

Mr. AXX

(A protected party by his litigation friend, Mr. XRE)

Claimant

and

Mr. Piotr Zajac

Defendant

Judge: Dr Victoria McCloud, a Master of the Senior Courts Queen's Bench Division

Hearing: 6 July 2022, Royal Courts of Justice

Representatives:

Claimant: Mr Christopher Gutteridge, instructed by Messrs Thompsons, Manchester.

Defendant: Mr Quintin Fraser, instructed by Messrs Horwich Farrelly.

Keywords:

Vulnerable parties – Article 6 ECHR – PD 1A – case management – split trial – disability – brain injury – personal injury – psychosis – PTSD – mental health – Equal Treatment Bench Book – adjustments – disability adjustments appointment – Les Misérables

Accessible language summary (not part of judgment)

This summary has a Flesch score of above 50 and was written to ensure accessibility of the judgment to readers with average reading ability.

The Claimant is suing for money to compensate him for injuries which he says he suffered in a road accident. He is unwell and suffers from what may be psychosis and other mental health conditions. He says that he suffered a brain injury in the accident. The Defendants say he did not suffer a brain injury in the accident. The judge had to decide whether there should be a separate trial about the question of the brain injury and what effects it may have had on the Claimant and whether it happened because of the accident or not.

The Claimant had been refusing to speak to experts especially the Defendant's experts to help them produce their reports for the court on whether there was a brain injury.

The parties agreed the Claimant was a vulnerable person but they disagreed about whether there should be a separate trial. The Claimant wanted a separate trial. They said that ordering one could help to enable the Claimant to take medication which he was refusing to do. His lawyers argued that if he took medication that could mean medical experts later in the case were clearer about whether he would get better as time passes or not, and could help him to put his evidence before the court through the experts because he would cooperate with him if he was less unwell.

The Judge applied new guidance in Practice Direction 1A and directed a separate trial, and she made comments on the approach taken by her to that guidance so as to try to help other judges.

Judgment

1. This is my judgment on one issue in this case, which raises significant points under the very newly created provisions of the Civil Procedure Rules as to vulnerable litigants which came into force in April 2021 (this judgment is therefore one of the first – and it appears actually the first - reported in the Senior Court, and hence no

case law was cited to me in relation to it and there is a lack of guidance or authority in the White Book presumably due to the absence of applicable precedent).

2. There being no reported case law as to the application of the new provisions and having heard full argument on the matters raised in this case I am accordingly giving this reserved set of reasons having briefly indicated my decision and outline reasons to both counsel *ex tempore* and indicating that I would produce this judgment.
3. The decision was made in the course of a lengthy management hearing and I will confine this set of reasons almost wholly to the matters relating to “vulnerability” and the new CPR provisions on that subject so as to, I hope, provide something of a worked example (good, bad, or merely respectably amateur is for others to judge but I call to mind a character in *Les Miserables* to the effect that “***I am not totally useless. I can be used as a bad example.***”)

Summary of facts

4. This is a complex case, as one would expect in the High Court but it raises issues which are likely to be raised in other cases in lower courts. It relates to personal injuries suffered by Mr AXX in 2016 when a vehicle driven by the Defendant ran into him whilst he was on a bicycle. He is presently 29 years old. He is a former firefighter.
5. He is represented through his litigation friend in these proceedings and at one stage has also been ‘sectioned’ under the Mental Health Act. His case is that leaving aside more minor injuries he suffered traumatic brain injury (TBI). His primary case is that he now suffers from neuropsychiatric symptoms including psychosis, paranoia and delusion. He lives in what may best be described as neurorehabilitative accommodation with some degree of supervision on site but is not ‘sectioned’ and not in hospital. He copes with day to day living and small sums of money allocated to him. However, to give an example of how unwell he appears to be, he tends to wear a tin foil hat and has for example recently presented to one expert in the case with the belief that he is a Rabbi. He is not receiving antipsychotic medication because he will not take it and cannot be forced to do so unless ‘sectioned’. The NHS do not appear to be taking the view that he can be sectioned at present because he is not

regarded as a danger to self or others. The Claimant's representatives and litigation friend take the view that with a case manager appointed and with further medical input it would make it more likely that he would receive medication.

