[2024 Gib LR 1]

GONZALEZ v. GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Yeats, J.): January 4th, 2024

2024/GSC/001

Tort—personal injuries—damages—life expectancy calculated using Ogden Tables unless claimant atypical individual—application by Gibraltar Health Authority for permission to rely on report from life expectancy expert refused because parties' experts (in vascular surgery) had not yet been given opportunity to provide opinion on whether claimant atypical individual

The Gibraltar Health Authority applied for permission to rely on an expert report on the claimant's life expectancy.

The claimant brought a claim against the Authority alleging negligent treatment of an infected toe resulting in a below-the-knee amputation. The Authority denied any clinical negligence. On breach of duty and causation, the parties each had permission to rely on the expert evidence of a vascular surgeon. A necessary factor in calculating future losses was the claimant's life expectancy. This was ordinarily calculated by reference to multipliers set out in the UK *Actuarial Tables for Use in Personal Injury and Fatal Accident Cases* ("the *Ogden Tables*"). The Explanatory Notes to the *Ogden Tables* provided that the tables were based on a reasonable estimate of the future mortality likely to be experienced by average members of the population. No further increase or reduction was required for mortality unless there was clear evidence that a claimant was "atypical" and could be expected to experience a significantly shorter or longer than average lifespan. If a claimant's life expectancy was atypical, a bespoke calculation would be required.

The claimant was 71 years old. He had poorly controlled type II diabetes, suffered from hypertension, was obese and had a heart condition. The Authority contended that he was an atypical individual and that the court should not have regard to the *Ogden Tables* but should allow the parties to rely on bespoke expert evidence on life expectancy. The Authority had already commissioned a report from such an expert, whose opinion was that the claimant's life expectancy was 75.47 years.

The claimant's case was that in accordance with the *Ogden Tables* he was expected to live to 86. In addition, the parties' vascular surgery experts had not yet been given the opportunity to comment on his life expectancy and so the application was, at best, premature.

The Authority produced an email from its vascular expert which said: "The calculation of the effect of any medical event on life expectancy is a highly specialized activity involving complicated statistics, best performed by an expert who specializes in this field."

Held, refusing the application:

The Authority's application would be refused. Permission for bespoke evidence on life expectancy from an expert in that field would not ordinarily be given unless the clinical experts could not offer an opinion or required specific input from a life expectancy expert. The starting point for evidence of the claimant's life expectancy was therefore the parties' experts in vascular surgery. They must be given an opportunity to provide an opinion on whether the injury had had an effect on the claimant's life expectancy and, in any event, on whether his pre-existing conditions made him an atypical individual. The short email from the Authority's expert that this exercise was "best performed" by another type of expert did not displace this starting point. It might be that once the parties' experts in vascular surgery formally considered the question of life expectancy it would become apparent that bespoke evidence was required. If that were to be the case, the application could be renewed (paras. 19–21).

Cases cited:

(1) *Arden* v. *Malcolm*, [2007] EWHC 404 (QB), considered.
(2) *Dodds* v. *Arif*, [2019] EWHC 1512 (QB), considered.

I. Winch (instructed by Hassans) for the defendant/applicant;
J. Phillips and *C. Smith* (instructed by Phillips Barristers & Solicitors) for the claimant/respondent.

1 **YEATS, J.:** This is an application made by the defendant health authority for permission to rely on an expert report on the claimant's life expectancy.

2 The claimant is a 71-year-old male who issued a claim against the defendant on September 15th, 2022. The claimant alleges that the defendant was negligent in the treatment of an infected nail fold in his left first toe as from September 19th, 2019. This alleged negligence resulted in him undergoing a partial foot amputation and subsequently, in 2020, a below-the-knee amputation. The defendant denies any clinical negligence.

3 On breach of duty and causation, the parties obtained the court's permission to each rely on the expert evidence of a vascular surgeon and a general practitioner. Reports by the experts have been exchanged. Mr. John Scurr is the claimant's expert on vascular surgery. Mr. Michael Gaunt is the defendant's expert in this same discipline.

4 The claim is valued at between £500,000 and £1m. As is usually the case, a significant part of this will relate to future losses and expenses—

although these have not yet been particularized by the claimant. A necessary factor in calculating future losses is a claimant's life expectancy. Life expectancy is ordinarily calculated by reference to multipliers set out in the United Kingdom's *Actuarial Tables for Use in Personal Injury and Fatal Accident Cases*, known as the *Ogden Tables*. The claimant's case is that in accordance with Table 1 of the 8th edition of the *Ogden Tables* (as updated in August 2022), he is expected to live to age 86.

