IN THE COUNTY COURT AT LIVERPOOL F95YJ511

BETWEEN

MARTINE ROBINSON

And

LIVERPOOL UNIVERSITY HOSPITAL NHS FOUNDATION TRUST

And

DR CHRIS MERCIER

JUDGMENT

THIRD PARTY COSTS ORDER APPLICATION

BACKGROUND

1. This was a claim for dental negligence brought by Ms. Robinson, against the Defendant hospital trust, for treatment that she received at Aintree Hospital. At the conclusion of the evidence, Mr. Gray on behalf of the Claimant withdrew her claim. Mr. Maddison for the Defendant trust sought 21 days to consider whether a third-party costs order should be pursued against Dr. Mercier in light of the evidence he had provided. I granted that application. Unfortunately, Dr. Mercier had blanked his screen at this stage in the proceedings and unbeknownst to the court was not listening to this part of the proceedings having left to pick his son up from school. It is not clear to me how much he heard. In the same vein, his screen was blanked throughout much of the first day of the proceedings. His second witness statement suggests that he was similarly not present for some of the hearing prior to giving evidence.
2. For completeness I intend to set out the position between the parties at those proceedings prior to the withdrawal of the Claimant after the evidence of Dr. Mercier.

3. In September 2015 Ms. Robinson attended at her general dental practitioner whereupon significant decay to a number of teeth was identified. Her GDP referred her to Aintree Hospital for extraction of the LL7, LR7 and UL7 teeth. It is the latter of those teeth that caused the dispute between the parties. Having been referred for those three teeth, Ms. Robinson did not attend for extraction. In December 2015 one of her UL molars (UL8) was removed due to pain, as an emergency procedure under local anaesthetic. In making a re-referral her dentist noted that her UL7 had been removed (presumably in December) and therefore she was referred on this second occasion solely for the removal of the two lower molars. It is clear that a number of practitioners have referred to the removed tooth as UL7 when in fact it was UL8. Although there was a wealth of discussion as to which tooth was in fact originally referred, it was in my judgment clear that the tooth that was originally referred was probably the same tooth as was extracted in December 2015 – UL8.
4. An attempt was made to remove these two lower teeth in August 2016 but because the procedure listed utilised local anaesthetic only, Ms. Robinson became so distressed that the dentist felt it inappropriate to continue, and referred her on for the procedure under general anaesthetic. It is not disputed that Dr. Sweet had intended to remove only the two lower teeth in August and that it was his intention for only the two lower teeth to be extracted on the next occasion.
5. On the day of the operation – 8th November 2016 – it was agreed that the oral surgeon erroneously had before him the referral of September 2015 rather than August 2016. It was further agreed that no note of an examination of Ms. Robinson was made, prior to her consent being taken. It was agreed that this is a breach of duty. It was not agreed that there was no examination by Mr. Bajwa – the oral and maxillofacial surgeon - on the 8th November 2016 nor was it agreed that any examination was inadequate. This is a central issue in the application before me. Not having the second referral before him, it is agreed that Mr. Bajwa was also not privy to the pre-op consent signed in August 2016 for the removal of the lower molars. In taking consent from Ms. Robinson, Mr. Bajwa then followed the referral in his possession and took consent for the removal of three teeth – the bottom two molars, and UL7.

6. Upon operating, Mr. Bajwa removed only the lower molars, opining that he felt that the molar remaining in the mouth - UL7 - was restorable and the description of it in his paperwork did not match the appearance in situ. It appears that he identified that the x-ray before him was out of date and made the decision to leave UL7 in place. Dr. Mercier for the Claimant argued that no reasonable dental surgeon could have concluded that the UL7 was restorable as at that date (although he accepted in oral evidence that it did not match the written description given). Mr. Webster for the Defendant disagreed as to restorability. He argued that in fact the tooth would have been restorable as at the date of surgery and it would have been negligent to have removed it. Neither expert having met Ms. Robinson prior to 2018, the dispute therefore came down to what could be determined from the image taken in September 2015 and what I made of the evidence of Mr. Bajwa.
7. The Claimant alleged various acts of negligence or breaches of duty on behalf of the Defendant Trust particularised at page 3-6 of the original bundle. The particulars include that the Trust was negligent in failing to remove the Upper left second molar, by which Mr. Gray refers to the UL7. What was not pleaded was a breach of duty in failing to carry out an examination at the hospital on the day of the extraction, prior to GA.