6. The Defendants deny that his psychiatric condition was caused or contributed to by the accident and whilst they do not need to point to an alternative explanation, they point out that there is an admitted history of use of cocaine by him.
7. A serious problem in this case is that when visited by any expert to assess his medical condition so as to opine on the existence or otherwise of a TBI, he engages to a limited degree or refuses to engage at all. Thus he engaged with (Claimant's) Neuropsychiatrist Dr Isaac when he visited the Claimant, but the content of the interview was fairly mixed in terms of the sense made verbally: for example he told Dr Isaac that he had had '*some sort of device shoved up my arse that can make things spontaneous*' but '*had no fucking clue*' as to who put it there. He later claimed the device '*had a mind of its own*' and that an unspecified company had a lot of money and he was '*getting under their skin*'. At times he did provide some biographical and other information.
8. Other experts fared less well. The Claimant's expert Dr Alder, a Neurologist, 'found it very difficult' to assess the Claimant using a semi-structured interview due to his tangential and 'evasive' approach but did get some limited information from him.
9. The Defendant's expert Dr Heaney (Neurologist) was turned away via one of the carers where the Claimant lives. The Claimant whilst initially almost agreeing to enter the consulting room, turned away Dr Neal (Psychiatrist for the Defendant) who noted that 'his speech was not fully coherent, with odd sentence construction, which made him difficult to understand. I established that he did not want to be assessed by me.'
10. The issue before me and to which this decision relates is whether there should be a split trial whereby the issue of causation is tried first. That is opposed by the Defendant. The vulnerability provisions of the CPR came into play on that issue as shall be explained.

11. Later in the hearing a question arose as to whether I should also make an order requiring the Claimant to make himself available for medical examination in default of which a stay would be imposed. I decided that issue in the hearing also, not ordering a stay in that event, but since it relates to the vulnerability issue and engages capacity issues I will make observations here about it as well.

Claimant's submissions.

12. The Claimant referred me to the current form of CPR 1.1(2)(a) (ensuring parties are on an equal footing and can participate fully in proceedings), to CPR 1.6 which cross refers to PD 1A, and states that it provides for how the court is to give effect to the overriding objective where there are vulnerable parties or witnesses, and to Practice Direction 1A under the heading Vulnerability.
13. Due to the fully disputed causation question there is no likelihood of an interim payment until or unless causation is found in the Claimant's favour, and the Claimant argued that as a result the significant likely cost of arranging for such people as a care manager to advocate for him and obtain best medical care was not available (the Claimant has some money and a possible modest pension lump sum of only £20,000 on its way but such would not go far). Furthermore he could not for example obtain independent medical professionals for the purposes of assisting him in other ways with a view to getting him to engage in treatment.
14. The relevance of this, it was said, was that the general present thrust of the medical evidence is that his prognosis can only at best be said to be 'guarded' and cannot be assessed on a more informed basis unless he is given antipsychotics. If those did assist him then perhaps rehabilitation would be possible, and perhaps he could move to a position to be willing to engage with experts.
15. This was said to engage the vulnerability provisions because (it not being disputed he is vulnerable) a split trial would potentially enable him to resolve the causation issue and thereafter apply for an interim payment so as to obtain medical help so as to stand a prospect of '**participating in the proceedings**' in accordance with PD1A.1(1). The Practice Direction states at para. 5 that when considering whether a factor

within a person's vulnerability may adversely affect their 'participation' the court should consider their ability to understand the proceedings, express themselves and, most relied upon, '(c) *put their evidence before the court*'. I note also that in (d) the PD includes '*respond to or comply with any request of the court*' (which would presumably include medical examinations for quantum purposes if the causation aspect was resolved in his favour).

