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Case No: 9LV21806

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Civil Justice Centre, Manchester

Date: 20th November 2009

Before :

MR JUSTICE COULSON

Between :

DAVID JOHNSTON	**Proposed Claimant**
- and -	
THE CHIEF CONSTABLE OF MERSEYSIDE POLICE	**Proposed Defendant**

Mr N Stanage (instructed by **David Phillips and Partners**) for the **Proposed Claimant**
Mr G Wells (instructed by **Weightmans LLP**) for the **Proposed Defendant**

Hearing date: 13.11.09

Judgment

The Honourable Mr Justice Coulson:

I. INTRODUCTION

1. By an application issued on 24th March 2009, the proposed claimant seeks permission from the court, pursuant to section 139 of the Mental Health Act 1983 ("the Act"), to commence civil proceedings for damages arising out of allegations of assault and false imprisonment against the defendant. In addition, if permission is granted, the proposed claimant also seeks to dis-apply the time limit under section 11 of the Limitation Act 1980, the relevant incident having occurred on 8th January 2006, over three years before the application was made.

2. The proposed claimant has a history of mental health problems, including schizophrenia, dating back to 1996. On the 8th January 2006, he was at 481, Southport Road in Bootle, a property occupied by Tracey O'Keefe and her partner. As a result of his behaviour, and at his request, Ms O'Keefe called 999 for an ambulance although, in accordance with standard practice in these cases, the operator also alerted the police. When the ambulance and the police arrived, there was an incident in respect of which I have five witness statements, analysed in greater detail below. One of the police constables at the scene, PC Court, alleges that, throughout the incident, he acted in accordance with section 136 of the Act, because he had found the proposed claimant in a public place, apparently suffering from a mental disorder and in immediate need of care or control.

3. During the incident, CS gas was sprayed at the proposed claimant by PC Court, resulting in severe skin blistering and damage to the left hand side of his face, the left ear, neck and chest region. He was put into handcuffs, detained and taken to hospital. He was not subsequently charged with any criminal offence.

4. The issues between the parties are these:

a) What is the appropriate test for an application for permission under section 139 (2) of the Act?

b) Has the proposed claimant satisfied the appropriate test on all the material before the court?

c) What are the relevant principles governing the dis-application of the time limit pursuant to section 33 of the Limitation Act?

d) Should the relevant time limit be dis-applied in the present case?

I deal with those issues in turn below. I am very grateful to both counsel for their considerable assistance in dealing with these issues.

2. THE TEST UNDER SECTION 139 OF THE ACT

5. The relevant parts of the Act for present purposes are sections 136 and 139. They are in the following terms:

> "136 Mentally disordered persons found in public places.
>
> (1) If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may if he thinks it necessary to do so in the interests of that person or for the protection of other persons, remove that person to a place of safety within the meaning of section 135 above.
>
> (2) A person removed to a place of safety under this section may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved social worker and of making any necessary arrangements for his treatment or care…..
>
> 139. Protection for acts done in pursuance of this Act
>
> (1) No person shall be liable, whether on the ground of want of jurisdiction or any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, or in, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the authority having jurisdiction under Part VII of this Act, unless the act was done in bad faith or without reasonable care.
>
> (2) No civil proceedings should be brought against any person in any court in respect of any such act without the leave of the High Court…"

6. The leading authority on section 139 (2) remains the Court of Appeal decision in ***Winch v Jones*** [1986] 1 QB 296. In that case, the judge at first instance had refused leave on the ground that the applicant had not satisfied him that she had a prime facie case in negligence against the proposed defendants. The appeal was allowed on the basis that the judge had applied too stringent a test. Sir John Donaldson MR said at page 305:

> "As I see it, the section is intended to strike a balance between the legitimate interests of the applicant to be allowed, at his own risk as to costs, to seek the adjudication of the courts upon any claim which is not frivolous, vexatious or an abuse of process, and the equally legitimate interest of the respondent to such an application not to be subjected to the undoubted exceptional risk of being harassed by baseless claims, by those who have been treated under the Acts. In striking such a balance, the issue is not whether the applicant has established a prime facie case or even whether there is a serious issue to be tried, although that comes close to it. The issue is whether, on material immediately available to the court, which, of course, can include material furnished by the proposed defendant, the applicant's complaint appears to be such that it deserves the fuller investigation which will be possible if the intended applicant is allowed to proceed. "