THESE PROCEEDINGS

8. The Defendant seeks a TPCO in the sum of £52,056.57, or such other sum as is deemed appropriate by the Court, by reference to the Costs incurred by the Defendant from the outset of proceedings, or alternatively from any specific stage in the proceedings, and which would have been avoided but for the conduct of Dr. Mercier. At the trial, taking place on the 7th And 8th December 2020, there is no dispute that the Claimant's case in respect of Breach of Duty and Causation rested solely on the expert evidence of Dr. Mercier.
9. On behalf of the Defendant trust it is submitted that Dr. Mercier:
    a) should not have been giving evidence in this case, at all; and,
    b) had an ongoing, and continuing, duty to the Court to ensure that he was the appropriate expert to assist the Court which he patently failed to abide by until he gave his oral evidence at Trial.

10. On behalf of Dr. Mercier it is argued that his expertise was well suited to this case, and that he has at all times acted properly and consistently with his duty.

11. In determining this application I have had sight of the application bundle, a second witness statement of Dr. Mercier dated 8th July 2021, the transcript of day one of the trial, submissions on behalf of the Defendant dated 10th May 2021 and 6th August 2021, and composite submissions on behalf of Dr. Mercier, dated 5th August 2021. I have also had sight of the original trial bundle, the original submissions on behalf of Mr. Gray for the Claimant, and a bundle of authorities (including a 223-page bundle, ***Montgomery v Lanarkshire*** [2015] UKSC 11 and ***Travelers v XYZ*** [2019] UKSC 48).

LAW

12. Part 35.3(1) and (2) of the CPR 1998 makes it plain that "*It is the duty of experts to help the Court on matters within their expertise*" and that "*this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.*"

13. The Practice Direction to Part 35 reinforces this statement. Part 34.14 CPR enshrines the right of the expert to ask the Court for Directions for the purpose of assisting them in carrying out their functions.

14. By virtue of 46.2 and 46.8 CPR 1998 and Section 51 of the Senior Courts Act 1981, the Court may make a Costs Order in favour of, or against, a non-party to proceedings, and against legal representatives. This includes Counsel, Solicitor, and Medical Experts (See ***Philips v Symes (No 2) [2004] EWHC 2330 (Ch)*** and the notes in **The White Book at para 35.3.6 and at para 46.2.2**).

15. In ***Philips (paragraph 95)***, Peter Smith J. stated:

> "It seems to me that in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD 35, it would be quite wrong of the Court to remove from itself the power to make a costs order in appropriate against an Expert who, by his own evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the Court."

16. It is right that in the case of ***Phillips (No 2)***, the Court referred to a "*flagrant reckless disregard*" of the duties of experts to the Court (***See para 33 to 36; para 95***). Such an Application is "*exceptional.*" However, the ultimate question

to be addressed is whether, in all the circumstances, it is just to make an order, following the decisions of ***Symphony Group Plc v Hodgson [1994] QB179*** and ***Dymocks Franchise Systems (NSW) v Todd (Costs) 2004 UKPC 39***.

17. The case of ***Ridehalgh v Horsefield [1994] Ch 205, CA***, determined that when a Wasted Costs Order is contemplated, a 3-stage test is to be applied:
    i. Had the [third-party] of whom complaint was made acted improperly, unreasonably, or negligently?;
    ii. If so, did such conduct cause the applicant to incur unnecessary costs?;
    iii. If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?
18. It is right to acknowledge that the language of the case of ***Ridehalgh*** is that of impropriety, unreasonableness, and/or negligence. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a [third party's] duty to ascertain with accuracy may suffice (***Myers v Elman [1940] AC 282 at 319***).
19. When making an Order under section 51(6), pursuant to section 51(7A), the Court "must inform such of the following as it considers appropriate - (a) an approved regulator". Whilst "an approved regulator" is defined with reference to section 20 of the Legal Services Act 2007 in relation to legal activities, given that the jurisdiction under section 51 has been interpreted to extend not only to a legal representative, but to include experts appointed with permission of the Court, the Court may consider itself bound to refer the medico-legal expert against whom a wasted costs Order is made to their relevant regulatory body (in this case, GDC). I add this to highlight the serious nature of the consequences that would follow to a professional against whom a wasted costs Order is made.
20. In any event, it is right to observe that the test for making a Costs Order in these circumstances is set very high. Hence, the use of the word "*exceptional*" in the making of such a Wasted Costs Order.
21. In the case of ***Thimmaya v (1) Lancashire NHS Foundation Trust (2) Mr Firas Jamil***, 30th January 2020, Manchester County Court, HHJ Evans referred to the "*significant failings*" on the part of an expert witness (***para 13***). She stated that he owed "*important and significant duties to the Court. He failed*

comprehensively in those duties from November 2017 onwards. As a result, a public body has incurred significant unnecessary costs" (***para 19***). HHJ Evans stated that "*it is right that experts should all understand the importance of their duties to the Court and the potential consequences if they fail in them*" (***para 19***).