16. In this case Mr Gutteridge for the Claimant argued that to enable causation to be resolved would improve the prospects of enabling the Claimant to 'place his evidence before the court' by engaging with the experts at quantum stage, and by enabling prognosis to be clearer if and when he is able to be medicated and it is known whether the medication improves his condition. I had a letter from a care expert Dr Holloway confirming that he cannot provide an opinion on long term needs due to the fact Mr AXX is not medicated and the position might vary considerably based on the outcome of such treatment.
17. It was also argued that splitting the trial would save costs, potentially, and that any duplication of witnesses between the two parts of the case would be limited in expert terms to just the two categories deployed on the causation issue since no solely quantum experts would be needed at the first stage.

Defendant's submissions.

18. Mr Fraser submitted that a split trial would add delay to a case where the accident took place 6 years ago. Moreover splitting the trial would be no guarantee that the court would avoid having to 'contemplate difficult prognosis evidence' come what may. There was overlap between the two categories of experts but also likely overlap in terms of witnesses of fact since on this occasion the Claimant was proposing to call 11 witnesses of fact on causation (in part to deal with the sting of the cocaine issue by rebutting it through showing that the Claimant remained psychotic even when he had had periods of cocaine abstinence). It was surely the case that a number of those witnesses would have to reappear if there were to be a quantum trial.

19. Furthermore this would be an ‘involved’ causation trial given the number of witnesses and the presence of experts with a time estimate of 4-5 days and out of the norm. Absent more evidence on prognosis, moreover, the prospects of settlement were low: getting on with quantum evidence now would potentially facilitate settlement. As to the submission that absence of an interim payment was preventing medical progress, the Claimant had a flat and was (soon to be) in receipt of a pension from the Fire Brigade and a lump sum of around £20,000 so there was money available of his own.

Reply by Claimant

20. In rebuttal the Claimant argued that the causation trial would not be unusually ‘involved’: it was often the case that where one had a split trial there needed to be liability experts and witnesses. There was nothing to stop the parties, if they chose, making progress on quantum evidence but what this was really about was taking case management steps which maximised the chances that the Claimant as a Vulnerable person could put his evidence (on quantum and prognosis) before the court in as useful a form as possible. Absent taking that step the court would be faced with vague evidence on prognosis: at least if treatment were tried and failed the court would know that he may never improve. As to ‘overlapping’ witnesses, it was not the case that all of the liability witnesses would be re-used at the quantum trial: much of it would go to the cocaine issue, which is a causation aspect.

Decision

- 21 I gave my decision and brief reasons at the hearing, *ex tempore*, but indicated I would reduce them to writing given the absence of authority on the application of the “vulnerability” provisions introduced into the court rules recently.
22. As noted, there was no dispute that the Claimant is “vulnerable” by reason of his psychiatric condition(s), which means he falls within PD 1A.1 (3)(d) which is “Mental health condition”. I agree that his vulnerability as things stand does appear to impede his participation in these proceedings. I say that without prejudging the issue of whether he has capacity to understand the importance of assisting experts and

capacity to appreciate that refusing to do so may adversely affect his case, which is a live issue.

23. It is important that I direct myself as to the particular likely impacts. It seems to me that the particular likely impacts which his present vulnerability may have are that in accordance with PD1A.1(5)(a)-(f) it either does or may impair his ability to (a) understand the proceedings and his role in them, (b) express himself throughout the hearing, (c) put his evidence before the court, (d) respond to or comply with any request of the court, or to do so in a timely manner, (e) instruct representatives and (f) attend any hearing.
24. He has a litigation friend to give instructions to representatives which deals with (e) proportionately. In terms of attendance at any trial, such issues should be considered in terms of any possible adapted procedure or listing, or venue, nearer the time however it appears at present that he would be too unwell to attend given his condition and lack of medication, hence likely meaning that there is no currently proportionate modification which would deal with (f) for the causation hearing but consideration should be given to a CVP remote hearing attendance being set up for him in case nearer the time of the liability trial he becomes willing or able to watch remotely. He refuses to engage much or at all with his father (the litigation friend) and hence at present, again given his medical condition and lack of medication that appears likely to be a real obstacle to achieving understanding of the proceedings ie point (a). It is not intended that he would give evidence directly at the trial and hence expressing himself at the liability trial appears not to be engaged here (point (b)).
25. As to points (c) and (d), namely putting his evidence before the court and responding to any request from the court at all or in a timely manner, these aspects were engaged with in argument especially. As noted, the Claimant's submission was that "putting his evidence before the court" is not limited to a party's personal evidence in a formal sense (witness statement, affidavit or oral evidence at court) but that it should be read as also meaning putting his experts' evidence before the court in the form of what I shall summarise as being 'best evidence', and in that context should, it was said, include as far as possible being put in a position to speak with experts and answer the

