Braybrook v Basildon & Thurrock University NHS Trust [2004] EWHC 3352 (QB)

QUEEN'S BENCH DIVISION

SUMNER J

7 OCTOBER 2004

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Practice and procedure — Admission — Application to withdraw admission — Guidance — CPR 14.1(5), SI 1998/3132.

R Weir for the Claimant

Mr Goddard for the Defendant

Kester, Cunningham and John; Bevan Britton

SUMNER J:

[1] The defendants, Basildon & Thurrock Univerersity Hospital NHS Trust are defending a claim for damages by the claimant, Mrs Tracey Braybrook, arising from the death of her husband, Mr Michael Braybrook, on 9 February 2001.

[2] He was then aged 48. He had been admitted to the defendants' Trust Hospital on 7 August 2000. He was suffering from meningitis. This was not diagnosed in time. Treatment was delayed. It led to his death six months later.

[3] The claimant commenced proceedings in April 2003. By their defence of 11 August 2003 the defendants admitted liability. Damages are in dispute. The case is set down for hearing in Cambridge County Court in three weeks' time on 26 and 27 October.

APPLICATIONS

[4] There are two applications before me. The first application is dated 9 September 2004. It is to vacate the hearing date. The basis for this was that neither defendant counsel nor their expert medical witness could attend.

[5] The second application is dated 30 September 2004. It was made five days before the original application was listed to be heard by a district judge. It seeks permission to withdraw an admission made by letter of 27 January 2004, the application being under CPR 14.1(5).

THE HEARING BEFORE ME

[6] The time estimate for the two applications was half an hour. The day before yesterday Mr Weir for the claimant and Mr Goddard for the defendant duly attended at Cambridge County Court for the matter to be heard by District Judge Pearl. She had a full list. Half an hour was allocated for these applications. Enquiries showed that the applications were opposed. Counsel estimated that three hours were required. If successful it was common ground that the final hearing would have to be adjourned. That date had been fixed following listing questionnaires being filed on 7 May of this year. An initial hearing date was given for 30 September and 1 October. That was subsequently fixed for two days on 26 and 27 October.

[7] My family list at the court had gone short on that day. With the consent of counsel I agreed to hear the applications. Counsel's time estimate was accurate so far as the hearing was concerned. It lasted two and a half hours. I shall make further observations later about giving serious underestimates of time for applications apparently in an attempt to secure an early hearing date.

[8] Mr Goddard made clear at the start of his submissions that he was proceeding only on the second application. He put his argument shortly and clearly.

THE ADMISSION SOUGHT TO BE WITHDRAWN

[9] By a letter of 27 January 2004 the defendants' solicitors said this:

> "Our client admits for the purpose of this claim only that intravenous antibiotic should have been administered to Mr Braybrook by 3pm on 7 August 2000 and that its failure to do so amounted to a breach of its duty of care to Mr Braybrook. In addition, our client admits that if intravenous antibiotics had been administered by 3pm on 7 August 2000 Mr Braybrook would have (made a full or virtually full recovery. If he had made a full recovery he would most probably have been left with some minor memory problems and forgetfulness. It is further admitted that on balance he would have been able to overcome these problems and) returned to his previous position at Monarch Airlines. For the avoidance of doubt the quantum of the claimant's claim remains in issue."

[10] The defendants wish to withdraw the words in brackets from that admission so that the admission would read as follows:

> "Our client admits for the purpose of this claim only that intravenous antibiotics should have administered to Mr Braybrook by 3pm on 7 August 2000 and that its failure to do so amounted to .a breach of its duty of care to Mi Braybrook. In addition, our client admits that if intravenous antibiotics had been administered by 3pm on 7 August 2000 Mr Braybrook would have returned to his previous position at Monarch Airlines. For the avoidance of doubt the quantum of the claimant's claim mains in issue."