22. I do accept the proposition that the threshold set out in Phillips is higher for experts than it is for legal advisors because the experts are in a different position to the legal advisors "who have the ability to take tactical decisions in furtherance of their objective" whereas the experts are "not in a position to determine how the Claimants or the Defendant advanced their respective case" (***Walker and another v TUI UK Ltd [2021]*** 1 WLUK 398, para 60-61).
23. The Court has to be satisfied that the conduct of the person against whom the costs order is to be made is causative of the costs which have been incurred. If the costs would have been incurred in any event, then a s51 order must not be made.
24. I remind myself that the Defendant Trust brings this application and therefore it is for the Trust to prove its case on the balance of probabilities.

PARTICULAR ALLEGATIONS

25. The Trust makes the fundamental assertion that it should have been obvious to Dr. Mercier at the outset, and at various stages throughout the proceedings, that he was not the appropriate expert to opine on the management, and treatment, afforded to the Claimant on 8th November 2016. It is submitted that it would, and should, have been obvious to Dr. Mercier that as a General Dental Practitioner, he should not have been expressing an expert opinion on the standard of care afforded to the Claimant by an oral and Maxillofacial Surgeon. In particular the Trust rely on the following concessions made by Dr. Mercier:

(i) that he had had no experience of surgical removal of teeth under General Anaesthetic since 2000 **[79]**;

(ii) that he had no experience of consenting patients for the extraction of a tooth/teeth under General Anaesthetic **[80]**; and,

(iii) that he conceded that Mr Keith Webster, as Maxillofacial Surgeon working in a Hospital, was "*better placed*" to give expert evidence in the case **[81]**.

26. It is right that at the substantive trial, Dr. Mercier said the following:

Q. Can you speak to the standards attributable to an oral/maxillofacial surgeon?
A. I believe so.
Q. You have never actually occupied that position having never actually been an oral and maxillofacial surgeon, have you, no?
A. No, that's correct.
Q. Since 2000 you have never had a patient on a table under general anaesthetic?
A. Correct.
Q. Would you say you are as well placed as Mr Webster to speak to the standards to be applied to the evidence of an oral and maxillofacial surgeon?
A. No, Mr Webster is an oral and maxillofacial surgeon so he is going to have more experience in a hospital setting than I have.
Q. My question was are you as well placed. Would you accept you are not as well placed to speak to----
A. Yes.

27. This extract was redolent of the evidence given by Dr. Mercier throughout. The answer "Mr. Webster is an oral and maxillofacial surgeon, so he is going to have more experience in a hospital setting than I have" is not a complete answer reflecting the reality. He's not simply going to have more experience in a hospital setting, he is going to have a lot of experience in a number of areas that Dr. Mercier just doesn't have. Dr. Mercier does not have any experience of managing a list in a hospital setting, of the facilities to be expected, of the competing pressures, and of the practice of the general body of such professionals. At the outset of the extract he has said that he believes that he can speak to the standards attributable to an oral/maxillofacial surgeon.

28. I remind myself of the **Bolam** test that "A doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique." (**Bolam v Friern Hospital Management Committee [1956]**). That is the test that Dr.

Mercier is purporting to apply when he gives evidence before the Court in relation to a claim of dental negligence. It is right that at no point in any of his written or oral evidence did he himself refer to that test.