5 The defendant however says that the claimant's pre-existing medical conditions, and the injury to which this claim relates, will both have an effect on his life expectancy such that he is an atypical individual and the court should not have regard to the *Ogden Tables* but should allow the parties to rely on bespoke expert evidence on life expectancy. The defendant has in fact already commissioned a report by Professor David Bowen Jones. Professor Bowen Jones is of the opinion that had it not been for the alleged negligence, the claimant's life expectancy would have been to age 75.7. Including the consequences of the alleged negligence, it is 75.47.

6 Expert evidence in a case such as this is restricted to that which is reasonably required to resolve the proceedings. No party can rely on an expert without the court's permission (CPR r.35.1 and r.35.4(1)). The defendant says that the court should grant permission because a report from a life expectancy expert is necessary. The claimant says that it is not.

7 The Explanatory Notes to the *Ogden Tables* provide some assistance. The authors say that the tables (Section A, para. 7, at 13)—

> "are based on a reasonable estimate of the future mortality likely to be experienced by average members of the population alive today and are based on projected mortality rates for the United Kingdom as a whole."

The following is then set out (paras. 8 and 9, at 13):

> "8. The Tables are based upon average or typical male and female life expectancy, which it is assumed claimants will have unless proved otherwise. The Tables do not assume that the claimant dies after a period equating to the expectation of life, but take account of the possibilities that the claimant will live for different periods, e.g. die soon or live to be very old. The mortality assumptions relate to the general population of the United Kingdom as a whole. Therefore no further increase or reduction is required for mortality alone, unless there is clear evidence in an individual case that the claimant is 'atypical' and can be expected to experience a significantly shorter or longer than average lifespan, to an extent greater than would be encompassed by reasonable variations resulting from place of residence, lifestyle, educational level, occupation and general health status.

> 9. If it is determined that the claimant's life expectancy is atypical and that the standard average life expectancy data does not apply, the court starts with a clean sheet and a bespoke calculation needs to be performed . . ."

8 The parties also referred to para. 13, at 14. This states as follows:

> "13. When a claimant's life expectancy is atypical and a bespoke life expectancy assessment is required, the court should take into account not only the consequences of the injury but also all pre- and post-injury positive and negative factors relevant to the individual claimant, including, but not confined to, the claimant's medical history; genetic and hereditary factors; geographical location; educational, professional or vocational status; lifestyle factors such as smoking, drinking and weight (whether of ideal BMI or obese); and whether the claimant is likely to receive the appropriate level and quality of care, accommodation, aids and equipment and other support needed."

9 Therefore, unless a claimant's life expectancy is "atypical," the court should refer to the *Ogden Tables*.

10 *Dodds* v. *Arif* (2) was a case in the English High Court in which Master Davison provided a helpful summary of how the courts should approach applications to rely on expert evidence on life expectancy. In his judgment, the learned judge said the following ([2019] EWHC 1512 (QB), at para. 23):

> "23. To summarise, the authorities on this topic seem to me to support the following propositions:
>
> i) Where the claimant's injury has not itself impacted upon life expectancy, permission for this category of evidence will not be given unless the condition in paragraph 5 of the Explanatory Notes is satisfied, namely that there is 'clear evidence . . . to support the view that the individual is atypical and will enjoy longer or shorter expectation of life'.
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> ii) Where the injury has impacted on life expectancy, or where the condition in paragraph 5 of the Explanatory Notes is satisfied, the 'normal or primary route' for life expectancy evidence is the clinical experts.
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> iii) The methodology which the experts adopt to assess the claimant's life expectancy is a matter for them.
>
> iv) Permission for 'bespoke' life expectancy evidence from an expert in that field will not ordinarily be given unless the clinical experts cannot offer an opinion at all, or for reason state that they require specific input from a life expectancy expert, or where

> they deploy, or wish to deploy statistical material, but disagree on the correct approach to it."

Mr. Phillips highlighted sub-para. (iv) and submitted that the parties' vascular surgery experts have not yet been given the opportunity to comment on the claimant's life expectancy and so the application is, at best, premature.

11 Mr. Phillips referred to *Arden* v. *Malcolm* (1), where permission to rely on an expert on life expectancy was refused and the parties were directed to put questions to the clinical experts. Tugendhat, J. said ([2007] EWHC 404 (QB), at paras. 35–36):

> "35. The real issue comes down to this. Should the court give permission to adduce a report from Professor Strauss at this stage, or should the statistical material to which he refers first be raised in the form of a question or direction to the existing experts, with the possibility of a report from Professor Strauss being left to be decided [at] a future application, in the event that the question and directions route does not resolve the matter. Mr Purchas QC submits that this is not a practical way of proceeding, and that permission should first be given to rely on the report of Professor Strauss. I have regard to his great experience in cases such as this. It may be that in the end he will be proved right. But I am not convinced that giving permission now is necessary if justice is to be done.
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> 36. In my judgment it is in the spirit in the decision of the Court of Appeal in *Royal v Victoria* that the clinician experts should be the normal and primary route through which such statistical evidence should be put before the court. It is only if there is disagreement between them on a statistical matter that the evidence of a statistician, such as Professor Strauss, ought normally to be required."

