states:

> "I do not consider that she is able to manager finances and lacks financial capacity. I consider that she does understand matters and is able to weigh these up when explained to her but in the real world setting without support I do not consider that she has capacity to manage her finances." (B974)

17. Dr Reynolds, a neuropsychologist instructed on behalf of the defendant, states:

> "I also agree that she likely has capacity to manage her weekly/monthly finances but would likely require support to manage a large sum of money." (B998)

18. I have carefully considered the entirety of these and the other reports in the hearing bundle. I remind myself that at the heart of the jurisprudence of the Court of Protection, for example, is the proposition that questions of capacity are intensely decision- and issue-specific.

19. There are various formulations of what would be sufficient to invoke the inherent jurisdiction of the court. In *Coles v Perfect* [2013] EWHC 1955 (QB), Teare J held that the inherent jurisdiction could properly be invoked where neither party positively asserted there was a lack of capacity, but if the court found that there was a doubt about capacity. *Coles* was cited with approval by Fordham J in *Grimshaw* at [5]. There Fordham J spoke of whether "on the evidence" there was "a sufficient concern – or a sufficient potential concern – relating to capacity".

20. Behind the exercise of the inherent jurisdiction here lies the ambition to achieve finality in litigation by avoiding an unnecessary trial about capacity. There is a body of commentary on this question that has been helpfully set out by Fordham J in *Grimshaw* (ibid.). I mention just one source here. In Foskett on Compromise (9th ed.) at §4-04, it is said:

> "The course adopted in that case is often followed also where there is some element of doubt about the relevant party's capacity, but a trial of the issue is considered to be unnecessary or disproportionately expensive".

21. Having reviewed the authorities and broader learning, Fordham J concludes:

> "I have been shown, and seen, no commentary or case in which the jurisdiction in *Coles*, or the appropriateness of its invocation, have been doubted in the nearly 8 years since *Coles* was decided." (*Grimshaw* (ibid.))

22. I must make the court's decision having regard to the interests of justice and the overriding objective. I find on the balance of probabilities that a real and credible doubt remains about the claimant's capacity to litigate the issues before the court and particularly whether she has capacity to manage the substantial award proposed in a sustained and effective way without significant assistance.

23. The evidence certainly significantly exceeds the "low bar" counsel agree upon – a potential capacity concern, what Fordham J at [7] called a "sufficient question-mark about capacity to provide good reason for the course that has, understandably and properly, been adopted." Consequently, I find that it is appropriate to invoke the inherent jurisdiction. The *Coles* objectives are to achieve a "valid, final and binding settlement" (*Coles*, [12]; *Grimshaw,* [14]). This is what I aim to promote today. The court proceeds to decide whether to approve the compromise of the award in the same way that it does for a protected party. To hold a trial at this stage to determine capacity is unnecessary and disproportionate; it would not be in the public interest, nor in the best interests of the claimant. I adopt the course suggested in the White Book (2023 edition) at §21.10.2 (p.618), that:

> "It may therefore be wise where there is any doubt about capacity to seek approval."

24. In that, I remind myself of the historic function of the inherent jurisdiction, which has existed, Blackstone tells us, "as far back as the annals extend" (per Sir Wm. Blackstone, 4 Bl.Com. 286). The purpose is for the court to exercise its overarching supervisory jurisdiction for the protection of the most vulnerable. I judge that such a power should be exercised in this case to protect the claimant.

Procedural history

25. There has been an admission of liability by the defendant. The defendant accepts that its admitted breaches of duty caused the claimant to sustain all her neurological injuries. However, no admissions were made about the extent of the neurological injuries. The case thus resolved into a question of quantum of damages.

26. Judgment was entered on 16 April 2021 by Master Cook and the case was set down for a trial on damages due to start on 30 October 2023. There was a Joint Settlement Meeting on 21 September 2023. An offer was made by the defendant that was rejected by the claimant. On 28 September 2023, the defendant made a Part 36 offer in the terms set out later in this judgment. It was accepted by the claimant on 4 October 2023.

Approval

27. I am grateful to both legal teams for the great care with which they have prepared this case and the obvious sensitivity with which they have presented it. Today, Mr Post most responsibly explained how the defendant is very glad to reach a mutually satisfactory agreement, with the clear advantage of the settlement being to avoid the claimant's exposure to, as he puts it, "the stresses of a contested trial".

28. The purpose of today's hearing is for the court to consider whether the proposed settlement of damages agreed between parties is in the best interests of the claimant. It is an elementary proposition that court approval engages questions of judgment. It must act in the interests of justice and the best interests of the claimant and have regard to the overriding objective. As stated by Lady Hale in *Dunhill* at [20], the purpose of approval hearings in accordance with CPR 21.10(1) is:

> "to impose an external check on the propriety of the settlement."

29. Part 21 of the CPR includes rule 21.10. Its subheading is "Compromise etc. by or on behalf of a child or protected party". The rule provides insofar as it is material:

> **21.10**
>
> (1) Where a claim is made –
>
> (a) by or on behalf of a child or protected party;
>
> no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

30. I find that such provisions can validly and legitimately apply to a person whom the court deems should be treated as if a protected party.