7. In ***Seal v Chief Constable of South Wales Police*** [2007] UK HL 31; [2007] 1 WLR 1910, Lord Bingham observed, by reference to ***Winch v Jones***, that "the threshold for obtaining leave under section 139 (2) has been set at a very unexacting level… an applicant with an arguable case will be granted leave." ***Seal*** was concerned with a rather different point, which becomes relevant to the limitation issue in this case: there, the House of Lords decided, by a majority, that proceedings brought by a claimant without first obtaining the permission of the court under section 139 (2) of the Act, were a nullity, such that retrospective permission cannot be granted.

8. In the course of his clear submissions, Mr Wells took two points in support of his argument that, 25 years on, the test identified by Sir John Donaldson in ***Winch v Jones*** needs to be modified and is, in reality, a slightly higher and more stringent test than is there articulated. I deal below with the two ways in which that argument was put.

9. First, Mr Wells pointed to two cases involving similar allegations to those that arise in the present case, where the claims were struck out, either at the pleadings stage or at the conclusion of the claimant's evidence, because they could not be sustained on the facts. In the first, ***Menagh v Chief Constable of Merseyside*** [2003] EWHC 412 (QB), the claimant's claim for false imprisonment and malicious prosecution was struck out after close of pleadings. There was no direct evidence to support any of the scenarios on which the claimant's case was based, so that the claim hinged on inferences from primary facts. The judge ruled that there was "no cogent or positive evidence" that would allow the jury to draw the inferences sought. In the second, ***Khadine v The Commissioner of Police of the Metropolis*** [2005] EWCA Civ 196, the Court of Appeal upheld the judge's decision to withdraw from the jury a claim for unlawful conduct by the police, on the basis there was no evidence to support the claim. The claimant's claim in that case amounted to a series of challenges to what was said by the police witnesses and, as the judge made plain, "mere challenge does not raise a conflict of evidence".

10. By reference to these decisions, Mr Wells submitted that, despite what was said by Sir John Donaldson in ***Winch v Jones***, it was necessary for the court to examine carefully the evidence put forward in the statements by both the proposed claimant and the proposed defendant, and to deal with the application under section 139(2) of the Act on the basis that what matters is whether the proposed claimant has an arguable case, that is to say, one which has a real prospect of success in accordance with CPR Part 24.

11. Mr Wells' second submission in support of this part of his argument was to note that in ***Winch v Jones***, Parker LJ makes clear at page 306 of the report that, pre-CPR, it was "no part of the judge's duty on an application for leave to conduct a trial on affidavits. The purpose is to see whether the evidence before him adds up to the answer: if this allegation were tried out, there is no realistic possibility that the case might succeed. It is not, in my judgment, permissible to go further…" Mr Wells submits that whilst, in those days, on interlocutory hearings, the court assumed the correctness of the facts set out in the particulars of claim, that is no longer the position and that the court has to consider all the material available, to see whether the claim has a real prospect of success or, as Parker LJ presciently put it, to decide whether there was "a realistic possibility that the case might succeed".

12. It seems to me that, notwithstanding the changes wrought by the CPR, it would be wrong to modify in any significant way the test propounded by Sir John Donaldson MR in ***Winch v Jones*** (paragraph 6 above). I say that for two reasons. First, because it is a test which, at least in passing, Lord Bingham expressly approved in ***Seal.*** And secondly, because it seems to me that the balance to which Sir John Donaldson referred, and the necessity for the court to

focus on whether the proposed claim being put forward was frivolous, vexatious or an abuse of process, remains the correct and fair approach to applications of this kind.

