

Timing the Medical Examination: Read v Dorset County Hospital NHS Foundation Trust

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An interesting case came out of the Bear Garden at the end of February, which may be of interest to clinical negligence practitioners. The judgment in *Read v Dorset County Hospital NHS Foundation Trust* [2023] EWHC 367 (KB) can be read [here](#).

Ms Rianna Read developed cauda equina syndrome following a sudden disc prolapse, which led to a critical stenosis of the spinal canal. On her case, avoidable delays in her transfer between hospitals put back the timing of surgery, which she contended would have led to a significantly better outcome to full, or near full, motor function had it been performed expeditiously.

The issue before Master Stevens was whether, prior to service of the Defence, the claim should be stayed so that the Claimant could be examined by the Defendant's expert in neurosurgery. Although the Claimant had not yet been examined by her own primary causation expert at that stage of the claim, the Defendant's expert indicated that he would need to undertake a full examination before providing his opinion on causation. The Defendant thus applied to the court for this step to take place, arguing that they could not serve a fully-pleaded Defence until their expert's finalised report was to hand. The Claimant resisted, contending an examination was not required at such an early stage and that the Defendant was able to plead its case on the information already available. It was appropriate to follow established procedures in which expert evidence on causation would be finalised at a later point in the claim.

The judge was referred by the parties to *Laycock v Lago* [1987] PIQR P518. The *Laycock* test has two stages. First, the court has to determine whether the interests of justice required the examination sought. If that stage is overcome, the second question is whether the party opposing the examination had a substantial reason for so doing. Applying the second limb of the test requires a balancing of the interests of justice i.e. the progress that the examination might bring to the action against the weight of the objection advanced by the opposing party.

In dismissing the Defendant's application, Master Stevens held that the reasons provided failed to justify departure from the usual directions in multi-track clinical negligence cases, as set out at paragraph 10.27 of the *Queen's Bench Guide* 2022, and generally available on the gov.uk website. These directions were generally applied at the first case management conference, which followed service of the Defence and provided for exchange of expert witness evidence after disclosure and exchange of witness statements. These directions were routine in cauda equina cases and the issues of co-morbidity raised by the Defendant's expert as a reason for examining were insufficiently unusual to depart from them. The Defendant was protected by the requirement in the CPR that a condition and prognosis report must be served with the Particulars of Claim. Although in this case this had not come from the Claimant's primary causation expert, something exceptional was still required to depart from the normal directions and this case did not provide such a reason. The Defendant was able to plead its case on the information currently available. In fact, the correspondence disclosed that they had a formulated view on causation. It was also a distinguishing feature from *Laycock* that the Claimant was not refusing to undergo the examination altogether but objecting to it being advanced in the timetable.

Master Stevens held it was important not to confuse commitment to a signed and disclosable report, which could not

happen until after examination, with the private provision of an opinion to the defence legal team to enable pleadings to be drafted. It was not necessary for a detailed report based upon examination to be available to enable the Defendant to plead its Defence. Multiple examinations by an expert are to be avoided where one would be sufficient, and there was a risk that the Defendant's expert would have to examine the Claimant again. Accordingly, in the circumstances of the case, which included a degree of psychological vulnerability on the part of the Claimant, the interests of justice did not require an examination at this stage of the proceedings.

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