Neutral Citation Number: [2024] EWHC 2712 (KB)

Case No: KB-2023-001983
And others
THE COVID HEALTHCARE WORKERS LITIGATION

IN THE HIGH COURT OF JUSTICE
KINGS'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2024

Before :

SENIOR MASTER COOK

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Between :

SHANE FARNHAM	**Claimant**
- and -	
EAST OF ENGLAND AMBULANCE SERVICE	**Defendant**

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Charles Woodhouse KC and Daniel Bennett (instructed by **GA Solicitors**) for the **(GA) Claimants**
Robert Weir KC (instructed by **Bond Turner)** for the **(BT) Claimants**
Sarah Prager KC (instructed by **Howe & Co**) for the (**H&C) Claimants**
Simeon Maskrey KC and Kiril Waite (instructed by **Kennedys**) for the **NHS Defendants**
Jeremy Hyam KC and James Marwick (instructed by **NHS Wales Shared Services Partnership Legal & Risk Services**) for the **Welsh NHS Defendants**

Hearing date: 23 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 29 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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SENIOR MASTER COOK

SENIOR MASTER COOK:

Introduction

1. This is a preliminary case management hearing in what has come to be called the Covid Healthcare Workers Litigation. The Claimants are all frontline health care workers (HCW) who allege that they contracted Covid-19 in the course of their employment and by virtue of their employers' breach of duty. Breach of duty and causation are denied.

2. With one current exception each of the Claimants suffer from Long Covid which has had a devastating impact on their lives and livelihoods. Many of the Claimants have been unable to return to work at all as a result of their illness. Those who have returned to work are unable to work full-time hours. One case arises out of the fatality of the Claimant's mother.

3. The claims last came before me on 8 March 2024 when I made preliminary directions for the orderly conduct of what was obviously a large number of claims by HCWs being conducted by a number of firms of solicitors in the High Court and in various County Courts around the country, on the basis that co-ordinated case management of the claims set out in the schedules to my order was desirable.

4. The following witness statements were filed for today's hearing;

   i) Third Witness statement of Kevin Digby dated 10 Oct 2024 on behalf of the GA Claimants.

   ii) Witness statement of Sara Stanger dated 14 October 2024 on behalf of the Bond Turner Claimants.

   iii) Witness statement of Christopher Malla dated 10 October 2024 on behalf of NHS England.

   iv) Witness statement of Robert Jenkins dated 10 October 2024 on behalf of NHS Wales.

5. The Claimants fall into two main groups. First, those represented by GA solicitors and a smaller number of claims represented by other solicitors but the same counsel teams (the GA cohort). Second, those represented by Bond Turner (the Bond Turner cohort)

6. It is clear that the GA cohort, currently consisting of approximately 114 claims, have sought to co-operate with the other Claimant cohorts and the Defendants to achieve meaningful progress of their claims. To that end they have prepared and served a generic list of issues, generic Particulars of Claim and have unilaterally disclosed the preliminary expert evidence of Ms Tina Conroy, Chartered Occupational Hygienist. As set out in Mr Digby's witness statement they propose that lead cases are chosen which will determine all issues in relation to breach of duty, causation and limitation in relation to three generic issues:

i) The suitability and/or adequacy of the control measures and personal protective equipment provided to the Claimants for their work, particularly the provision of surgical face masks as Personal Protective Equipment (PPE),

ii) The Defendants' liability for the supply of any PPE found not to be suitable or adequate, and

iii) The law and/or tests to be applied on causation of Covid-19.

7. To further this proposal, it was suggested that further disclosure should take place in the context of a limited group of lead claims.

8. It is a feature of the GA cohort claims, as reflected in the list of common issues that the various defendants are liable for following national guidance which itself was defective.

9. The Bond Turner cohort consisting of approximately 170 claimants are not as far advanced. As set out in Ms Stanger's witness statement the claims are all pre-action and the solicitors are moving through a process of risk assessment. She explains that there is a difference of approach to the GA cohort in that they do not adopt as a central allegation that the guidance issued by Public Health England and Public Health Wales was wrong and it was negligent to rely upon it. Rather their approach was to examine how each Trust and Health Board interpreted, communicated, implemented, and trained utilising the national guidance in its various iterations to its staff. Also, to consider any regional and local guidance issued, which may have departed from national guidance, or was absent. In the circumstances it was likely that breaches on the part of the Employing Trust or Health Board of the national guidance and their own regional and local guidance would be alleged.

10. Ms Stanger also pointed out that the 3rd Module of the Covid-19 Public Inquiry is currently in progress and is likely to end during November 2024, with Baroness Hallett's report anticipated during the first half of 2025. The 3rd Module addresses the Impact of the Covid-19 pandemic on healthcare systems in the 4 nations of the UK and, thus she suggested, may address and/or assist with some of the information the cohort may require and may reduce duplication of effort. In the circumstances she suggested that a further hearing would be useful once the Inquiry's report was to hand. This view was very strongly supported by Mr Jenkins, see paragraphs 6 to 9 of his witness statement.