13. That said, there is one modification to his formulation which, so it seems to me, is appropriate. CPR Part 24 has introduced a new emphasis on allowing claims to go to trial only where they have a real prospect of success, as defined in ***Swain v Hillman*** [2001] 1 All ER 91. It would, I think, be absurd for a court to conclude that a claim was not frivolous, vexatious or an abuse of process, and thus grant permission under section 139 (2) of the Act, in circumstances where, if the court had asked itself the CPR Part 24 question, it would have concluded that the proposed claim had no real prospect of success.

14. In my judgment, therefore, it is necessary for the court to ask, on an application under section 139 (2), whether or not the proposed claim has a real prospect of success. Moreover, it should not be forgotten that, as set out in the speech of Lord Hobhouse of Woodbrough in ***Three Rivers DC v Bank of England (No 3)*** [2001] 2 All ER 513, under Part 24, "the criterion which the judge has to apply… is not one of probability; it is absence of reality."

15. Accordingly, I conclude that a court faced with an application for permission under section 139 (2) of the Act must strive to apply the test set out by Sir John Donaldson MR in ***Winch v Jones*** (paragraph 6 above), with the proviso that the court should also consider whether, in all the circumstances, the proposed claim has a real prospect of success. For the reasons set out in Section 4 below, that proviso makes no difference to my conclusions on this application.

3. THE RELEVANT EVIDENCE

16. As I have said, there is a considerable amount of evidence in this case in the form of written statements. That is at least in part because the defendant conducted his own detailed investigation into what happened. I have carefully considered all of that evidence, and the following paragraphs should be read as comprising only the briefest summary of the relevant material.

17. The statement from the proposed claimant is dated 31.5.06. In it, he confirms that, on 8th January 2006, he needed and wanted medical help, but he did not want the police to be called. When he saw the police, he was confused and ran away. He said that he was chased by one officer (PC Court) and that, when he turned and faced the officer, he put his arms out in a submissive way to show that he was not a threat. He alleges that the officer was standing no more than two feet away from him and proceeded to spray CS gas on the left side of his face, neck and chest. The proposed claimant thought that the officer had his

finger on the nozzle for at least eight seconds. He refers to his skin burning and the extreme pain he suffered in consequence.

18. His evidence is supported, at least in some important respects, by Ms O'Keefe. It is right to point out, as Mr Wells did in the course of argument that, although Ms O'Keefe denies that the proposed claimant was being violent or that she had told the emergency services that he was being violent, the transcript of the 999 call makes plain that that is precisely what she did say. However, she says that, following their arrival, the aggression came from the police officers and that the proposed claimant was sprayed with CS gas without warning or justification. She gives detailed evidence as to much of the incident which is broadly consistent with that of the proposed claimant. She concludes that "the behaviour of the police officer who sprayed David with CS gas was unnecessary and disproportionate given David's demeanour and obvious vulnerability".

19. In addition to the factual evidence, there is forensic evidence on which the proposed claimant relies. In a sense, the most telling evidence can be found in the photographs of his injuries, which show the significant skin damage which he suffered as a result of the CS gas spray. On the face of it, it is not easy to see how his conduct, even as set out in the proposed defendant's own statements, could have justified such a result. In addition, there is a report from a consultant dermatologist, Doctor Holt, in which he concludes that the proposed claimant was over-exposed to CS spray and that, on the evidence "well over half a can" was discharged onto his face and clothing.

20. There is, however, considerable evidence the other way. There is the evidence of PC Court, who refers to his first contact with the proposed claimant outside the house, saying that he was shouting abuse and "roaring like an animal". He says that the proposed claimant continued to lunge towards him, shouting threats, and that it was only as a result of the continued aggression on the part of the proposed claimant that caused him to draw his CS gas spray. In that evidence, PC Court is largely supported by the two ambulance men at the scene, Mr Steven Gilsenan and Mr Matthew Hough. Both say that, contrary to the accounts given by the claimant and Ms O'Keefe, the proposed claimant was acting aggressively from the outset and would not respond to the officer's requests. Mr Gilsenan also confirms the "roaring" emanating from the proposed claimant.