THE RELEVANCE OF THE ADMISSION

[11] It arises in this way. At the time of his death Mr Braybrook was a senior sales executive with Monarch Airlines earning £42,787 a year. The claimant informed the defendants in April 2003 of the basis of her claim. It was as follows. But for the defendants' negligence Mr Braybrook would have returned to his former occupation. He would subsequently have been promoted to a sales manager earning £56,000 a year plus benefits. This was said to be 100% likely. There was a five per cent chance that Mr Braybrook would have been further promoted to the position of sales director earning £70,700 a year plus benefits.

[12] In the autumn of 2003 the claimant's solicitors were pressing the defendants to make further admissions. They had sought an interim payment from the defendants. The defendants resisted making any offer over £10,000. They did so because of what was said to be uncertainty over what Mr Braybrook s condition would have been but for the accident. In a letter of 7 August 2003 the claimant's solicitors said:

> "We therefore consider that it will be necessary for the court to hear the evidence of a consultant general physician as to the time at which diagnosis and treatment of Mr Braybrook's treatment for meningitis should have taken place. Thereafter we consider that the court will need to hear the evidence of a consultant neurologist as to what Mr Braybrook's predicted condition, prognosis and life expectancy would have been but for the admitted delay in diagnosis and treatment for the court to be able to establish the value of any dependency."

[13] They wrote again on 5 November 2003:

> "We acknowledge and we have admitted breach of duty; however, we do not know which part of Mr Braybrook's actual treatment you believe fell below an acceptable standard. The significance of this is that we are unable on the basis of your admission to assess what Mr Braybrook's health would have been if properly treated (ie no breach). We need to know what Mr Braybrook's outcome would have been if properly treated to assess whether or not it affects the quantum of the claim as pleaded by the claimant (see our schedule)."

[14] It was as a result of that correspondence that the defendant solicitors made their admission on 27 January 2004. No further details about the reason for it have been given.

SUMMARY

[15] The claimant's solicitors knew that they had to prove their claim for damages. Part of that related to any promotion which Mr Braybrook would have earned. They set out their case on what promotion they claimed he would have achieved. What they needed to know was whether the defendants were going to argue a further point. It was that, had Mr Braybrook recovered from meningitis, his prospects of promotion would have been reduced or eliminated as a result of his illness. The admission made it clear, I am satisfied, that no such argument was going to be advanced.

REASON FOR APPLICATION

[16] Two medical experts, Dr Young for the claimant and Dr Johnson for the defendant, met on 21 September 2004. This was to see if certain issues could be resolved. They had been sent an agenda. I have not seen it. The ambit of their discussion is not in dispute. It is set out in earlier correspondence and appears from the joint report that resulted from the meeting. It is sufficient to quote from the report as there is no real variation. On the second page of the report this is said:

> "This is our agreed joint statement for the court on life expectancy and working life of Mr Michael Braybrook (deceased)."

[17] The reason for the medical opinion was that Mr Braybrook suffered from other potential health problems. Earlier reports had indicated that this was likely to affect his life expectancy and possibly the length of his working career. As a result of the two specialists meeting on 21 September agreement was reached. They accepted that because of his health difficulties there would be a reduction in life expectancy and they put it in these terms:

> "In respect of life expectancy we agree it is impossible to argue between eight and ten years but the reduction we both believe to have been of this magnitude. Neither figure should be taken as precise."

[18] However, the matter did not rest there. In support of their present applications, the defendants filed a statement from Dr Johnson dated 4 October. The relevant part reads as follows:

