Cauda Equina Syndrome and Referrals for Investigations: High Court Rejects Claim for Delayed Scan

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In *Jarman v Brighton and Sussex University Hospitals NHS Trust* [2021] EWHC 323 (QB), the Claimant brought a claim against the Defendant hospital for failing to promptly diagnose Cauda Equina Syndrome ("CES"). This case is of note for two reasons:

1. The Court re-emphasised the urgent nature of CES treatment.
2. The Court provided an overview of the relevant considerations when assessing expert evidence in a case to which the *Bolam*/*Bolitho* test applies.

The judgment can be read here.

The Facts

The Claimant was a primary school teacher who injured her back at work. She presented to her GP on 17 February 2015 with some subjective signs of CES, but she exhibited no objective symptoms. She was told to return if symptoms persisted, which she duly did on 23 February and then on 3 March 2015, at which time she was referred to the Accident and Emergency department of the Defendant hospital due to increased numbness around the S3 vertebrae.

At A&E, she was referred for an orthopaedic opinion. The doctor in question carried out a comprehensive examination, which included testing for signs of CES. The examination was even described as "*unusually thorough*" by the Claimant's own orthopaedic expert. The doctor diagnosed a probable disc prolapse, recording "*Either L1/L2 or L5/S1 prolapse, no evidence of cauda equina.*" Whilst there were some subjective symptoms of CES, the objective signs (sensation in the lower vertebrae, perianal sensation, anal tone and bladder volume) did not support a diagnosis of CES. He referred her for an urgent MRI scan "*in the next few days*" as opposed to an "*emergency*" (i.e. immediate) scan and instructed the Claimant to return to A&E if her symptoms deteriorated.

The Claimant underwent her scan on 18 March 2015, which was then reviewed on 20 March 2015. She was diagnosed with CES. She underwent emergency surgery on 21 March 2015.

The Claimant was sadly left with permanent neurological symptoms.

Cauda Equina Syndrome

The Cauda Equina (from the Latin phrase for "Horse Tail") is the collection of nerves at the bottom of the spinal column. It provides sensation and movement to the lower limbs and pelvic organs. A diagram is as follows:

(Source: BMJ).

At [2], Jason Coppel QC (sitting as a Deputy Judge of the High Court) explained the context of CES in medico-legal claims:

> "*CES is a relatively rare condition which is commonly caused by a disc prolapse. The disc bulges and puts pressure on the bundle of nerve roots emerging from the end of the spinal cord below the first lumbar vertebra. These nerves transmit messages to and from the bladder, bowel, genitals and saddle area, and control sensation and movement in that area. CES is typically characterised by severe lower back pain with bilateral sciatica and is associated with*

saddle anaesthesia, urinary retention and bowel dysfunction. As the Court of Appeal has recently noted in Hewes v West Hertfordshire Acute Hospitals NHS Trust & Ors *[2020] EWCA Civ 1523, §5, once CES has been diagnosed, it is seen as an emergency, because unless the pressure on the nerves is released quickly, they can be damaged permanently. CES may be suspected following consideration of a patient's symptoms (as subjectively reported) and, following examination, of any objective physical signs of CES, but a diagnosis of CES can only be confirmed by an MRI scan.*"

The Expert Evidence

The Court heard evidence from a number of experts, the crucial evidence on breach of duty coming from consultant orthopaedic surgeons Mr Spilsbury for the Claimant and Mr Chiverton for the Defendant.

It was Mr Spilsbury's evidence that the Claimant should have been referred for either an emergency scan or a scan within three days.

It was Mr Chiverton's evidence that, whilst he personally would have referred the Claimant for an emergency scan, that there was a reasonable and responsible body of clinicians who would have arranged for the Claimant to have a scan within 14 days, whilst instructing her to return to hospital if her condition deteriorated. This was based upon the absence of objective indicators of CES.

The Court's Decision

The Court set out the legal test for whether an expert's evidence should be rejected, as summarised by Green J in *C v North Cumbria University Hospitals NHS Trust* [2014] Med LR 189 at [25]:

1. Where a body of appropriate expert opinion considers that an act or omission alleged to be negligent is reasonable a Court will attach substantial weight to that opinion.
2. This is so even if there is another body of appropriate opinion which condemns the same act or omission as negligent.
3. The Court in making this assessment must not however delegate the task of deciding the issue to the expert. It is ultimately an issue that the Court, taking account of that expert evidence, must decide for itself.
4. In making an assessment of whether to accept an expert's opinion the Court should take account of a variety of factors including (but not limited to) whether the evidence is tendered in good faith; whether the expert is "*responsible*", "*competent*" and/or "*respectable*"; and whether the opinion is reasonable and logical.

The Court went on to analyse each of the factors of (i) good faith; (ii) responsible, competent and/or respectable; and (iii) whether the opinion is reasonable and logical.

The Judge rejected the Claimant's claim on breach of duty:

1. There was no criticism of the examination of the doctor at A&E.
2. The Claimant could not cite any published guidelines, academic literature or decided cases to support the contention that a patient with the Claimant's symptoms should be referred for an emergency scan in March 2015 when there were no clinical signs of CES.
3. The Court had to judge the standard of care as at March 2015, despite there being a tendency to undertake MRI scans more frequently nowadays.
4. The Defendant was able to produce some academic literature in support of its position.
5. The Court found at [44] that the Claimant's expert's conclusion was, to an extent, based upon a "*fundamental flaw*", in that he stated that the scan should have occurred within 48-72 hours as opposed to immediately. At [45], the Judge held that he "*could not satisfactorily explain why a four day delay would have been appropriate, let alone correct.*" The Judge went on: "*I therefore reject Mr Spilsbury's contention and such is the oddity of his position that I am driven to accept the Defendant's submission that Mr Spilsbury was guilty, to some extent*

at least, of framing his position to fit the Claimant's primary legal argument, that the Trust was negligent by not implementing Mr Khan's plan to scan within "a few days". This was, in my view, an important shortcoming in Mr Spilsbury's evidence."

6. The Judge found the Defendant's orthopaedic expert's "*reasoning, and his conclusions, to be logical and reasonable*": see [46].

He therefore dismissed the claim on the issue of breach of duty.

The Judge held, in the alternative, that the claim would have been dismissed on causation in any event.

Practice Points

The case is a useful example of the difficulties that can arise in CES cases.

It further serves as a reminder of the legal test that the Court will apply when determining breach of duty applying *Bolam*/*Bolitho* where there is disputed expert evidence.

Expert evidence in clinical negligence cases requires rigorous examination, and reference should be made to the guidance set out in *C v North Cumbria* when assessing the strength of an expert's position.