21. There is a good deal of evidence, including forensic evidence, as to how long the canister was sprayed for. There is evidence from the force armourer, William Kneale, that an average CS gas canister when full would weigh 90/91 grams and that it discharges at a rate of 8 millilitres per second; and evidence from Police Sergeant Norbury that, following the incident, the can weighed 80 grams. Those figures suggest that the CS gas was only sprayed for just over one

second, which would appear to be contrary to the evidence of a number of the factual witnesses.

4. SHOULD PERMISSION BE GRANTED UNDER SECTION 139?

22. I have concluded that, on the material before me, the proposed claimant's claim is not frivolous, vexatious, or an abuse of process. In addition, I have also concluded that the claimant's claim, although far from straightforward, has a real prospect of success. The reasons for those conclusions are set out below.

23. First, it is important to note that the claimant's evidence is not based simply on challenging the police evidence (as was the case in ***Khadine***, noted above). It is a version of events which is supported, in important particulars, by the evidence of Ms O'Keefe. Whilst I accept that Ms O'Keefe's statement must be, at least in part, regarded as unreliable, because it is at odds with the content of the 999 call, it must also be noted that Ms O'Keefe has no reason not to tell the truth as far as she can recall it, particularly given that, until that night, she had never even met the proposed claimant.

24. Accordingly, this is not a case where the claimant's version of events stands alone, to be contradicted by everybody else present. There were five principal witnesses to this event. PC Court and the two ambulance men say one thing, and in important respects, the proposed claimant and Ms O'Keefe say another. In such circumstances, it cannot be said, before trial, that the claimant's claim on the facts has no real prospect of success.

25. Secondly, I regard the dispute about the amount of CS gas released to be something of an irrelevance. As noted above, it seems to me that the important thing about the gas attack was its effect on the claimant. He suffered considerable injuries as a result of the use of the CS gas spray. The nature, scope and extent of those injuries make it at least arguable that the force used was excessive. If it is indeed the case that only just over one second's worth of CS gas was sprayed, then it may be that, to cause those injuries, it was sprayed unacceptably close to the proposed claimant's face. Either way, it seems to me that the photographs demonstrate a result that nobody could have reasonably intended or expected, which is a further factor in the proposed claimant's favour on this application.

26. Thirdly, it seems to me that there is legitimate debate about whether PC Court even mentioned section 136 of the Act. The proposed claimant says in his statement that no mention of the Act was made by PC Court. And in his own statement, although PC Court says that he was acting in pursuance of the Act, he does *not* say (contrary to the assertion in the defendant's solicitor's

statement) that he gave the necessary or any warning to that effect to the proposed claimant at the scene.

27. For all these reasons, it seems to me that the proposed claimant's claim gets over the necessary threshold: it is not frivolous, vexatious or an abuse and has a real prospect of success. I accordingly grant the necessary permission under section 139 of the Act.

5. THE RELEVANT TEST UNDER THE LIMITATION ACT 1980

28. As noted above, the claimant's claim is for false imprisonment and assault. The parties are agreed that the claim for false imprisonment is the subject of the 6 year limitation period under section 2 of the Limitation Act 1980. Thus no limitation difficulty arises with that aspect of the claim.

29. There is, however, a difficulty in relation to that part of the claim dealing with the alleged assault. It had long been thought that such a claim would also fall within section 2 of the Limitation Act 1980 and thus be the subject of the non-extendable 6 year time limit. But in their speeches in ***A v Hoare*** [2008] 2 WLR 311, the House of Lords ruled that such claims were subject to section 11 (4) of the Limitation Act 1980, which provides for a 3 year limitation period from the date of accrual or the date of knowledge (if later). Unlike the 6 years under section 2, this period is capable of being dis-applied under section 33 (1) of the same Act, if the court considers it equitable to do so.

30. Accordingly, that part of this claim based on the alleged assault has a 3 year limitation period expiring on 7th January 2009. The application for permission was made on the 24th March 2009 and was thus 2 ½ months out of time. Accordingly, the proposed claimant needs a disallowance of the 2 ½ months delay pursuant to section 33 in order to bring the assault claim.