> "I was instructed to discuss the case with the claimant's expert, Dr Young, consultant neurologist, on 21 September 2004. I was sent an agenda agreed by the parties' solicitors for the discussion on 20 September 2004. I understand that it was accepted that had Mr Braybrook recovered from his meningitis and survived he would have returned to his previous job. His type of work and length of time in employment could obviously be affected by any impairment of his higher cerebral function secondary to meningitis. Hence, during my discussion with Dr Young, when we were discussing his likely retirement age and working potential I asked Dr Young what he meant by paragraph 9.12 of his report dated 20 January 2004 and 16 December 2004 (as heard). This paragraph read as follows: 'On the balance of probability it is my opinion that had the deceased been promptly diagnosed as suffering from meningitis and antibiotics administered urgently then he would have made a good physical recovery although it is probable that he might have had some blunting of his cognitive function.' Dr Young stated that what he meant by this was that he considered although Mr Braybrook would have been able to return to work in his previous job, the blunting of his cognitive function was such that he might not have sought or achieved promotion. I asked Dr Young whether he was prepared to have his opinion recorded in the joint statement. He said that he was not because the question of capacity was not on the agenda. I took responsibility for drafting the joint statement as I agreed with Dr Young that I would forward it to him and he would sign it if he agreed with it before he left the country. I drew up the draft which omitted our discussion about capacity as Dr Young wished and forwarded it to him."

[19] Dr Young also filed a statement of 1 October. He was aware of what was going to be said. He said:

> "We concluded that we could not be specific as to an exact figure and therefore identified a range of between eight to ten years reduction of life expectancy and that Mr Braybrook would have retired between the ages of 60 and 65. Having discussed the issues on the agenda, both Dr Johnson and I discussed the case generally. I believe these discussions were 'off the record' as it did not touch upon the agreed agenda. I am outraged that my reported views have been used by the defendants and that they have been incorrectly quoted. Dr Johnson went on to ask me what I meant by paragraph 9.12 of my report. I confirmed that I thought Mr Braybrook would have made a good physical recovery following appropriate treatment. However, he might also have suffered from some blunting of his cognitive function. There was a discussion between us concerning whether or not Mr Braybrook would have achieved promotion. However, I said that we should not discuss the same as it was not part of the experts' agenda. I confirm that in any event I would not have been able to express a view concerning Mr Braybrook's ability to achieve promotion as I have no detailed knowledge of the position Mr Braybrook was in prior to his death or the position he was to be promoted to. I am most concerned that the 'off the record' discussions between the experts has been reported and construed incorrectly."

[20] Dr Johnson commented on that statement and he said this:

> "There are no formal minutes of this part of our discussions. Dr Young made it clear he did not want his views on promotion included in the statement. I accept that his views may have been 'off the record' insofar as they were not part of the formal

> agenda nor minuted. However, Mr Braybrook's promotion prospects would clearly affect his life time earnings and, to an extent, his date of retirement. Hence this was a valid topic of discussion. I would suggest Dr Young be formally invited to express his views on promotion with extra information he says he requires in paragraph 9 of his statement."

[21] I note at this stage that Dr Johnson does not expressly say that Dr Young's recollection is incorrect. It may be that that can be inferred. I also note that it is common ground that Dr Johnson drew attention to Dr Young's earlier recorded comment that the result of Mr Braybrook's meningitis might have led to some blunting of his cognitive function. He does not say whether he, Dr Johnson, agrees with that view or not.

THE DEFENDANTS' CASE

[22] In Mr Goddard's written submissions he quotes Dr Johnson's statement which I have already referred to at para 9.8. He went on to say this:

> "At the meeting of experts Dr Young declined to further express what he meant by paragraph 9.12 of his report save to say that he would have made a good physical recovery following appropriate treatment, however he also might have suffered from some blunting of his cognitive functions The probability mentioned in his report is now possibility. This needs to be clarified. Oral evidence is likely to be required given his apparent change of opinion. He is not available on 26, 27 or 28 October 2004."

He then goes on to set out what a witness who was to be called by the claimant on the basis of promotion understood about his cognitive function. Nowhere is there mention for Dr Johnson's recollection of that conversation nor that it disagreed with that of Dr Young.

