Case Commentary: Mrs Susan Jayne Major v Dr Darren Jackson & Ors.

Liverpool County Court, 8 October 2019

Mrs Susan Jayne Major (Applicant) v Dr Darren Jackson (1), Dr Mark Findlay (2), Dr Michelle Findlay (3) and Dr Rohitkumar Fajyagaru (4) (Defendants/Respondents)[1]

This note has been prepared by Mills & Reeve LLP, who acted for the Respondents in this matter. Questions regarding the case should be directed to Claire Williams, Principal Associate (Claire.williams@mills-reeve.com).

Background to the case

The Applicant instructed solicitors ("Fletchers Solicitors" or "Fletchers") to pursue a claim for clinical negligence against George Elliot Trust for failure to diagnose a fracture. In November 2018 Fletchers sent a subject access request to the Respondents (partners at the Barwell & Hollycroft Medical Practice (the "Practice")) for all of the Applicant's medical records (using a consent form similar to that agreed between the BMA/Law Society, which can be located at Annex B to the Pre-Action Protocol for the Resolution of Clinical Disputes). That consent form references the Data Protection Act 1998, which at the relevant time had been repealed.

On 28 November 2018, the Respondents acknowledged the Applicant's request and indicated that their records would be copied and made available at the GP surgery reception. The Respondents explained that they preferred not to send records by post or electronically due to data protection concerns. The Respondents processed the request under Article 15 of the General Data Protection Regulation ("GDPR") and on 3 December 2018 placed the documents at reception for collection by the Applicant. The Applicant was informed by letter that the records were available.

On 11 January 2019, the Practice telephoned the Applicant to again confirm the records were available. The Applicant informed the Practice during that call that Fletchers had told her not to collect the documents.

Matters reached a stalemate. The documents were present at reception for the Applicant to collect. The Applicant visited the Practice in December 2018, January 2019 (twice), June 2018 (three times), August

[1] A detailed note of the judgment as handed down in court is set out at the end of this document.

2019 (four times) and September 2019, but failed to collect the documents. Fletchers also confirmed to the Practice in writing that the Applicant would not be collecting the documents.

In July 2019, the Applicant issued an Application for Pre-Action Disclosure, seeking the documents.

The Law

Under CPR 31.17, for disclosure against a non-party (as the Practice was in this case), the court can only make an order where:

a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
b) it is necessary in order to fairly dispose of the claim or to save costs. (emphasis added)

Both parties accepted that it is common practice in every case of alleged medical negligence for medical records to be reviewed. However, the Applicant failed to make out the second limb of the test.

The court did not consider an application for pre-action disclosure to be necessary in a situation where: the documents had been left for the Applicant to collect for (by that time) 10 months; the Applicant lived 0.1 miles from the practice; the Applicant had visited the Practice 11 times since the date the documents became available; and the Applicant was actively and demonstrably refusing to collect the copies.

The Applicant sought at the hearing to argue that necessity arose because:

a) the Applicant didn't want to incur the expense of posting records to Fletchers; and
b) by requesting the documents to be supplied directly, it may avoid any allegation that she had tampered with the records.

The judge described those submissions as "surprising", noting that if cost was genuinely a factor it would not be proportionate to issue an application for pre-action disclosure, rather than for the Applicant to collect the records and simply pay the cost of sending records to her solicitor. The suggestion that there could or would be an allegation of tampering with the records was described as "quite fanciful".

Although the Respondents' reasons for leaving the documents at reception were based on data protection concerns, the judge did not find it necessary to consider the provisions of the GDPR in order to make a decision.

Conclusions

The judge noted that the documents had been freely supplied by the Respondents (by copy documents available at the practice). A prospective Applicant is expected take reasonable steps to avail him or herself of other routes by which the documents can be obtained. It was clear that the appropriate course of action for the Applicant would have been to collect her notes and send them to her solicitors. Formal applications for pre-action disclosure should not ordinarily be made where access has already been freely given.

As a county court decision, the decision in this case is not binding on other courts, though will be useful for others seeking to defend applications made in the same or similar circumstances.

The issue as to whether, in making the documents available at reception for a patient to collect (as is customary for a GP surgery) the Practice had fulfilled its obligations under GDPR, was not explored by the court. It may be subject to future challenge, either in the courts or before the Information Commissioner.