DR. MERCIER'S EVIDENCE

29. Dr. Mercier was instructed on 15th March 2018 to prepare reports on breach of duty and causation, and condition and prognosis (Page 173). On the 16th May 2018 Dr. Mercier produced a report for his instructing solicitor Liver Law. That report provides a full recitation of Ms. Robinson's report and the dental records. He also reports that having examined Ms. Robinson the tooth in question has – as at the 16th May 2018 – a very poor prognosis. In the report Dr. Mercier notes that Ms. Robinson was referred to the hospital for the removal of the two lower 2nd molars only, and not the upper molar. He records the consent forms signed following examination on 31st August 2016. He then records the consent form signed on the 8th November 2016 – at which date we know that Mr. Bajwa had incomplete information prior to that form being signed. What he at no point refers to in that report is that there was a failure to examine on the 8th November 2016. In his submissions before me today he – through Miss. Whittaker - opines that it was always the basis of his allegation, that the failure to undertake a proper review of the information available and failure to properly examine was the breach of duty which caused damage. That simply is not true. In his initial report, he talked only of confusion relating to teeth and never mentioned a failure to examine or review.
30. He then went on to discuss whether the tooth in question is presently restorable, but makes no observations as to why he says that would have been the position on the 8th November 2016 i.e. why he has concluded that there has been no change in presentation over the intervening 18 months, or frankly why he considers that the tooth would have needed restoring as at 8th November 2016, given that the documentation indicates that she was not referred for that tooth to be extracted but only for the lower two. He further makes no observations as to why he considers an oral and maxillofacial surgeon would have known that.
31. On the 3rd October 2019 Dr. Mercier added to his report a section entitled "Breach of Duty". It is reasonable to assume given the heading that he was

aware when drafting those paragraphs that they were for use in legal proceedings. In that document he refers to the failure to adequately assess Ms. Robinson on the 8th November 2016. He thereafter notes the inconsistency between all of the documentation, but for some unfathomable reason concludes that Mr. Bajwa should have accepted the unsupportable consent form of the 8th November 2016 which he is said to have created without proper review or examination, over the other documentation prepared properly previously. The report itself reaches wholly unsustainable conclusions, however, I acknowledge that that is something upon which a competent Barrister ought to have sought further clarification. I unfortunately cannot know what discussions followed – if any – between Dr. Mercier and his instructing solicitor. I note that Dr. Mercier's statements are silent as to what conversations occurred with the legal team.

32. Dr. Mercier has submitted two witness statements in relation to this application. The first, dated 29th April 2021, details at length why Dr. Mercier felt the tooth in question was restorable. It makes no reference to the failure to examine on the 8th November 2016. Indeed in that witness statement, Dr. Mercier makes reference to a letter written by him (CM3) on 2nd July 2020 in which he says "If St Helens and Knowsley Teaching Hospital are now trying to claim that this tooth was actually removed on 18th July 2016, how would it then be possible that there is a consent form four months later indicating that the tooth required removal?" The answer to that is because that consent form was created in breach, which he tells me was the central point of his evidence. If it was I cannot see why he would not have said so in July 2020.

33. Dr. Mercier tells me that he saw the OPG radiograph dated September 2015 for the first time on the day before the joint meeting of the experts in September 2020. That radiograph demonstrated clearly that there were two UL molars present in September 2015 which means that between then and November 2016 one must have been removed. Dr. Mercier in no way goes back to reconsider his conclusions with that information, but sticks intransigently to his position. He goes on to discuss in his statement whether or not either of those teeth were restorable in September 2015. Perhaps unsurprisingly he concludes not, but what he does not do is address his mind in any way to the standards to be applied to an oral and maxillofacial surgeon.

He talks about his discussions with Mr. Webster and appears to agree that the UL8 was the tooth that was referred for extraction, and that the UL8 had in fact been removed in December 2015. He then does not offer an explanation as to why he feels an oral or maxillofacial surgeon who had properly examined and consented Ms. Robinson on the 8th November 2016, would have departed from her treatment plan to remove a tooth that had never been referred for removal – irrespective of whether it should have been or not.

34. Dr. Mercier's witness statement it seems to me entirely misses the point. At paragraph 38 he talks about the questions posed of him during his evidence. He says that "As this would have been one course of action that would have been available to the treating surgeon, I answered "Yes"." He therefore accepts that he agreed that a proper course of action would have been to send the Claimant back to the GDP about the upper tooth, and remove the two lower, and further states that that answer was correct when given. If that is right then the Bolam test is not satisfied and there is no causal link to any damage. I do not know whether Dr. Mercier's difficulty is a sheer unwillingness to consider other propositions or a fundamental lack of understanding of the legal test. It is notable that in his letter of 2nd July 2020 Dr. Mercier confirms that his opinion is that the remaining molar "was identified as requiring extraction and that the extraction of this tooth was not carried out as consented for and planned". His case now appears to be that it wasn't identified but it should have been, and by Mr. Bajwa on the 8th November 2016 notwithstanding no other dental practitioner having identified it as requiring extraction previously. It is in my view disingenuous to suggest that his opinion has remained the same throughout. His opinion fluctuates to whatever he feels will win the case.