[23] That, however, was not Mr Goddard's position in oral argument. He adopted Dr Young's account of the conversation. He pointed out that the value of the claimant's case might be either side of £500,000. If the claimant proved her case on promotion it would add about £100,000 to the claim. He said that the earlier admission was equivocal saying full or virtually full recovery. Now, he said, there is evidence that Mr Braybrook might not have sought or obtained promotion because of his illness. The defendants may now seek further medical evidence or otherwise rely upon and call Dr Young. Dr Young had changed his evidence. It gave rise to an issue about the effect of the illness on promotion. The sum in dispute is significant. It cannot properly be ignored. It should be litigated. It is accepted, however, that this was a late application and that it would lead to delay. I asked him about the principles to be adopted. He submitted it was the balance of prejudice between the parties, although the issue of delay had to be taken into account.

THE CLAIMANT'S CASE

[24] Mr Weir's response was both detailed on the law and comprehensive. He drew attention to what was said or, perhaps more correctly, what was not being said about the original admission. It was not being argued that it was mistaken at the time. It was not being said that any evidence had been hidden from the defendants. No evidence was led about the basis on which the admission was made. He pointed to what was known at the time so far as the claimant was concerned. There was Dr Johnson's report of 24 November 2003. That related solely to life expectancy. It was a two-page report. It is interesting to note that his conclusion at that time was that Mr Braybrook's life expectancy would be reduced by about seven years.

[25] On 20 January 2004 Dr Young produced his report. It contained at para 9.12 the part that I have already quoted. However, it also included earlier this comment at para 3.02:

> "He probably would have suffered some blunting of his cognitive functioning so that he might not have been able to resume his former level of employment but the probability is that he would have not been unemployable."

Whilst it is raised as only a question of "might", what Dr Young was saying is that, far from not being able to earn any promotion as a result of illness, he might not even have been able to return to work at his former level.

[26] That report was sent to the defendants' solicitors about the date of the admission of 24 January. Mr Goddard told me on instructions that the defendants' solicitors had not had sight of it when they sent that letter. However, it is accepted that it was received and read within a day or so thereafter. That comment of Dr Young's is to be contrasted with what he is said to have mentioned in discussion on 21 September. His view had modified. He was no longer saying that he might not have been able to resume his former level of employment. If correct, he was now

saying that he might not have sought or achieved promotion. Thus, whilst still a favourable comment so far as the defendants' case was concerned, it was less favourable than his original statement in January 2004.

[27] The significance of that becomes apparent in due course. Mr Weir says that the scope of the claimant's case was by 24 January quite clear. The result of the admission on that date was, as he says the defendants must have anticipated, that the claimants proceeded to prepare their claim excluding any consideration of the effect of the illness. No doubts were raised on that following the receipt of Dr Young's report. Nothing further was said until 30 September, five days before the original application was due to be heard. It is said that Dr Young had changed his evidence. Mr Weir argues that that is not so. I agree.

[28] Mr Weir goes onto point out that even if there had been a change of evidence, (whether in Dr Young's original report or the comment he is alleged to have made on 21 September). All he was saying was based upon the word “might”. It was, submits Mr Weir, at best a possibility which I accept. He says further that the admission in January was a fully informed conscious decision by the defendants knowing what the consequences would be. They were not misled, nothing was hidden from them. All that they now rely upon was available to them, if not at that time, then within a day or so thereafter.

[29] What they have now done, he argues, is to try and hijack a court hearing on an obviously wrong estimate of time to seek to go back on their admission only three weeks from trial. Were they permitted to do this, the prejudice to the claimant is real and profound. He relies upon a statement put in in relation to the original application by the defendants by Mrs Braybrook of 16 September. I quote from that statement:

> “Since I lost my husband I have found it very difficult to cope with bringing the children up on my own and deal with stresses of the pursuing litigation. One thing that I have been able to hold on to was the fact of knowing that this would all be over by the end of this year and that my life and my children's lives would return to some type of normality. I was extremely distressed to discover that that may not be the case now and I may have to continue with trying to cope with further upsets and distress. I find it very hard to accept another adjournment by the defendants despite the fact that they admitted liability in January 2004 and their apparent reluctance to have this matter settled as soon as possible. The fact that we have requested numerous settlement meetings, it appears that these requests have been totally ignored. I feel that we are not being treated with the respect we deserve over Mike's death. I have become very depressed recently and am finding it very difficult to cope. I try to put a brave face on for the sake of the children but this is becoming harder and harder. I am sure my doctor will put me on antidepressants because she has done in the past due to the stress I have suffered over Mike's death. I see local reports of other cases against the defendant hospital which have happened long after Mike's death yet they have reached a conclusion. I feel so angry. Not only have I lost my husband and my children have lost their father, our grief, torment and upset is being prolonged. I so desperately want to see an end to the constant turmoil of emotions upset and just want for us as a family to get on with our lives as best we can.”

[30] Mr Weir points out that, were this application to be allowed, it is plain that there would be further medical evidence to be obtained, experts would meet, and a new date for trial would have to be sought. It is not a question of a few weeks. It might be nearer Easter of next year before this matter could be concluded. That would be a major burden to be placed upon the claimant and her family in the light of that statement. In such a tragic case as this, he argues, closure is urgently required. It is now three and three quarter years since Mr Braybrook died. It is two years since liability was admitted, an earlier date than Mrs Braybrook says in her statement. Finally, he says, this is a classic case of strategic manoeuvring. Why, he asks, did Dr Johnson raise an issue already resolved so shortly before the trial? Was it just to try and seek some advantage for the defendants?

THE LAW

[31] Mr Weir submits that his defence of this application is well founded in law. He refers me to CPR14.I.5, It is in these terms:

> “The court may allow a party to amend or withdraw an admission.”

It contains no qualifications of its own. It is subject, he says, to the overriding objective in r 1.1 because under r 1.2:

> “The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the rules or (b) interprets any rule.”

[32] The overriding objective is well known. Nevertheless, because it is of particular importance to this application I should set it out:

> "These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) dealing with a case justly includes so far as is practicable -(a) ensuring that the parties are on an equal footing;
>
> (b) saving expense; dealing with the case in ways which are proportionate;
>
> (c) to the amount of money involved, to the importance of the case, to the complexity of the issue and to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the court's resources while taking into account the need to allocate resources to other cases."

[33] Mr Weir draws my attention in particular to 1.1(e) and the allocation of an appropriate share of the court's resources. He points out that the foundation of the defendant's application is that the claimant's medical expert said that Mr Braybrook might not have sought or obtained promotion. Accordingly, it is right that they should have the opportunity of raising this issue. But, he points out, as I have already noted, this remark is in dispute. As I put to Mr Goddard in argument, if his submission is to succeed it may well be necessary as a preliminary part to determine whether the remark upon which he relies was or was not made in the first place. If the court held that it was not made then on my understanding of his argument that would be the end of the defendant's application. They do not seek to say that they overlooked or misunderstood what Dr Young had said in his report of January 2004. If that is so, then the prospects are that there could be a further interim hearing to determine whether the defendants' application does or does not have any factual basis.

[34] That might not be the end of the matter. Dr Young has made it clear that he could not continent on the question of promotion without detailed information on the post that Mr Braybrook held at the time and the post, responsibilities and abilities required to perform any further position he might achieve on promotion. How Dr Young is to gain that information is not clear. Mr Bernstein, a fellow employee, has made two statements in relation to Mr Braybrook's prospects of success. I have only seen the second. I am doubtful, however, that the first provides the sort of information which a neurologist such as Dr Young would need to have to make the assessment required of him. Mr Bernstein's focus was on the prospect of promotion, not, I suspect, on the particular skills and abilities required to achieve it.

[35] The difficulties then arise of whether that information could be given to Dr Young short of a hearing. It might be done by statements from the employers if they knew what was required of them. On the other hand, the defendants would be entitled to know and if necessary challenge that evidence before Dr Young reached his conclusions on it or in an attempt to cross-examine him on any conclusions that he might have felt able to draw. This argument need go no further to see that there is a prospect, if the defendants were to succeed on proving the factual basis, of another trial relating to the evidence for Dr Young to assess. It might be at that hearing or subsequently when he had been able to give it mature consideration. This is taking the matter further than is justified. It is satellite litigation.