11. By the time the hearing began before me the parties had reached a large measure of agreement as to the way forward. There remained one substantive issue between the GA cohort and the Defendants.

The agreed issues

12. The parties agreed that it would be sensible to await the publication of Baroness Hallet's report and to that end a further directions hearing should be listed in summer 2025.

13. Mr Maskrey KC and Mr Hyman KC helpfully indicated that their respective clients would agree to a limitation moratorium provided that all claims were issued by 9 January 2026.

14. The parties agreed to cooperate with focused voluntary disclosure in particular to assist with the Bond Turner risk assessment process. I declined to make any formal order on the basis that it was clear that there was a good and productive working relationship between the parties.

The issue of contention

15. Mr Maskrey KC and Mr Hyam KC submitted that a very clear legal issue had been identified in the GA cohort claims which it would be convenient to determine forthwith. The legal issue was crisply summarised by Mr Malla at paragraph 12 (c) of his witness statement:

> "Does the principle of non-delegable duty fix an NHS Trust employer with liability in circumstances where it reasonably relied on national infection control advice provided by NHS England/Public Health England, and that expert advice is subsequently found to be negligently wrong."

16. The issue arises in the context of paragraphs 9 and 10 of the Master Particulars of Claim:

> "9. For the avoidance of doubt, the Claimants assert that the Defendants' duty was non-delegable. Whilst each Defendant seeks to rely upon advice and guidance provided by Public Health England ('PHE)/Wales ('PHW') in respect of protection of their employees from Covid-19, the Defendants, remain personally liable to the Claimants to comply with all their duties in respect of their employees' health and safety at work. The Defendants are not entitled to rely on third party advice and guidance that was, in itself, negligently provided.
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> 10. Without prejudice to paragraph 9 herein the Claimants assert in any event that Public Health England/Wales and each Defendant are emanations of the Department of Health and Social Care. In the premises, it is denied that advice issued by Public Health England/Wales constitutes advice from a separate entity to the relevant Defendant.".

17. It is also reflected in issue 11 of the common issues identified by the GA cohort:

> "11. Is reliance on PHE guidance an impermissible delegation of D's duty to personally undertake an appropriate risk assessment of the risks to HCWs treating patients known or suspected to be suffering from SARS Coronavirus and to implement a safe system of work including the provision of appropriate PPE?"

18. Mr Maskrey KC drew attention to the following features of this issue:

    i) It is an issue that can be determined without the need of an individual case to act as a vehicle;

ii) It is thus an issue that can be determined without the need for evidence from individual cases;

iii) It is, in fact, a pure matter of law: is the reliance upon guidance provided by third parties (or, as GA would put it, another arm of a linked organisation) a delegation of a duty of care such that the Trusts remain liable if the guidance is found to have been negligent even in the absence of any personal breach of duty on the part of the Trusts?

iv) Given that Bond Turner do not wish to participate in the determination of this issue (but accept that they are nonetheless bound by the determination), there is no reason why this issue cannot be litigated as between GA and the defendants whilst Bond Turner 'catch up'.

v) Directions can be given now which will enable GA to engage on the precise wording of the issue and to propose any other issue that is not case specific, and which is predominately a matter of law and there is no reason why such an issue cannot be ready for determination by January 2025.

vi) The determination of this issue has the capacity to resolve cases advanced by GA, or at least to narrow the issues in those cases.

19. Mr Maskrey KC suggested that ordering the preliminary issue would make useful use of the time spent waiting for the Bond Turner Cohort to catch up and for Baroness Hallett's report to be published.

20. Mr Hyam KC supported Mr Maskery's KC's submissions. He submitted that determination of the preliminary issue would clearly be in accordance with the overriding objective and would take no more than 2 to 3 days. If the Defendants were right and they had to discharge their duty of care in the work place a large swarth of detailed investigation would be cut out.

21. Mr Woodhouse KC strongly opposed the ordering of a preliminary issue on the basis that it would not resolve the claims and would not save time and costs.

22. Mr Woodhouse KC submitted that it would be unattractive to determine a point of law without also determining whether or not that guidance was in fact negligently wrong (and if so, how negligent) and also determining the reasonableness of any individual employer's reliance on it, bearing in mind their own knowledge of the risk posed to their employees. It would be to put the cart before the horse. He suggested that it could be viable to try both issues by way of selection of lead Defendants, without use of lead claimants, thereby resolving the issue of breach of duty as a whole.

23. Mr Woodhouse KC submitted that in the event the Court determines that reliance on the guidance is not an impermissible delegation of duty, it will still be necessary to determine the employers' own knowledge and culpability. In such circumstances it will also be necessary to determine the issue of whether PHE and the NHS are in fact separate persons in law. Further, beyond any such findings there was the possibility of amendment to bring in other parties.

24. Mr Woodhouse KC took me to some of the law, in particular the classic statement of Parker LJ in **Davie v New Merton Board Mills [1958] 1QB 210** Munkman on Employers Liability at 4.56:

> "The duty owed by a master to his servant at common law can be stated in general terms as a duty to take reasonable care for the safety of his servants … if the master delegates … the performance of that duty to another he remains liable for the failure of that other to exercise reasonable care … this principle holds good whether the person employed [i.e. employed to carry out the duty] by the master is a servant, a full-time agent or an independent contractor."