35. Dr. Mercier tells me in his second witness statement that he envisaged that with an adequate examination, Mr. Bajwa would have had all the information he needed about Miss Robinson, including the state of the bone associated with that tooth and the fact that Miss Robinson was a dental phobic. He goes on to state that irrespective of whether there was a mistake in referral, she should have been given the choice of removal at hospital. He therein offers no analysis of what equipment is available at the hospital for such an examination pre-operation, or what degree of documentation would generally

be available in such a setting. As a general dental practitioner, I cannot see how he could know such things, certainly not to such a degree to be able to comment on what a reasonable body of such professionals should expect. Had Mr. Bajwa realised that he had incomplete dental records prior to GA, it cannot be right that he should have simply proceeded knowing that he had incomplete records. He did not have the letter suggesting that she had a dental phobia. It cannot be right that he should have known information that was not before him. Whilst it is acceptable for Dr. Mercier to opine that he should have had this information. He did not, and it cannot be right to suggest a reasonable oral or maxillofacial surgeon appreciating that he did not have any of this information, should have proceeded to remove teeth on the sole basis of his own discussions with Ms. Robinson and a brief observation of her teeth. Dr. Mercier's evidence is simply absurd and his inability to recognize that is extremely concerning. Whilst he is at liberty to say that Mr. Bajwa should have had access to certain information, once he has concluded that he didn't, to then conclude that he ought to have proceeded to remove teeth is simply unsustainable. It is also fair to say that he should have realized that his documentation was inaccurate prior to GA, but again, it is unreasonable to go on to say that had he realized that he should have gone on to remove. Dr. Mercier implies in his witness statements that that was not his evidence and he was merely intending to convey that Mr. Bajwa should never have been in that position in the first place. That is in no way what he said. It is in my judgment inarguable to suggest that he did not comment on what Mr. Bajwa should have done having found himself in the position he did after GA.

36. At trial, Mr. Bajwa gave the following evidence about what he did prior to consent being sought:

> Page 38:
> Q. Okay, so you are not meeting her to perform an examination yourself?
> A. I'm meeting her to confirm that the teeth that require extraction are there and that she is – that there is agreement amongst all the documentation that I have, and the patient, that we are doing three teeth and that is the plan. So I just need to be satisfied in my mind that what I am about to do to that patient under anaesthetic is the correct thing for that patient.
> MR GRAY: When you are conferring with the claimant, or indeed any patient, effectively having looked at the papers – "I

think I'm here to take three teeth out, what do you think' happening?"
A. Yes.
Q. Is it the type of thing that would normally happen, that she would point out to you those teeth?
A. Yes.
RECORDER HUDSON: Sorry, just so that I am clear – "it is the type of thing that would happen" – is it the type of thing that would happen upon your request or is it just the kind of thing that patients do when they're ---
A. A bit of both really because again this is – I'm there as the surgeon to try and help the patient have the treatment that they want. I'm not there to try and catch them out in any way, so if the patient volunteers that information then I obviously accept that information as being in good faith.
Q. But what I am trying to understand is might you say to them, "Just point to the teeth"?
A. Yes.
MR GRAY: So what the claimant told us this morning then rings true with your experience when you see patients. She says, "Whoever asked, I said to him 'This one, that one and that one'.."?
A. Yes.
Q. "He said 'okay' and wrote it down on a consent form"?
A. Yes.

37. Dr. Mercier tells me in his second witness statement that "Mr. Webster and I agreed that Mr. Bajwa's actions fell below what would be expected by a reasonable body of practitioners" prior to the consent being completed. In his report Mr. Webster acknowledges that the records faxed from St Helen's to Aintree did not contain the updated consent form of updated letter from Mr. Sweet. That is the breach as far as Mr. Webster was concerned. Both experts agreed in the joint statement that a reasonable body of practitioners would carry out and record the results of any examination prior to the consent being completed, and that such a record was not made on 8th November 2016. At no point has Mr. Webster commented negatively on the actions of Mr. Bajwa beyond the lack of note in relation to his examination. At paragraph 22 of the witness statement, the implication is that Dr. Mercier and Mr. Webster agreed that Mr. Bajwa had made a mistake in relation to what he had said he had done in his oral evidence. They of course cannot have agreed on that, because as far as I am aware they were not in communication during the trial.