[36] The law: I have been referred to *Gale v Superdrug Stores plc* [1996] 3 All ER 468, [1996] 1 WLR 1089, *Sollett v DJ Brodi Ltd & Others* (CCRTF 199 8/0578/B2) and *Flavius v Pavley & Others* (HQ010l579). In *Gale*'s case the majority of the Court of Appeal allowed an appeal from His Honour Judge Rothe. The defendants in that case had admitted liability. When the case did not settle the plaintiff issued proceedings. In the defence liability was denied. The plaintiff applied to a district judge, successfully, to strike out that defence. An appeal to Judge Rothe failed so the defendants appealed to the Court of Appeal. In the Court of Appeal counsel accepted that the same principles applied as if the defendant had made an application to withdraw an admission. Judge Rothe relied on an earlier Court of Appeal decision in *Bord v Birds Eye Walls Ltd* (*The Times* 24 July 1980).

[37] In that case there was a claim for repetitive strain injury which was disputed. Four weeks before the hearing, which had been set down for trial for no less than two and a half years, the defendants sought to allege contributory negligence for the first time. This was allowed. The claimant appealed successfully to the Court of Appeal for this to be reversed. In the course of his judgment Ralph Gibson LJ pointed to the risk of damage to the plaintiffs now

having to investigate this defence and the delay that would result. He added in the disappointment to the plaintiffs. He said that the court must look at the explanation given by the defendants.

[38] He said this which is repeated by Waite LJ in his judgment in the *Gale* case:

> "More importantly, I think, some explanation is necessary. If a mistake has been made the court would, in my view, tend to the view that the victim of the error must be relieved if the other side can be properly protected. If some new evidence has been discovered which puts a different complexion on the case, that is in the nature of a mistaken assessment of the case. For my part I would be anxious to assist a party who has made an honest error and not hold that a party to a liability which, if the error had not been made, he would not have been under. The only explanation tendered in this case, as we are told, is that there had been a decision in 1984 made by the insurance on economic grounds that they would not fight these cases, ie the amount that they might expect to have to pay is such that it was not worth incurring the costs of fighting the issue of liability and having it decided by the court . . . speaking for myself, having regard to all the other factors, I cannot regard that as the sufficient explanation which would justify the grant of leave."

[39] In *Gale*'s case Waite LJ said:

> "I prefer Mr Vinyl's submission that the discretion is a general one in which all the circumstances have to be taken into account and a balance struck between the prejudice suffered by each side if the admission is allowed to be withdrawn or made to stand as the case may be."

[40] In the circumstances, of that case the appeal was allowed. Millet LJ (as he then was) delivered a concurring judgment; Thorpe LJ dissented. As reliance was place upon Thorpe LJ's judgment by Mr Weir and taken up in the later case of *Sollett*, I should refer to part of it, I need to quote no more than a passage towards the end of his judgment where Thorpe LJ says this;

> "Although his judgment was given some weeks before the issue of the Lord Chief Justice's practice direction calling for much firmer judicial control of civil litigation, it certainly reflects the message of the direction."

I pause there to say that that is a comment on the judgment of Ralph Gibson LJ:

> "The civil justice system is under stress and far-reaching reforms are in prospect. There is a public interest in excluding from the system unnecessary litigation and a consequent need to curb strategic manoeuvring. Here the plaintiff presented the defendant's insurers with a choice of admission of liability or service of writ. The defendant's insurers probably advised chose to admit liability. That admission was the foundation of over two years of continuing search for a compromise on quantum. As Mr Sewell submitted, had the plaintiff insisted upon obtaining a consent judgment on the issue of liability before embarking on the protracted negotiations, the' defendants would have protested that it was a proposal to incur costs to no purpose. I share Judge Rothe's opinion that against that background the defendant's explanation for resiling from their admission was 'really a very weak one'."