experts' questions when medically examined so that the experts can opine on his condition and no doubt summarise or quote his answers and describe his state in the reports.

25. I agree that point (c) within the vulnerability Practice Direction can appropriately be read that way, which is consistent with the Claimant's Article 6 rights under the Convention and also consistent with equalities duties and the basic requirement of the Overriding Objective to attempt to place parties as far as possible on an equal footing.
26. Accordingly to "put their evidence before the court" in PD1A.1 (5)(c) in my judgment includes doing so indirectly by way of cooperating with and speaking to medical experts for the purpose of expert reports for the Court.
27. The Claimant's argument summarised above was that a split trial on causation, leaving possible quantum of damages for later, was a measure which would be proportionate (in addition to the usual points made in support of splitting causation which I summarised in setting out submissions above) because to enable causation to be resolved would stand a real prospect of enabling the Claimant to place his evidence before the court, by making it more likely he could engage with the experts at quantum stage and by also enabling prognosis to be clearer if and when he is able to be medicated. I accept that argument. That in turn was affected by the potential to obtain an interim payment once liability for substantial damages is established (if it is) at a split trial.
28. As noted above I had a letter from a care expert Dr Holloway confirming that he cannot provide an opinion on long term needs due to the fact Mr AXX is not medicated and the position might vary considerably based on the outcome of such treatment. That means that the expert evidence available on quantum if we went to trial now on all issues would be very much less than the most helpful it could be. It is true that, if the Claimant can be treated with medication with the benefit of paid-for case management and other steps, it may still remain the case that he is no better, or not materially so at the end of it if his condition is intractable. However, the court's duty is to attempt to mitigate against the effects of his vulnerability, and it seems to me that the proposal to split causation from quantum here maximises the likelihood

of him (i) being better able to engage with experts and (ii) ensuring his prognosis, good or bad, is made as clear as practicable.

29. One must of course consider proportionality. I accept that there is a risk of costs being increased by a split trial, though that is mitigated given the prospect that costs can be saved if either the claimant substantially fails to establish causation or if the causation issue is resolved in his favour and enables treatment and clearer prognosis then it either simplifies the quantum process or, as often happens, enables proper negotiation over quantum against a more informed prognosis. I do not see the 'overlapping witnesses' issue as particularly significant, and as to the argument that the causation trial would be unusually involved or complex, it does not seem to me to be notably so given that it is quite common for medical causation experts to be engaged in causation trials and common for lay witnesses to give evidence. Typically one sees experts in relation to accident dynamics and such things as cycle helmets as well as initial treatment and observation in the course of the immediate aftermath of the accident. In that sense the causation issue is somewhat different here in that it relates to whether the Claimant has a brain injury which was caused by the accident and whether such injury, if any, has in turn caused any post-accident symptoms (if so to what extent). However in my judgment that degree of atypicality is not something which strongly points against proceeding with a split trial.

30. I direct accordingly that (in terms agreed after the hearing by the parties' counsel):

There be a separate trial under Rule 3.1(2)(i) of the following issues, namely:

(i) Whether the road traffic accident on 13th February 2016 involving the Claimant and the Defendant caused any traumatic brain injury to the Claimant;

(ii) Whether any traumatic brain injury caused by the said road traffic accident has caused any post-accident psychiatric symptoms, and the extent of the same;

(iii) Whether the road traffic accident has otherwise caused Post-Traumatic Stress Disorder and the duration of the same.

