If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No. QB-2021-003959

[2022] EWHC 3696 (KB)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 20 May 2022

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

MICHELLE SARAH SENFUKA DELARGY — Claimant

- and -

OXLEAS NHS FOUNDATION TRUST — Defendant

THE CLAIMANT appeared In Person.

MS C JONES (instructed by Capsticks) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE MARTIN SPENCER:

1 By an application notice dated 27 January 2022, the claimant Michelle Sarah Senfuka Delargy has sought the permission of the court to proceed with her claim in clinical negligence against the defendant Trust arising out of the treatment given to her principally in 2018 comprising a medication regime which Ms Delargy asserts caused her damage.

2 The background to this claim is as follows. Ms Delargy was born on 4 December 1971 and at some stage in 2002 she married Robert Delargy but, sadly, that relationship broke down in 2005. It appears that Ms Delargy's initial contact with psychiatric services was towards the end of 2005 when she was presenting with a 3-week history of delusional ideas. Her grandmother brought her up previously but had died in May 2005, and the claimant had been diagnosed with a depressive condition.

3 Thereafter, there were reviews of Ms Delargy's condition on a regular basis. In about 2009, she commenced a relationship with a Thomas Otunde which led to the birth of their daughter Carla on 24 December 2009. A final review of her condition was made by a Dr Arokia on 26 August 2010. Unfortunately, the claimant's relationship with Mr Otunde broke down after about three years and she was left to care for Carla on her own.

4 In May 2017, a referral was made for review of medication and on 14 December 2017, Ms Delargy was reviewed by a Dr Kitty Farooq following a referral by Ms Delargy's GP when the GP had raised concern about a relapse in her psychosis after change in medication leading to hyperprolactinemia. The diagnosis was one of an acute relapse of paranoid schizophrenia. The review letter from Dr Farooq dated 14 December 2017 is fully set out in the medicolegal report of Dr Sajid Suleman dated 18 October 2018 at para.5.21.

5 On 25 June 2018, the claimant was compulsorily admitted to hospital under s.2 of the Mental Health Act 1983 as a result of her perceived acute symptoms relating to the paranoid schizophrenia which had previously been diagnosed.

6 On 20 July 2018, the s.2 admission was converted into a s.3 admission. During the period of her admission, her daughter Carla was placed in foster care.

7 On 17 August 2018, Dr Patel, Ms Delargy's treating consultant at Oxleas House, a twenty-bed general adult acute inpatient ward for women, provided a report addressed to Davidaire Horsford, the Assistant Head of Legal Services of the Royal Borough of Greenwich, the purpose being to provide the court with an update regarding Ms Delargy's current presentation, details around the hospital admission, and the prognosis. At that stage, it was anticipated that it would be possible to discharge Ms Delargy in mid-September 2018.

8 At p.5 of that report, Dr Patel refers to the history of Ms Delargy's treatment immediately prior to her admission in the period 2015 to 2018 stating:

> "Ms Delargy was referred back to Oxleas PCT Psychiatric Outpatient Services by her GP in March 2015 but discharged back to the care of her GP following unsuccessful attempts to contact her. She remained well in the community until she experienced hyperprolactinemia at which point her GP was advised to change her medication from risperidone to aripiprazole. Her GP subsequently referred her back to Oxleas Outpatient Services in June 2017 as her mental state had deteriorated and she was experiencing paranoid delusions and auditory

> hallucinations once more. She has received regular follow up in outpatient's clinic since this time."

9 Ms Delargy relies on that paragraph in support of her assertion that Dr Patel was aware that the antipsychotic medication which she had received was causing her harm in the form of the condition hyperprolactinemia and by reference to the medication regime at the hospital referred to in the medical records, She asserts that despite that knowledge, Dr Patel proceeded to administer medication compulsorily knowing that it would cause Ms Delargy harm which Ms Delargy says negligent. I note that at p.7 of the report, Dr Patel refers to the medication regime stating:

> "Initially treated with oral olanzapine and clonazepam which have now been discontinued. Now established on 40 mg flupenthixol decanoate (depixol) depot intramuscular injection fortnightly; Truvada (Tenofovir disoproxil 245mg/Emtricitabine 20gmg), one tablet daily; Evotaz (Atazanavir 300mg/Cobicistat 150mg) one tablet daily; and Multivitamins once a day."