31. The relevant part of section 33 is sub-section (3) which provides as follows:

> "(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-
>
> (a) the length of, and the reasons for, the delay on the part of the [claimant];
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the [claimant] or the defendant is or is likely to be less

> cogent than if the action had been brought within the time allowed by section 11…;
>
> (c) the conduct of the defendant after the course of action arose, including the extent (if any) to which he responded to requests reasonably made by the [claimant] for information or inspection for the purpose of ascertaining facts which were or might be relevant to the [claimant]'s cause of action against the defendant;
>
> (d) the duration of any disability of the [claimant] arising after the date of the accrual of the cause of action;
>
> (e) the extent which the [claimant] acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the [claimant] to obtain medical, legal or other expert advice and the nature of any such advice he may have received. "

32. As to the proper operation of section 33, I was referred to my own judgment in ***A v Hoare*** [2008] EWHC 1573 (QB) (in which, following the House of Lords ruling, I concluded that, on the relevant material, the claimant was entitled to a lengthy extension of the limitation period), and the decision of the Court of Appeal in ***AB and Others v Nugent Care Society*** [2009] EWCA Civ 827. From these and other cases, I would summarise the applicable principles of law in the following brief terms:

(a) The mere fact that the limitation period would operate to defeat what would otherwise be a meritorious claim is not of itself a reason to dis-apply the time limit, because limitation provisions "are based on the belief that a time comes when for better or for worse the defendant should be effectively relieved from the risk of having to resist stale claims": see ***Dobbie v Medway Health Authority*** [1994] 2 WLR 1234.

(b) In the same way, the loss of a limitation defence is not of itself a reason to refuse the application; what matters is the extent to which the delay affects the defendant's ability to defend the claim: see ***Cain v Francis*** [2008] EWCA Civ 1451 and ***AB v Nugent***.

(c) The court has a wide and unfretted discretion under section 33 and "must be guided by what appears to it to be equitable, which I take to mean no more (but also no less) than fair"; see Lord Bingham in ***Horton v Sadler*** [2006] UK HL27; [2007] 1 AC 307;

(d) The burden of showing that it would be equitable to dis-apply the limitation period rests with the claimant (see ***Thompson v Brown*** [1981] 1 WLR 744) and that to do so is "an exceptional indulgence to a claimant to be granted only where equity between the parties demands it"; see Auld LJ in ***KR and Others v Bryn Allyn Community (Holdings) Limited*** [2003] QB 1441. The correctness of the general approach of Auld LJ in ***Bryn Allyn*** was recently confirmed in ***AB v Nugent***.

I deal with other relevant authorities below, when I go through the relevant sub-sections of 33 (3) of the Limitation Act 1980.

6. SHOULD THE LIMITATION PERIOD BE SUPPLIED FOR THE 2 ½ MONTHS NECESSARY?

33. I have concluded that, on balance I should dis-apply the relevant limitation period pursuant to section 33 (1) of the Limitation Act 1980. My reasons for doing so are set out below.

a) The Length of and the Reasons for the Delay

34. The longer the delay then the more likely, and the greater, the prejudice to the defendant: see ***Bryn Allyn***. In the present case, the delay was 'only' 2 ½ months. Compared to the delays noted in the cases set out above, that is a relatively short period.

35. Moreover, when I consider the reasons for that delay, I find it difficult to conclude that the claimant has been anything other than diligent. He has not caused any significant delay. As set out in paragraphs 36-38 below, the difficulties which have arisen are rooted in a misunderstanding on the part of his legal advisers. In all the circumstances, particularly given the proposed claimant's mental health problems, it does not seem to me appropriate to make the proposed claimant liable for their default by refusing this application.

36. On 21st October 2008, comfortably within the limitation period, the claimant served a claim form and detailed particulars of claim. Those documents are in almost identical terms to the draft pleadings which are the subject of the present application. Of course, what the claimant failed to do was issue an application for permission at the same time. But, although the original claim ignored section

139(2) of the Act, that may not, by itself, have been unreasonable, given the proposed claimant's statement that the officer made no mention of the Act at the time, or said that he was acting in accordance with it. In October 2008, it may not have been apparent to the claimant or his advisors that the Act (and therefore the need for permission) was even relevant.