CONCLUSION

38. Dr. Mercier, and his advocate Ms. Whittaker have referred on a number of occasions to the fact that no other party has ever questioned his expertise during these proceedings. With respect I cannot see why it should be the duty of another party to police Dr. Mercier's duty to the court. CPR PD 35, para 2 clearly states:

> 2.4 Experts should make it clear—
> (a) when a question or issue falls outside their expertise; and
> (b) when they are not able to reach a definite opinion, for example because they have insufficient information.

39. Any examination made in a general dental surgery, by a dentist with the proper seating, lighting and equipment is different to the examination to be made by an oral surgeon in an office. It would be much easier to have an in-depth examination of a patient in the former than the latter. It is right that a more thorough examination would have enabled Mr. Bajwa to identify that the radiograph did not match the presentation, but it is not necessarily right that a reasonable body of oral and maxillofacial surgeons would have conducted the examination in a different manner to Mr. Bajwa. Contrary to Dr. Mercier's implied assertions at paragraph 22 of his second witness statement, Mr. Webster and he did not jointly agree anything following the evidence given by Mr. Bajwa from the witness box. Mr. Webster merely opined in his reports that the proper documentation should have been available to Mr. Bajwa, and that Mr. Bajwa should have documented what examination he conducted. Not that the examination itself was outwith the reasonable body of practitioners. Those two concessions are indisputable but they do not have the resulting causation of injury that Dr. Mercier then contends for. Dr. Mercier has gone on in his written and oral evidence to opine that had a more fulsome examination taken place prior to GA, the patient would have been told that her tooth was unrestorable and given the option of removal. He could have no way of knowing whether Mr. Bajwa's examination was within the practice of a reasonable body of oral surgeons, or what such a surgeon would have done following such an examination because he does not have sufficient experience of that role. It may be that it is unreasonable for an oral surgeon not to take a close look into the patient's mouth such that they could have identified that the radiograph was inaccurate, but I simply cannot see how Dr. Mercier could know that.

40. Thereafter, Dr. Mercier tells me that any reasonable dental practitioner would have recognised that the tooth was not restorable upon examination. That is obviously not agreed and I draw no conclusions as to that issue. I note that Miss. Gupta, Mr. Sweet and Dr. Farooq (previous oral / dental surgeons) - presumably following thorough examination - concluded that it did not require removal. The reality is that Dr. Mercier is simply not in a position to tell me that a reasonable body of oral surgeons, with the facilities available within the hospital setting, would have been able to state whether this tooth was restorable upon examination prior to GA. He cannot opine on the ability of such a surgeon to test mobility, to look directly at the tooth and to have expertise in the analysis of the radiograph or the available methods of restoration. It is simply not his field.
41. Dr. Mercier was instructed to identify if any errors had been made (page 194). When he received those instructions it must have been obvious to him that he was not able to comment on whether a person exercising a wholly different role had made errors such that they could be deemed negligent.
42. Dealing briefly with the specific allegations levelled at Dr. Mercier by the trust, in addition to the nature of his qualifications and experience the Trust draws my attention to specific failings in his evidence:

i) he based his opinion on an x-ray, dated 24th September 2015 ("*one of the central documents in the case*"), that he had not seen **[72; 96]** and on dental phobia that Mr Bajwa did not know about. Dr Mercier admitted that whilst he knew about this x-ray, he did not, in fact, receive this x-ray until shortly before the Joint Statement on 30th September 2020. Mr Bajwa confirmed in his evidence that he had seen that x-ray **[72]**;

ii) he opined that Mr Bajwa was guilty of clinical negligence when he did not have the x-ray, dated 15th September 2015, which was the "*key document*," available to him. Dr Mercier did not even request sight of that x-ray **[97]**;

iii) he based his opinion on incomplete records **[102]**;

iv) having considered the x-ray and a physical examination in theatre, he accepted that the tooth was potentially restorable **[108]**;

v) he is not an Oral/Maxillofacial Surgeon. As such, it was conceded that Mr Webster was better placed to comment on the allegations of negligence than he was **[81]**.