12 Mr. Winch's position was that he raised the question of life expectancy evidence with the claimant's solicitors on July 7th, 2023 but had not received any meaningful reply until December 5th, 2023, a week before the hearing of the application. Mr. Winch also submitted that he had liaised with his expert in vascular surgery who had confirmed that he was unable to deal with life expectancy. Mr. Winch produced an email he had received from Mr. Gaunt which says as follows:

> "The calculation of the effect of any medical event on life expectancy is a highly specialized activity involving complicated statistics, best performed by an expert who specializes in this field. For example in another case I was involved in the life expectancy report consisted of 16 pages of formulae and statistics."

13 In his email to Mr. Phillips of July 7th, 2023, Mr. Winch put this in different terms:

> "I have for some time been in contact with the defendant's nominated expert in vascular surgery who has come to the conclusion that, in view of the claimant's complex medical history and co-morbidities, the court will require bespoke expert evidence."

14 Importantly for the purposes of this application, the defendant has not put before the court what the expert was asked.

15 In his written submissions, Mr. Winch referred to the claimant's solicitors' email of December 5th, 2023, and suggested that they had "tacitly conceded" that the claimant is an atypical individual. I must say that I do not see such a concession, tacit or otherwise. The claimant's solicitors simply say that because the issue of life expectancy has been raised by the defendant they have asked their clinical expert whether he can give his opinion on it and the expert confirmed that he could. They then propose that the experts consider it at their joint discussion.

16 Mr. Winch also pointed to how his proposed expert was a clinician as well as a life expectancy expert and therefore the court should have no difficulty in accepting that he is qualified. Professor Bowen Jones is a consultant physician with a medico-legal practice. He is an expert in endocrinology and diabetes. (I do not understand it to be in dispute that the claimant has poorly controlled type II diabetes, suffers from hypertension and has a heart condition.) Professor Bowen Jones says that as a result of these medical conditions the claimant is atypical. In his report he says the following (at 4):

> "I consider that Mr. Gonzalez is an atypical individual as a result of his history of type 2 diabetes, peripheral vascular disease, ischaemic heart disease, aortic valve disease requiring replacement, non-smoking status, obesity and hypertension."

17 According to Professor Bowen Jones, the method he used to determine life expectancy is that known as "the Rating of Substandard Lives" (also referred to as the Brackenbridge methodology). In his report he states (at 17):

> "For some conditions there is a variation in the effect on life expectancy due to changes in severity. In patients with Diabetes, the degree of glycaemic control achieved results in changes in life expectancy. Therefore, a degree of clinical judgment is required to assess the level of control and to modify the mortality rate applied. This also applied to several other conditions. I have therefore applied clinical judgment in an assessment of the severity of the underlying conditions and the mortality rates which should be applied, based on my experience as a consultant physician."

18 Mr. Phillips reminded the court that the parties had instructed vascular surgeons as experts and not consultant physicians, endocrinologists or

experts in diabetes. Indeed, vascular surgeons have provided all treatment relating to the claimant's injuries. The court should not therefore be distracted by the fact that Professor Bowen Jones is an expert in endocrinology and diabetes.

19 In my judgment, the defendant's application must fail. Notwithstanding the fact that Professor Bowen Jones' report has been produced with an element of clinical judgment, the starting point for evidence of life expectancy must be the expert clinicians. In this case these are the experts in vascular surgery. They must be given an opportunity to provide an opinion on whether the injury has had an effect on the claimant's life expectancy and, in any event, on whether his pre-existing conditions make him an atypical individual. I do not consider that the short email from Mr. Gaunt saying that this exercise is "best performed" by another type of expert displaces this starting point, particularly as we do not know what he was asked.

20 I do agree with Mr. Winch that it would certainly have been more helpful if the claimant's solicitors had made their position clear at an earlier point following the defendant's solicitors' email of July 7th, 2023. This may have avoided the incurring of the cost of the report by Professor Bowen Jones and the need for the application.

21 For the reasons set out in this judgment, the defendant's application is refused. It may be that once the parties' experts in vascular surgery formally consider the question of life expectancy it becomes apparent that there is a need to obtain bespoke evidence. If that were to be the case, the application can be renewed.

Application refused.