37. But when the defence was served on 12.12.08, the point was taken that the proceedings were a nullity because there had been no section 139(2) application. Having been alerted to the problem, the proposed claimant's solicitors then issued, on 23rd December 2008 (also within the limitation period) a claim for retrospective leave to proceed. Such an application was misconceived, because of the rule in ***Seal*** that the original proceedings were a nullity. Eventually, those original proceedings were discontinued by agreement and these proceedings, beginning with this application, were commenced on 24th March. That is how the claimant came to issue these proceedings out of time.

38. Accordingly, the only reason for the delay in the present case was that the proposed claimant's legal team either got the procedure wrong originally, by starting without an application for permission or, more likely perhaps, had no real reason to doubt the procedure adopted until mid-December (3 weeks before the limitation period expired) when the point was taken by the defendant. They then erred by seeking retrospective permission for the original proceedings on 23rd December, instead of issuing a new claim and an application for permission. Thus this is not a case where the claimant himself is responsible for the limitation difficulties.

b) Cogency of Evidence

39. Because the delay was only 2½ months, and because there are contemporaneous statements from a number of witnesses, it cannot be said that the evidence at trial is likely to be less cogent on either side because of the 2½ month delay. Entirely properly, Mr Wells conceded that point at the outset. Again, therefore, unlike many of these cases, the relevant delay cannot be said to have caused any prejudice at all.

c) Conduct of the Proposed Defendant

40. There was no conduct on the part of the defendant which was in any way responsible for the delay. Indeed the defendant has dealt with this matter entirely appropriately throughout, and made available the findings of his own (prompt) internal enquiry.

d) Duration of Disability

41. The proposed claimant has mental health problems. Those problems have existed both before and after the accrual of his proposed cause of action. There is no evidence that this disability has any specific significance to this application.

e) Conduct of the Proposed Claimant

42. It seems to me that the claimant acted promptly and reasonably throughout. As discussed above, the claim was brought originally in October 2008, within the limitation period (which had itself been reduced from 6 years to 3 as a result of the House of Lords decision, earlier that year, in ***A v Hoare***). Certainly, the claimant did not sit on his hands. As indicated, the problem arose because of the course of action adopted by his legal advisors.

f) Expert Evidence

43. The report from Mr Holt is dated 16th June 2008. It was therefore obtained well within time.

Summary

44. This is the situation where the relevant application for permission was made 2½ months out of time. No prejudice to the defendant flows from that comparatively short delay, and it has had no effect on the cogency of the evidence on either side. Furthermore, the claimant's position in equity is strong, given that the original proceedings were commenced within the limitation period; it was not as if this was a stale claim which had been forgotten by all parties. I am also mindful of the fact that, if I did not extend time in relation to the assault claim, that might lead to a potential claim against the claimant's legal team for adopting the wrong procedure, and therefore create satellite litigation. That would be an unattractive course.

45. In all the circumstances, I have concluded that it is equitable and proportionate to dis-apply the time limit in section 11. Or, to put it another way, it seems to me that, although "there may be some unfairness to the defendant due to the delay in issue, that delay has arisen for so excusable a reason that, looking at the matter in the round, on balance, it is fair and just that the action should proceed": see the words of Smith LJ in ***Cain v Francis***.

46. I should add that, even if I had found the limitation issue to be more finely balanced than I have, I would have been significantly influenced by the knowledge that the false imprisonment clam - which turns on precisely the same facts as the assault claim - is not affected by any limitation difficulties. Again, it seems to me that fairness would require all matters to be canvassed at the same time, and in one hearing. It would be woefully artificial to conclude that the

proposed claimant could rely on these facts and matters for his false imprisonment claim but was debarred from raising a damages claim for assault arising out of precisely the same evidential material.

47. For all those reasons I have concluded that I should exercise my discretion under section 33 of the Limitation Act 1980 in favour of the proposed claimant. Accordingly, the proposed claimant has permission to bring these proceedings, and the relevant limitation period is dis-applied.