vi) he expressed an opinion on care afforded by "*a reasonable body of oral surgeons*" **[74; 75; 77]**. Dr Mercier is a General Dental Practitioner **[79]** and yet he

stated that he could speak to the standards attributable to an Oral/Maxillofacial Surgeon **[81]**;

vii) he does not have any experience of surgical removal of teeth under General Anaesthetic since serving as a dentist for the armed forces in 2000 **[79]**;

viii) the only extractions he has carried out since 2000 have been under local anaesthetic or conscious sedation **[80]**;

ix) his only experience of working on a surgical list in hospital is limited to observing procedures at Arrowe Park Hospital **[80]**;

x) he does not have any experience of consenting patients for surgical extraction of a tooth/teeth under General Anaesthetic **[80]**;

xi) he has never consented a patient for extraction under a general anaesthetic **[80]**;

xii) he asserted that 4 teeth should have been listed for extraction based on the x-ray, dated 25th September 2015, when only 3 teeth were identified in the mouth **[94]**;

xiii) in his second report, dated October 2019, he had copied over his clinical examination findings from his assessment of the Claimant in May 2018, without updating his findings;

xiv) he failed to consider the evidence in the case properly, or at all, until the Trial. Having performed that exercise at Trial, Dr Mercier conceded that Mr Bajwa, was not negligent in deciding not to remove the tooth present in the upper left quadrant on 8 November 2016 **[114]**;

43. I am bound to say that I cannot see how Dr. Mercier can possibly have opined as to the state that this tooth was in as at 8th November 2016 based upon the information that he had when he wrote his reports. His evidence has included references to bone loss and caries that he cannot possibly have been aware of prior to receiving the September 2015 radiograph. To allege negligence against another practitioner based on a current examination some 18 months after the fact is demonstrative of a gross lack of understanding of the seriousness of his role. It demonstrates a flagrant reckless disregard of his duty to the court.

44. It is right that he acknowledged in his evidence that on the information available to Mr. Bajwa in surgery he would have been entitled to conclude that the tooth was restorable. It is unclear to me why if he would be entitled to conclude that it was restorable with that information, he would not have been entitled to conclude that it was restorable after an additional chat with Ms. Robinson, particularly if she did not complain of pain.

45. It is not clear to me that Dr. Mercier has made any effort to understand the issues in this case. Dr. Mercier repeatedly commented in his witness

statements that he did not attempt to express a view on the surgical technique applied. To make such references appears to imply that there is no difference between an oral surgeon and GDP beyond the moment in theatre. There is a wealth of difference in terms of role, experience and facilities. At no point does Dr. Mercier make any attempt to analyse those issues. Nothing about his CV would indicate that he has any understanding of the role, experience or facilities of such a practitioner and to imply that the only difference is the moment in surgery is to be obtuse. It is perhaps right to observe that Dr. Mercier continuously refers to the process of consent, when he appears in fact to be describing the process of advice and treatment recommendation. The two are very different, and whilst oral surgeons will routinely conduct the former, they are significantly less likely than a GDP to engage in the latter.

46. In reaching a conclusion in this matter I have been at pains to distinguish between the way Dr. Mercier gave his evidence to the court and the specific assertions made by the Defendant trust. It is important that Dr. Mercier be given an opportunity to respond to allegations made. I formed the view during trial that Dr. Mercier was not making any efforts to assist the court, but instead wilfully sticking to his case theory irrespective of the questions asked or the evidence given. His evidence was grossly unhelpful and wholly unreliable in my judgement. I will not at this stage detail examples of the same, because it is not relevant to this application. The application before me is predicated on the specific assertion that it should have been obvious to Dr. Mercier at the outset, and at various stages throughout the proceedings, that he was not the appropriate expert to opine on the management, and treatment afforded to the Claimant on 8th November 2016. In the circumstances of this application therefore I confine myself to the nature of Dr. Mercier's expertise.

47. Dr. Mercier has worked as a GDP and did GA extractions in 1997-2000 while in the armed forces. He has done no general anaesthetic extractions since then, and has not worked in a hospital setting. He is not now nor has he ever been an oral and maxillofacial surgeon. He told me that he had observed in relation to some patients at Arrowe Park Hospital. He told me that he has never consented a patient for extraction under general anaesthetic. He told me that he felt he could speak to the standards to be applied to an oral or maxillofacial surgeon, but he accepted that he was not as well placed as Mr. Webster to

speak to those standards. I'm afraid that a couple of occasions attending at Arrowe Park in no way qualifies one to give evidence as to what a reasonable body of oral and maxillofacial surgeons should or should not know or do. In my judgment it is inappropriate for a GDP to be making such assertions.