The issue of imposing a stay if the Claimant does not cooperate with the Defendant's experts in a medical examination

31. I was asked to make an order whereby the claim would be stayed automatically with permission to apply, if the Claimant continues not to cooperate with seeing the Defendant's experts. I declined to make such an order but instead provided that:

"The Claimant shall make himself available for interview and assessment by the Defendant's expert neurologist and psychiatrist by 4pm on 31st October 2022 and:

(a) In the event that the Claimant refuses to consent to interview and assessment by one (or both) of the Defendant's experts, the case may be restored urgently by either party if so advised for

(i) an assessment of the Claimant's capacity to consent to such examinations; and

(ii) thereafter consideration of any necessary steps.

(b) In that event, each party shall have permission to rely on expert evidence on the issue of the Claimant's capacity to consent to such examinations and such evidence shall be served on the other party no later than 4pm, three clear days before the restored hearing."

32. I took the view that since mental capacity is context specific, and in this instance the court does not have evidence that the Claimant (whilst lacking capacity to conduct litigation) is unable to understand (with any suitable assistance) the need to speak to the experts, and that he has at least apparently consented before to examination by his own experts (by participating in examination), and that there is evidence that he is able to cope day to day with life tasks such as shopping and feeding himself, I could reasonably make the above order. However, I considered that since there is a possibility that he will continue to refuse to see the Defendant's experts it would be proportionate in that event to bring the issue back to court so that a more formal decision can be made as to whether the Claimant does or does not have capacity to consent to medical examination, and hence whether his refusal is on an 'understanding', as opposed to a 'non-capacitous', basis. Sanctions such as a stay or debarring order could only fairly be imposed on an informed basis in the light of such an assessment and of course weighing up fairness to both sides.

Discussion

33. I shall make some observations on the approach to PD1A taken here. The vulnerability provisions essentially spell out in the form of a “structured reasoning tool” the process which the court should go through and the factors to consider in every case so as to ascertain whether a person is vulnerable, how it may affect their role and position in the claim, and what steps to take to assist that person to participate. It does not replace the existing provisions in cases where a party actually lacks capacity to conduct litigation, but it can and should inform the court as to steps to take where a witness is vulnerable – which could for example include situations where a party can be enabled to have capacity to do certain other things such as attend a hearing and cooperate with experts in a medical examination.
34. It will be apparent that the approach I have taken sees the new provisions as a part of the wider duty of the Court to ensure hearings, and the management of cases, are fair and to have regard to and apply equalities duties and the principles of Article 6 of the Convention. Whilst I have taken a ‘structured’ approach to applying the listed criteria and categories of vulnerability, this is on the footing that the Practice Direction is a useful reasoning tool but is neither an exhaustive set of provisions nor intended to be construed narrowly as if a statute. Hence my reading of the provision as to enabling a person to put his evidence before the court is a purposive one and not a narrow one.
35. It is I think generally known that an innovation introduced by myself many years ago suitable for some cases is the ‘disability adaptations appointment’ appropriate to complex cases with disabilities which need to be accommodated, by which, away from the argument and heat of a contentious hearing, the parties can attend before the court on what amounts to a ‘mention’ to discuss in a non-judgmental way how to plan a trial and what adaptations need to be made. In my judgment where especially vulnerable litigants are involved, consideration of disability adaptations may become relevant to the application of the vulnerability guidance in PD1A and the two are complementary.

Equal Treatment Bench Book

36. I should not leave this subject without referring to the fact known to all judges but possibly sometimes less so to lawyers, that the Equal Treatment Bench Book provides

clear guidance on ensuring fair hearings. The guidance is for judges and is not 'law' but attempts to set out a collective view of the committee of editors as to acceptable or even best practice. It will be noted from that publication available from the Judiciary website that there is a wealth of information across a wide range of areas which can give rise to vulnerability, from issues of disability and health such as deafness or depression, to social circumstances or being part of stigmatised groups such as the "trans" community, being victims of abuse or violence such as in harassment or domestic abuse cases, or having literacy difficulties.

Judge: Dr Victoria McCloud, a Master of the Senior Courts, King's Bench Division

5/10/2022