[41] *Sollett*'s case was heard by the Court of Appeal after the reform of the civil procedure. In that case the Lord Chief Justice, Lord Bingham of Cornhill (as he then was) gave the judgment. The facts were stark. The claimant sought damages from DJ Brodie Ltd whose employee was said to have been negligent and injured the claimant. Liability was admitted in June 1994. It was repeated two years later in the defence to the proceedings. In February 1999 the defendant applied to substitute another company, TD Brodie Investments Ltd, who should have been the correct defendant. It appears 'that an error had been made and that this was accepted. They were unsuccessful. They appealed. They relied upon two submissions, firstly, that a party should ordinarily be permitted to withdraw an admission made by mistake unless this cannot be done without serious prejudice to the other party, and, secondly, the claimant would be in no worse a position as a result of the admission made on behalf of the wrong defendant than if the true legal position had been drawn to his attention at the proper time. The Lord Chief Justice quoted from the judgment of Waite LJ and then said this:

> "This passage gives valuable guidance as to the correct approach to the exercise of discretion and the striking of a balance in cases of this kind. It is, I think, plain that Waite LJ was not purporting to lay down any rule of law and that the exercise of any discretion depends upon the facts of the case. I would observe that the dissenting judgment of Thorpe LJ has very considerable persuasive force, particularly in the new procedural environment inaugurated by the Civil Procedure Rules. I would, however, accept that it is generally necessary to look at the prejudice which the parties would suffer if permission to withdraw an admission is given or not given."

[42] He went on to observe that the prejudice suffered by the defendants was almost entirely of their own making. Later he said this:

> "The recorder was much impressed, as indeed I am, by the obvious injustice of denying a judgment to Mr Sollett against a company which up to the door of the court has been admitting liability in principle."

He went on to consider that the recorder had not in fact considered with Mr Sollett would have been as gravely prejudiced if the true facts had be pointed out and concluded:

> "If, however, the recorder had reviewed the matter along the lines that he should have done and along the lines that I have suggested he would and should have come to the same conclusion which was that to which in substance he did come. For my part I would not deserve his conclusion and, therefore, dismiss the appeal of DJB."

[43] In an unreported case of *Flavius v Pavley* (noted in Civil Procedure para 14.1.8), Nelson J was concerned with a claimant from Brazil who suffered very serious injuries in a road accident case. Liability was admitted. The claimant accepted a sum of some £700,000 which had been paid into court in settlement of his claim. At this time the defendants had caused enquiries to be made in Brazil which showed that the claimant had lied about his claim, his age, his prospects in the United Kingdom and that he had used stolen documents. He was an illegal immigrant who had outstayed his leave to remain. The claimant conceded that the stay on proceedings should be lifted and the money repaid. The issue was whether only quantum should be litigated as the plaintiff submitted or whether the defendants could rely on a defence of illegality. In the result, Nelson J held that the issue of liability should remain. The defendants could, however, rely upon illegality as a defence to the resultant claim. At para 19 he recorded the agreement of the parties about the test that was to be applied:

> "There is no dispute between the parties as to the test to be applied in deciding whether permission should be given to the defendant to withdraw their admission of liability. The test is three-fold. First, whether the application is made in good faith; secondly, whether it raises a triable issue with a reasonable prospect of success and, thirdly, that it will not prejudice the claimant in a manner which cannot be adequately compensated (*Gale v Superdrug Store*)."

That short summary is set out in the Supreme Court Practice in the notes to CPR14.5. I have had the benefit of more detailed argument on the law. I consider that the appropriate principles may be rather more widely drawn.

[44] I also referred the parties to a report which I had seen of a decision of His Honour Judge Thompson QC which was reported in an Article in the Solicitors Journal Vol 148 number 34 page 1027 of 10 September. In *Hackman v Hounslow London Borough Council* (CLYB 2000) 354, the learned county court judge is reported as saying of the decision in *Gale*:

> "It did not survive the coming into force of the rules as their purpose was to make litigation more certain."