Also, to the cases cited afterwards, in particular **McDermid v Nash Dredging & Reclamation Co Ltd [1987] AC 906.** He made the point that the leading cases are all House of Lords or Supreme Court decisions and submitted that trying a point of law in the abstract may hold the superficial attraction of determining an issue in dispute but would not determine the claims, such a course carries with it an obvious risk of appeal, and is likely to add rather than save costs. On the other hand, if the guidance is found to have been reasonable or, if unreasonable, the defendants are found to have acted unreasonably in relying on the guidance, it is a point of academic interest only.

25. Lastly, Mr Woodhouse KC made the point that the Claimants are not in a position to fund this type of academic and subsidiary litigation and it will drain their resources, whilst not advancing the case. The stark contrast is that the Claimants do not have the financial resources available to the Defendants.

The legal principles

26. The decision to order a preliminary issue is a case management decision. The parties were agreed that the relevant considerations were helpfully summarised by Neuberger J as he then was in **Steele v Steele [2001] CP. Rep. 106.** In that case the judge refused to determine a preliminary issue which had been ordered by a Master and identified 10 relevant considerations:

    i) Would the determination of the preliminary issue dispose of the case or at least one aspect of it?

    ii) Would the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself?

    iii) Where the preliminary issue was one of law the Court should ask itself how much effort would be involved in identifying the relevant facts?

    iv) If the preliminary issue was one of law to what extent was it to be determined on agreed facts? The more facts were disputed, the greater the risk that the law could not safely be determined until those disputes had been resolved.

    v) Where the facts were not agreed the Court should ask itself to what extent that impinged on the value of a preliminary issue.

vi) Would determination of the preliminary issue unreasonably fetter the parties or the Court in achieving a just result?

vii) Was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial? If the determination could prompt settlement that was a factor to weigh against this risk.

viii) The Court should ask itself to what extent the determination of the preliminary issue may be irrelevant.

ix) Was there a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination?

x) Taking into account the previous points, was it just to order a preliminary issue?

27. I also bear well in mind Lord Scarman's observation in the case of **Tilling v Whiteman [1980] A.C.1 HL** at 25C, and referred to at paragraph 10.31 of the King's Bench Guide, to the effect that preliminary points of law are too often treacherous shortcuts.

Decision

28. I will say at the outset that I accept Mr Maskrey KC's submission that the issue is capable of being framed as a preliminary issue of pure law. It seems to me the real issues are: should it be so framed, and if so, should it be determined now?

29. I have come to the very clear conclusion that the issue should not be determined as a preliminary issue now. I have done so for the following reasons.

30. First I have very grave doubts whether disposing of the issue now would dispose of the case or part of it for a combination of factors:

i) This litigation is in its early stages. There has been an initial pleading of generic issues and some individual cases have pleaded out. However, the actual factual circumstances surrounding the formulation and promulgation of the advice from the central authorities remain unclear. In this regard the conclusions of Module 3 of the Covid-19 Inquiry will be crucially important and have the potential to impact greatly on the way in which these cases are put and responded to.

ii) I also take into account that there is a large cohort of Claimants for whom the issue is irrelevant, as it plays no part in their case. These cases, which are yet to be fully analysed are the main factor in the overall agreed plan to hold a detailed case management hearing in summer of next year.

iii) I accept Mr Woodhouse KC's observation that there is a risk of appeal with an early determination of the proposed issue of pure law and that where the leading authorities are decisions at Supreme Court level that risk can lead to even further delay.

iv) In the context of possible further delay, both the court and the parties will be in a far better position to consider the wider litigation landscape and issues in summer of next year.

v) I consider there is a very real risk that in the event the Defendants were to prevail on the proposed issue that applications would be made to add further parties, rendering the resolution of the issue irrelevant.

vi) The issue has the potential to narrow the scope of enquiry for the GA cohort claimants, however, even if they lose, the claims will proceed as the Defendants conduct in connection with the duty of care owe to their employees would still fall to be considered.

vii) Whilst the issue has been crisply defined and would be capable of relatively swift resolution, I am satisfied significant costs would nonetheless be incurred. It is highly important that the costs of such significant litigation are carefully controlled and the resources available to the Claimants are an important factor in that consideration.

31. I fully understand and appreciate the Defendants' desire to make progress with this litigation. As I have indicated, at the right point, the proposal to determine the issue may well be appropriate. However, in my judgment it is currently too early to make that decision. It is also an important factor that the issue is capable of being resolved relatively quickly. So, if the appropriate time came and the issue remained relevant, it could be swiftly determined without causing unnecessary delay to the wider progress of the litigation.

32. The costs of this case management hearing will be in case. It was appropriate to ventilate these issues and as I have indicated above, the course indicated by the Defendants may be appropriate at some point in the future.

33. I would be grateful if counsel could now prepare an appropriate form of order.