10 On 5 September 2018, the claimant was examined by Dr Suleman and he produced his psychiatric report on 18 October 2018. He confirmed the diagnosis of schizophrenia dating back to 2005. That is a detailed report setting out fully the medical history and quoting at length from the various letters sent by Ms Delargy's treating psychiatrists over the years. It appears to be a considered report but it makes no reference to the medication regime of Dr Patel being in any way untoward. It appears that Ms Delargy made a generally good recovery from that acute episode. She was discharged and was able to resume the care of her daughter Carla. However, in a letter dated 3 November 2020 to the Greenwich West Locality Team, Ms Delargy said:

> "In fact, I have never felt any better than now and you, Oxleas, are just disturbing my recovery from what you did to my daughter and me in June 2018. I self-quarantining until further notice. Therefore, I will NOT attend the CPA review meeting of 19 April 2021 at 11.00 a.m. or any other appointment which you wish/desire to force me on, at The Heights or a mental Malpractice hospital. I apologise for any inconveniences caused."

11 As a result, on 29 April 2021, Dr Malekzai wrote to the claimant's general practitioner Dr Street Burney recording that Ms Delargy was not prepared to engage with mental health services and had declined to attend clinical appointments or to see members of the mental health team when visiting her home. After a discussion in a multidisciplinary team meeting, it had been decided to discharge her back to the care of her GP.

12 In the summer of 2021, Ms Delargy turned her mind to a claim being made against the defendant alleging negligence in the period June to November 2018. As is clear from the letter of claim at p.43 of the bundle dated 7 June 2021, which sets out in headed paragraphs the usual details, the period of alleged negligence is said to be June to November 2018:

> "...that I realised the seriousness of harm caused by Oxleas' schizophrenia medications on 2 October 2018."

13 Thus, Ms Delargy was asserting that the three-year limitation period commenced on 2 October 2018, that being her date of knowledge, and it would therefore expire on 2 October 2021. This was therefore in the pre-action stage and was covered by the pre-action protocol.

14 Attention has been drawn to the pre-action protocol for the resolution of clinical disputes where at para.4.4 it is stated:

> "When considering what expert evidence may be required during the protocol period, parties should be aware that the use of any expert report obtained pre-action will only be permitted in proceedings with the express permission of the court."

15 That paragraph does no more than bring to the attention of the parties that the use of expert evidence in any case where proceedings have been issued only occurs with the permission of the court made in the course of case directions and the fact that a party has obtained a medical report in the pre-action period for the purpose of furthering the clinical negligence case does not guarantee permission to use that report in any subsequent proceedings although, in practice, such permission is usually given.

16 The relevance of that is that in June 2021, Ms Delargy wrote to the court a letter headed "Request for express permission of the court per 4.4 Pre-action protocol" stating:

> "I humbly ask this this court to grant me express permission to allow me to use pre-action expert hospital laboratory medical blood test results at the proceedings to show the direct cause of harm to me of the forced depot/Depixol injection 20 mg and a further 40 mg which was provided to you Dr Patel at Avery Ward, together with Olanzapine 50 mg and other schizophrenia treatments. Oxleas mental health clinic/hospital was negligent in doing so, in that, no other reasonable doctor would have administered to me two types of schizophrenia treatments at the same time, one oral and another injected. Therefore, Oxleas mental health clinic/hospital breached its duty of care to me. On 2 October 2018, right through to the last blood test results this year, results show serious harm that has been caused to my body."

