Genetic testing – whose choice is it anyway?

OLD SQUARE CHAMBERS

BEN COLLINS KC AND EMILY RAYNOR
OLD SQUARE CHAMBERS

It has become increasingly common in recent years for Defendants to seek permission for a Claimant to undergo genetic or other testing in order to inform questions of causation – for example to assist with the question whether symptoms of brain injury arise from a congenital condition or are consequent on negligence, perhaps in the form of perinatal asphyxia or a traumatic brain injury.

Where a dispute arises as to the appropriateness of such testing, a Defendant may invite the Court to order that some or all of the proceedings be stayed if the Claimant will not consent to undergo testing. It can readily be seen that this is a potentially very powerful weapon. The effect of a stay in relation to some or all of the Claimant's case on quantum may be self-evidently devastating.

CPR 3.1(2)(g) provides that the court may stay the whole or part of any proceedings either generally or until a specified date or event. The same power existed before the enactment of the CPR by virtue of the inherent jurisdiction of the Court (*Starr v National Coal Board* [1977] 1 WLR (CA)). When will the Court exercise its discretion to make such an order? A number of cases have considered this question.

In Starr, the Claimant refused to be examined by the expert witness instructed by the Defendant. The objection was not to examination per se, but rather to the particular expert. Scarman LJ identified the need to balance "*two fundamental rights*": the Claimant's right to personal liberty and the Defendant's right to defend himself. It is the balance between those rights which is at the heart of any application of this kind. In order to balance those rights, the Court held that the proper approach was:

(1) To start by asking whether the Defendant's request for the Claimant to be examined by the expert was a reasonable one; if that answer was yes, then:

(2) To ask whether the Claimant's refusal of the request was unreasonable.

These two questions were to be asked by reference to "*the necessity, so far as the court can assess it, of ensuring a just determination of the cause*" – something like a pre-CPR reference to the overriding objective.

In *Aspinall v Sterling Mansell Ltd* [1981] 3 All ER 866, the Defendant sought permission to undertake 'patch testing' on the Claimant's skin. The procedure involved a small risk of injury. Hodgson J considered that the distinction between an examination (as in *Starr*) and a procedure (as in *Aspinall*) was important: "*In my judgment the difference between medical examination, including as it must manual interference with the patient's body and such procedures as patch testing, the use of hypodermic syringe, the administration of a drug or anaesthetic and, at the far end of the scale, exploratory operations is one of kind not of degree.*"

Having considered *Starr*, the Judge held that the Claimant's right to personal liberty must prevail: "*I do not think it can ever be unreasonable for a plaintiff to refuse to undergo a procedure which carries with it a risk, however minimal, so long as it can be called real, of serious injury.*"

In *Laycock v Lagoe* [1997] PIQR P518, the Court considered whether the Claimant should undergo an MRI scan, in circumstances where he suffered from schizophrenia and would be (as an expert psychologist advised) at risk of undergoing an acute psychotic episode. The Claimant declined to undergo the scan and the Defendant applied for a stay. At first instance the stay was refused but the Court of Appeal disagreed. Kennedy LJ expressed the proper approach as follows:

> "*First, do the interests of justice require the test which the defendant proposes? If the answer to that is in the negative, that is the end to the matter. If the answer is yes, then the court should go on to consider whether the party who opposes the test has put forward a substantial reason for that test not being undertaken; a substantial reason being one that is not imaginary or illusory.*

In deciding the answer to that question, the court will inevitably take into account, on the one hand, the interests of justice in the result of the test and the extent to which the result may progress the action as a whole; on the other hand, the weight of the objection advanced by the party who declines to go ahead with the proposed procedure, and any assertion that the litigation will only be slightly advanced if the test is undertaken. But, if the plaintiff, for example, has a real objection, which he articulates, to the proposed test, then the balance will come down in his favour."

The White Book (3.1.8.1) suggests that *Starr* is the applicable authority in relation to an ordinary examination, and that *Laycock* provides the approach to be adopted where the examination involves a procedure giving rise to discomfort or risk of injury.

A number of recent interlocutory decisions have brought this issue to the fore. In *Paling (A Child) v Sherwood Forest Hospitals NHS Foundation Trust* [2022] Med LR 51 Master Sullivan refused an application for a stay pending genetic testing in a clinical negligence claim involving a serious brain injury. In doing so, she held that she should apply the two-stage test in *Laycock*. And in *Read v Dorset County Hospital NHS Foundation Trust* [2023] EWHC 367 (KB) the Defendant applied for a stay pending a neurological examination by its expert witness to determine whether the Claimant's cauda equina symptoms were attributable to any breach of duty. The parties agreed that the *Laycock* approach was applicable.

In *Clarke v Poole and others* [2024] 1 WLR 5149, the adult Claimant was involved in a road traffic collision which caused devasting injuries leaving her with a range of physical and cognitive impairments. She had a family history of muscular dystrophy ("MD") which gave rise to a 50% chance that she had the gene for MD, and the Defendants' expert neurologist suggested that some of her symptoms might be consequent on MD rather than the collision. He recommended that the Claimant undergo EMG testing to offer greater certainty as to the presence of MD.

EMG testing is undertaken by inserting needles through the skin into the muscle. It can be painful. The Claimant had always declined diagnostic testing and did not wish to know whether she had the MD gene, for both practical and psychological reasons. Her expert psychologist concluded, and the Judge accepted, that "*any pressure on the claimant to undergo such testing would be likely to have a detrimental impact on her mental health*".

HHJ Gargan, sitting as a Deputy High Court Judge, concluded that the proper approach was to apply a three-stage test:

(1) The starting point is to determine whether it is in the interests of justice for the testing to be carried out.

(2) If it is, the next question is whether the Claimant has put forward a substantial objection which is more than imaginary or illusory.

(3) If she has done so, it is necessary to balance the competing rights – the Claimant's right to personal liberty and the Defendant's right to defend itself.

He concluded that the balance should be weighed in favour of the Defendant. "*It does not seem to me to be just that the claimant should be entitled to pursue her claim in full if the defendant is to be deprived of the opportunity of carrying out tests which will identify whether or not she has active symptoms of MD*."

The Claimant sought permission to appeal to the Court of Appeal. HHJ Gargan's decision has received some attention and seems likely to affect the approach taken to stay applications by those representing Defendants.

It seems at least arguable that the *Clarke* approach is inconsistent with *Laycock*, and in particular with Kennedy LJ's dictum that if the Claimant has a "*real objection… then the balance will come down in his favour*". That weighting of the balance in favour of the Claimant's entitlement to object to interference with her bodily integrity, even at the expense of the Defendant's ability to defend the litigation, might seem consistent with the more modern *Montgomery* approach to the concept of personal integrity.

What is clear is that any Claimant faced with an application of this sort will need to focus on the provision of evidence to the interlocutory judge – as to the nature of and reasons for the Claimant's objection, as to the likely physical and psychological effects of the testing, and as to any limitations in the test results - for example as to whether they will entirely resolve a question between the parties or only lend weight to one party's case; or as to the significance in quantum terms of the issue which the testing addresses. It cannot be overlooked that an application of this sort will give rise to an exercise of a discretion which is particularly fact-sensitive. In the meantime, it remains to be seen whether the Court of Appeal will consider this interesting question.