The author, Mr Dignam, concluded:

> "Thus it seems that whilst Gale has been considered distinguished and even doubted, it remains the starting point and presuming the defendant to be acting in good faith and to have an arguable defence – possibly also the finishing point."

[45] From these cases and the CPR I draw the following principles.

(1) In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective.

(2) Amongst the matters to be considered will be:

(a) the reasons and justification for the application which must be made in good faith;

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospects of success of any issue arising from the withdrawal of an admission;

(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

(3) The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing.

CONCLUSIONS

[46] I am clear that this application must fail. I accept and adopt Mr Weir's arguments. There are a series of reasons which I would summarise as follows. The application was opportunistic in origin. There was no justification for the topic of promotion being raised at the September meeting of the doctors. The only issues to be discussed were life expectancy and the age of retirement. There has been no change of evidence by Dr Young. His views were known in a more favourable light to the defendants in January 2004 very shortly after the letter of admission of 27 January. In that report there was material which might have been used by the defendants to raise the issue of an illness-related cause for Mr Braybrook having no further promotion. They chose not to follow up that possibility. They are particularly experienced solicitors in this field. They have not said what was the basis of their letter of admission. They are not obliged to do so. They seek only to rely upon the plaintiff's expert at a later date. This they are entitled to do but, I conclude, that evidence in a form more favourable to them was available nine months earlier. Even if the September conversation is accepted it is not new evidence. It is not a change of evidence save in the realm of possibility, being slightly more favourable to the claimant than the original report in January 2004. The defendants chose not to avail themselves of that report at that time; now they seek to do so putting it in the guise of a remark by Dr Young at the meeting. It is not said anything was overlooked or misunderstood during the intervening nine months. The defendants alone are the authors of any prejudice they may suffer. To seek to raise it now is too late. That is sufficient to resolve this application but it does not rest there.

[47] Not only do the defendants seek to rely upon evidence, if it is evidence already available to them, but it is contested. Logic suggests that that must first be resolved. That would mean not one but two more hearings. That is not proportionate especially when the reason for it is the fault of the defendants. I am concerned, too, about the prospects of success were I to allow this application. At best the impact of the illness on promotion is put in terms of “might”. That is not sufficient to justify the success of the application and for the defendants to be able to mount it in the course of the case. On that ground as well I would reject this application.

[48] Finally, there is the question of prejudice. I accept that there is a significant sum of money dependent upon whether promotion can or cannot be proved. But, in my judgment, to seek to postpone the trial at this stage would be a grave prejudice to the claimant. In most personal injury claims last minute adjournments of the case causes hardship and upset. In a fatal accident claim that is even greater. In this case, there is evidence, accepting as I do the statement of Mrs Braybrook, that it would cause real distress. The continued strain on the family with the prospect of Mrs Braybrook going on to antidepressants is not to be underestimated. It means that no adjournment should be permitted without a strong and justifiable reason. I have not found it. The balance of prejudice in this case weighs heavily in favour of the claimant. It is because the prospect of an adjournment could give rise not only to upset but a health threatening situation as well.

[49] Accordingly, I conclude to uphold the overriding objective I must dismiss this application. I am not satisfied with the limited reasons given for the application. The defendants have failed to justify it. The balance of prejudice is heavily with the claimant. Any prejudice to the defendant is as a result of their conduct. There is a serious doubt about whether the defendants will succeed should their application be allowed. It would also promote undesirable satellite litigation and be a disproportionate use of court resources. I have to find that it is strategic manoeuvring at such a late stage.

[50] Finally, and quite separately, I deplore the attempt to shoe-horn a hearing which, with this judgment, has lasted some four hours, into a half-hour hearing. A party who does this will face either the prospect of the application being adjourned or dismissed with costs or, if heard, have to pay the costs whether they succeed or not. In this case, there is no dispute that the defendants should pay the claimant's costs. I dismiss the application with costs. At the parties' request I do not separately assess them.

Judgment accordingly.