17 It seems to me that this letter demonstrated a misunderstanding by the claimant of the intent behind para.4.4 of the pre-action protocol and the nature of blood tests results from a hospital laboratory. In any clinical negligence claim, blood tests results would be admitted as part of the disclosure process as a matter of course without the need to invoke the provisions whereby the court provides permission to rely upon expert evidence, those provisions being directed to different evidence, that is evidence from a medicolegal expert giving his or her interpretation of the treatment or advice given to the patient.

18 On 18 June 2021, Ms Jennifer Harris of Messrs Capsticks introduced herself to the claimant in an email and extended the limitation period to 2 December 2021 and there followed exchanges of correspondence between the claimant and Ms Harris. Ms Harris asked for time to serve a letter of response and the claimant was happy to allow such time. Therefore, on 18 October 2021, she made an application for a stay of proceedings pending compliance with the pre-action protocol. That application, in fact, pre-dated the issue of the claim form which was on 20 October 2021 and was accompanied by particulars of claim dated 18 October 2021. The application came before Master McCloud on 22 October 2021 when she gave permission to the claimant to issue the proceedings and stayed the claim in accordance with the application which the claimant had made for the purpose of allowing the defendant time. She gave permission to apply to restore and stated in the order:

> "The stay is open ended because of the matters in (3) below."

19 Then in para.3 of the order, she stated as follows:

> "The claimant's attention was drawn to the fact that under s.139 of the Mental Health Act 1983, to the extent that this case falls within that section, she will need to apply for permission from a High Court judge to proceed with the claim at the end of the stay. She should provide properly pleaded particulars of claim attached to that application when she makes it."

20 In fact, as Ms Charlotte Jones, who has appeared for the defendant before me today, has pointed out in her skeleton argument, the reference by the Master was almost certainly a reference to s.139(2) of the Mental Health Act which provides:

> "No civil proceedings shall be brought against any person ... in respect of any such act without the leave of the High Court..."

21 The reference to "any person ... in respect of any such act" is a reference to ss.(1) which provides:

> "No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, or in, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the authority having jurisdiction under Part VII of this Act, unless the act was done in bad faith or without reasonable care."

22 However, what the Master appears to have overlooked are the provisions of ss.(4) which provides:

> "This section does not apply to proceedings against the Secretary of State, or against the health authority or special health authority, or against the National Health Service trust established under the National Health Service Community Care Act 1990."

Thus, it would appear that this is not a case requiring the permission of a High Court judge to proceed.

23 The Trust completed its investigations and provided a letter of response on 4 January 2022. The purpose of the stay thus being completed and the pre-action protocol procedure having been completed on 27 January, the claimant made this application for permission to proceed with the claim. That application was accompanied by unsigned particulars of claim dated 27 January but those are in precisely the same terms as the signed particulars of claim of 18 October 2021 which had been filed with the court, together with the claim form, on 20 October 2021. However, Ms Delargy was, in the body of those particulars of claim, most properly complying with what Master McCloud had said in her order.

24 At first blush, it would appear that Ms Delargy should have permission to proceed with her claim as she seeks because the purpose of the stay has been fulfilled, that is for the parties to complete the pre-action protocol steps and because there is, in fact, no inhibition on her to this claim by virtue of s.139 of the Mental Health. However, the application is resisted by Ms Jones on behalf of the Trust on the basis that, on the face of it, the allegations of

negligence made by the claimant against the Trust are not supported by the opinion from a relevant professional with relevant expertise supportive of the allegations of negligence. Ms Jones submits that the pleadings must reflect expert opinion and not contain unfounded allegations, and the penalty for proceeding with a case in the absence of supporting expert evidence should be that the claim be struck out with summary judgment being entered against the claimant on the basis of there being no reasonable prospect of success.