31. In a case where the court's approval under the inherent jurisdiction is sought, the court should be provided with an opinion from the claimant's legal representatives on the merits of the settlement or compromise and any financial advice. Mr Cartwright's confidential advice is dated 11 October 2023 and is an invaluable and comprehensive document. It sets out with great clarity and precision why the settlement is considered by the claimant's legal team to be appropriate, by reference to an assessment of the quantum of recoverable loss, weighing the risks and uncertainties of litigation and the strengths and weaknesses of the evidence.

32. I have also read the detailed and complex expert reports that speak to this case. The structure of the settlement proposed is as follows:

Gross lump sum		**£2,500,000**
	Plus: periodical payments as set out in table below	
	Less: Interim payments	£-200,000
Total:		
Net lump sum:		**£2,300,000**

Capitalised value (conservative):		**£5,560,000** **approximately**

33. The defendant's liability under the Social Security (Recovery of Benefits) Act 1997 to the Compensation Recovery Unit is £60,469.93. This is made up of substantial sums the claimant received in respect of three different benefits (including universal credit and personal independence payments).

34. When a proposal award includes periodical payments, the court is obliged to consider the appropriateness of the payment structure. CPR 41.7 provides that the court must:

> "… have regard to all the circumstances of the case and in particular the form of award which best meets the claimant's needs, having regard to the factors set out in the practice direction."

35. Part 41 of the Rules and Practice Direction 41BD taken together list the relevant factors including the scale of the annual payments and the preferences of both the claimant and the defendant.

36. In this case, there is no report from an independent financial adviser. Instead, Mr Cartwright took on the burden of assessing the optimal award structure himself. He sets out his reasoning in detail in his confidential advice. It confirms the advantages of periodical payments within the structure of an award that is required to meet lifetime needs that may extend over many years. The proposal for periodical payments is as follows:

Payment period	**Amount**	**Index**
15.12.23	**£131,482**	ASHE 6115 80th percentile
15.12.24-15.12.34 inclusive	**£124,000**	ASHE 6115 80th percentile
15.12.35 onwards	**£43,805**	ASHE 6115 80th percentile

37. The first periodical payment will be made on 15 December this year.

38. I am satisfied that I have gained an equivalent position to a case where the claimant lacked capacity. I have been able to perform the required *Dunhill* propriety check in a highly comparable way (*Grimshaw* at [8]). I agree that the both the settlement level and its structure are sensible from the claimant's point of view. I find that this settlement is in the claimant's best interests. On that basis I approve the settlement under CPR 21.10. I make the further order made in *Grimshaw* (see especially [14]-[15]) that the steps taken in the proceedings are valid and take effect notwithstanding the absence of a litigation friend. It is true that there was a litigation friend in *Coles*, but that was a legacy of proceedings having commenced when the claimant was still a child.

39. To conclude, I would like to say something about what the claimant is like and what she has experienced.

40. Since her injury, she has struggled greatly with her memory and frequently forgets to do things. She has become very reliant on her Apple watch, iPhone and computer. As she told the court today, her memory "has gone". She cannot fully follow television programmes and gets very fatigued. Simple things in life have become a strain. She struggles with her balance and mobility and has put on weight, which upsets and depresses her. She has not been able to work in any capacity since the injury, whereas previously she worked as a practice manager at a doctor's surgery, where she was a partner. As she put it, the injury has "turned my life upside down". She was not able to enjoy the first few months of her daughter's life due to her brain injury. She will never get that time back. Her injuries have been life-changing. She says, "I miss my independence". Her injury has affected not only her daughter, but her parents. She feels as if she is "a disappointment to them and have taken their lives from them." When asked what is good in her life, she replied immediately, "My daughter". Yet even this undoubted boon is tinged with sadness because her cognitive difficulties prevent her helping her daughter with homework such as mathematics.

41. The claimant's mother also addressed the court and spoke with tremendous pride about her daughter. The claimant had excelled academically and won a place at one of the best universities in the United Kingdom. In her filed statement, the mother explains what a buoyant, happy and successful young woman her daughter had been before the injury. Now her mother feels "tired mentally all the time". Supporting her daughter and stepping in to help out with her granddaughter has been exhausting. All this has unquestionably been a tremendous strain on the claimant and those who support and love her.

42. The court conveys to the claimant and her family that it appreciates that no amount of money can turn back the clock and put their family in the position they would have been in had the injury to the claimant not occurred. Money cannot do that. It is simply the best we can do. A proxy for the quantification of the pain and suffering, heartbreak and anxiety that they all continue to experience in many different ways. But I do hope that the end of these proceedings will be a relief and this long-awaited financial settlement will make life a little easier. One of the obvious virtues of the court invoking its inherent jurisdiction is to ensure, within recognised legal principles, that these protracted proceedings will be swiftly ended. Subject to liberty to apply, this has been achieved today. This is paradigmatically a case where the distinctive characteristics of the inherent jurisdiction come to the fore, which are:

> "the doing of the court of acts which it needs must have power to do in order to maintain its character as a Court of Justice." (White Book (2013 ed.), Vol. 2, p2442)

43. The case demonstrates yet again the long experience of the court, how despite severe hardship, pain and suffering, loving families rally round. The court pays tribute to the claimants' mother and father particularly for their unstinting and selfless support and sacrifice.

44. I have emphasised to all present today that this judgment will be published to the National Archives so that a copy will always be available to the claimant - this is her

case. I wish her family, and the claimant especially, the very best for the future.

45. That is my judgment.