Note of Judgment and Costs information

In attendance

Deputy District Judge Waring

Darya Amin ("Ms Amin"), Solicitor, Fletchers, for the Claimant

Kara Loraine ("Ms Loraine"), Counsel, for the Defendants/ Respondents

Dr Mark Findlay ("Dr Findlay"), GP Partner, Barwell & Hollycroft Medical Centre

Judgment as handed down[2]

This case stems from an incident in September 2018. The Claimant has instructed solicitors to pursue a claim for clinical negligence against George Elliot Trust for failure to diagnose a fracture. In November 2018 Fletchers sent a request to the Respondents for all of the Claimant's medical records. That request was sent to the Respondents who are in practice as the Claimant's GP. It was not envisaged that the Respondents were likely to be a party to any future litigation. On 28 November 2018, the Respondents

[2] Prepared from notes taken at the hearing. Not confirmed with Deputy District Judge Waring. Persons seeking a verbatim transcript should contact the court to enquire about obtaining a transcript of the hearing.

acknowledged the Claimant's request and indicated that their records would be copied and made available at the GP surgery reception. The Respondents explained that they preferred not to send records by post or electronically due to data protection concerns. This is an ongoing issue between the parties, but not something I need to consider in any great detail today.

I have two statements: a witness statement from Ms Argent of Fletchers Solicitors and a witness statement from Dr Findlay, the partner in the medical practice who deals with applications by solicitors for medical records, which I received today. It is clear from his statement that not all records are easily available electronically because some older records are on paper. More up to date records are available electronically, but the Respondents' normal practice is to photocopy and print all records and provide them for collection at reception by the individual patient.

Dr Findlay explained that the practice has no access to an NHS approved portal to upload documents to. The reason his practice adopts this approach is that their interpretation of the data guidelines is that it would be acceptable to leave records for a patient to collect, unless they are unable to do so for example, if they have difficulty due to mobility issues. This system also incorporates security risks and by providing medical records directly, the Claimant has an opportunity to fully understand what is being disclosed, rather than sending directly to a third party, notwithstanding that they may be her solicitors.

It is therefore apparent that in this particular case from Dr Findlay's statement that paper copies of records were made and were made available at the reception of the Respondents' surgery.

In response to that, at paragraph 15 of Ms Argent's statement, it says the Claimant 'did not wish' to collect the records and wanted them sent to her solicitors in electronic format. The statement does not give any reason for that wish. The Claimant lives approximately 0.1 mile away from the surgery and between 18 December 2018 and 19 September 2019 the Claimant visited the surgery on 11 occasions, so it appears it would have been a simple matter for her to acquire the notes on any one of those occasions. There is no suggestion that the Claimant is unable to collect them.

Today, Ms Amin, acting for the Claimant, attempted to put some flesh on the bones of that contention. Ms Amin said that the Claimant didn't want to incur the expense of posting records to the solicitors and that by requesting them to be supplied directly, it may avoid any allegation that she had tampered with the records. I find those submissions surprising. If cost was genuinely a factor, then I can't see how it is proportionate for the Claimant to issue this application rather than pay the cost of sending records to her solicitor. As to the suggestion that there could or would be an allegation of tampering with the records, I find that quite fanciful.

I am therefore satisfied that, notwithstanding there has been a lot of references to Data Protection Act law, I can deal with this application succinctly under CPR 31.17. This rule indicates that for disclosure against a non-party, the court may make an order only where a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings – this isn't a contentious point as it is common practice in every case of alleged medical negligence for medical records to be reviewed and b) it is necessary in order to fairly dispose of the claim or to save costs.

I was handed an authority by Ms Loraine today. It is not necessary for me to go through the facts of that case but I can distil the following:

Disclosure in cases such as this should be restricted to where both limbs satisfied, it is unlikely where the documents are available by alterative means, the making of an order is the exception and not the rule and the power to do so under CPR 31.17 should be exercised cautiously:

Quote: [from paragraph 32][3]

> *"Of course, as Lightman J. said in the passage cited above, the court must always have in mind the public interest in not involving innocent third parties if this can be avoided and 'a necessity required to justify exercise of this intrusive jurisdiction is the necessity arising from the absence of any other practicable means of obtaining the essential information'.*

That is the nub of this application. This is not a situation for an application for disclosure under CPR 31.17, it is a situation whereby the Claimant's solicitors simply refuse to accept there are other means available whereby the medical records can be obtained and they require the records to be sent to them directly by the Claimant's GP practice. The supply of that information (by copy documents available at the practice) is freely given by the Respondents to the Claimant. Every application of course needs to be dealt with on its merits.

I find in this case the second limb of the test is not made out, bearing in mind the Claimant's close proximity, and that she has visited the practice on 11 occasions since her original request. Accordingly I dismiss the application.

Summary assessment of costs and Order

This is a broad brush approach due to time constraints. I am not satisfied that a Grade A rate is appropriate. I appreciate there are some data protection issues but this is ultimately fairly straightforward. Even

[3] *Sarayiah v Royal and Sun Alliance Plc*, 2018 WL 02049583 (2018)

allowing for the Respondents' instruction in August, a lot of time has been spent. The way I'm going to approach it, is to allow broadly:

£3,750 profit costs; £1,000 for counsel's fees plus VAT= £4750 plus VAT

£5,700 inclusive of VAT

The Order is as follows:

1. The Claimant's application is dismissed; and
2. Claimant to pay the Respondents' costs of the application summarily assessed in the sum of £5,700 inclusive of VAT.