25 She refers to the decision of Coulson J (as he then was) in *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC) where the learned judge said at [17]:

> "Save in cases of solicitors' negligence where the Court of Appeal has said that it is unnecessary (see *Brown v Gould & Swayne* [1996] 1 PNLR 130) and the sort of exceptional case summarised at paragraph 6-009 - 6-011 of **Jackson & Powell**, Sixth Edition, which does not arise here, it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view? CPR Part 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect."

26 There are, of course, cases, for example, what are commonly referred to as "never" cases where the negligence is so clear and obvious that expert supportive evidence is not required, an obvious example being to amputate the wrong leg in error. The allegations in the present case, however, are not of that nature. What is being said is not only that Dr Patel administered antipsychotic medication inappropriately but that she did so knowing that it would cause harm to the claimant and that is a serious allegation to make. In the light of that, I asked Ms Delargy to point to the evidence upon which she purported to rely to support such a serious allegation and she relied upon the medical records showing, she said, that she had suffered harm in the form of hyperprolactinemia on the medication she had received and the report of Dr Patel at p.5 from which I have quoted.

27 Effectively, Ms Delargy's claim follows the following logic.

(i) In her report, Dr Patel recorded that Ms Delargy had suffered hyperprolactinemia as a result of antipsychotic medicine in the course of 2017 as I have referred to in the review of the report from Dr Farooq.

(ii) Dr Patel therefore knew of the potential for such harm to be caused to Ms Delargy but, nevertheless, proceeded to administer antipsychotic medicine as part of the compulsory detention under s.2 and s.3 of the Mental Health Act; and,

(iii) In consequence, harm has been caused.

Ms Delargy does not rely on any independent report from the medical expert to support that allegation. In my judgment, Ms Jones is right that this is insufficient to support the allegations that are made in this case.

28 It seems to me that Ms Delargy, who is a litigant in person, should be aware that allegations of this kind cannot properly be pursued in the absence of supporting expert medical evidence from, in this case, it would be a consultant psychiatrist supporting the allegation that the medication regime administered to Ms Delargy by Dr Patel was inappropriate and Dr Patel could be taken to have known it was inappropriate.

29 It seems to me that the appropriate course is for the stay to remain in place for a further three months initially for Ms Delargy to attempt to obtain such supportive evidence and for her to indicate to the defendant's solicitor, Ms Harris at Capsticks, that such evidence has either been obtained or is being obtained so that the defendant can be reassured that the claim has the necessary evidential support. It would not be necessary for Ms Delargy to disclose that evidence at that stage because disclosure of reports and exchange of reports should follow the usual directions which would be made by a Master in a case such as this. What is needed is simple confirmation from Ms Delargy that she has the necessary supporting expert report or opinion to be able to pursue this case properly. After three months, the matter should come back for review when the court can be told either that the obtaining of such evidence is in hand or has occurred and that the evidence is supportive, in which case directions have been given for the further conduct of the action or, alternatively, that no such evidence is going to be available, in which case, as it seems to me, the appropriate course will be for the claim to be struck out.

30 I direct that such further consideration and the further conduct of this application be remitted to Master Thornett who is the Master assigned to this case.

MR JUSTICE MARTIN SPENCER: Ms Jones, does that cover the matter?

MS JONES: My Lord, I just wonder if you could narrow the scope of the expert evidence that has to be obtained but -- without being disclosed or probably without having to identify the name of the expert but it must, in my submission, be the supportive expert evidence of a consultant psychiatrist.

MR JUSTICE MARTIN SPENCER: I think I said that in the course of my judgment but can I ask you to carry the order----

MS JONES: My Lord, yes.

MR JUSTICE MARTIN SPENCER: -- and make such a provision in the order?

MS JONES: If your Lordship is minded to make that. I do not think, with respect----

MR JUSTICE MARTIN SPENCER: I am minded. I am minded.

MS JONES: -- it would be a GP matter or anybody other than a consultant psychiatrist as all the allegations concern consultant psychiatry.

MR JUSTICE MARTIN SPENCER: Yes. Yes.

MS JONES: I am obliged.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.