48. The question before me however is whether it was improper, unreasonable or negligent, or further did it show a flagrant reckless disregard for the duties of an expert to the court. I am bound to say that I do consider that it was wholly unreasonable and negligent. Dr. Mercier's first report is simply a recitation of information with a determination to find that the Claimant had a case. The amended report adding a paragraph in relation to breach of duty was wholly unsupportable. Throughout his evidence at court, Dr. Mercier failed to make any reference to the differences between his role and that of an oral and maxillofacial surgeon, and plainly failed to even address his mind to whether there were differences to which he could not speak. It is plainly the case that he has no expertise in the examination of a patient prior to GA in a hospital setting and cannot speak to any errors in the treatment given.

49. In his witness statements prepared for this application and in her submissions, Dr. Mercier and Ms. Whittaker have sought to create the narrative that Mr. Gray of Counsel created a case theory to which Dr. Mercier was not a party which made Dr. Mercier's evidence appear to be something that it was not. I do not accept this narrative, creative though it is. Dr. Mercier was asked to comment on whether the oral and maxillofacial surgeon on 8th November 2016 had committed a breach of duty causing damage. He responded by opining that a breach occurred and caused damage. His assertions were replicated in the particulars of claim. His evidence has changed over time which has led Mr. Gray of Counsel into difficult ground, but it is Dr. Mercier who has changed his case rather than Mr. Gray. I conclude that Dr. Mercier has shown a flagrant reckless disregard for his duties to the Court and that he did so from the outset in preparing a report on subject matter in which he has no expertise.

50. I have noted that Dr. Mercier at no point referred in his evidence to the relevant legal test, and often his answers implied that he does not understand it. However, I have not explored that issue given the specific assertions made by the Defendant trust.

CAUSATION

51. In order to recover the costs of these proceedings – in part or in full – the Defendant trust must prove "a causative link between the particular conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered under section 51": see [80] in ***Travelers Insurance Company Ltd v XYZ [2019] UKSC 48.*** Dr. Mercier argues that Ms. Robinson's case started with the allegations in the Particulars of Claim, which were not based on Dr. Mercier's evidence as his expert report on breach of duty was not prepared until later. Such an assertion is obtuse in my view. The Claimant could not have pursued a claim in dental negligence without a dental expert supporting her and Dr. Mercier is her dental expert. The particulars of claim do not contain the explicit pleaded head of failure in relation to the examination, but every other particular is taken from the report of Dr. Mercier, and he himself didn't make that assertion until the amended report. The claim was begun upon receipt of the support of a professed expert – Dr. Mercier – and would not have been begun absent that support. The report was served upon the Defendant trust with the particulars of claim in seeking settlement. Given my views in relation to the amended report and its conclusions I find the assertion by Ms. Whittaker at paragraph 2(v) of her submissions to be entirely without merit. I find it inconceivable that an alternate expert would have come to the same conclusion.
52. Miss. Whittaker suggests that the Defendant cannot reasonably argue that Miss Robinson would not have pursued the case if it was not for Dr. Mercier's evidence, in that Mr. Webster agreed with Dr. Mercier: "Whilst it is not possible for Dr. Mercier to say what motivated Miss. Robinson to pursue her case, it can definitely be said that it would have been reasonable for her to continue to pursue her case given that D's own expert agreed with Dr. Mercier's criticism of the lack of examination before seeking to obtain consent." (submissions, Para 10(iii)). This is a complete bastardisation of the wording of Mr. Webster's report which repeatedly finds its way into Dr. Mercier's case theory. Mr. Webster did not criticize the examination of Mr. Bajwa. He observed that the consent form must have been incorrect because a noted tooth was in fact absent from the patient's mouth, and he observed that a reasonable body of practitioners would carry out and record the results of an examination prior to the consent being completed. Beyond the implicit criticism that there was no

report of the examination, both "experts" agreed that there was no evidence at that time that an examination was or was not carried out. It is wholly wrong to assert – and to do so repeatedly – that Mr. Webster agreed that there was a lack of examination. There is not and never has been any evidence that there was a lack of examination by Mr. Bajwa. It is unhelpful to make misleading submissions.

53. I am entirely satisfied that but for Dr. Mercier's report this claim would not have been brought. All costs claimed within the Defendant's cost budget are therefore caused by Dr. Mercier's flagrant disregard for his duty to the court. A public body has been put to considerable expense in financing costly litigation that should not have been brought. Although it is not part of my considerations I observe that a hard-working oral and maxillofacial surgeon was maligned in public and undoubtedly caused significant distress by the actions of Dr. Mercier. The Trust is entitled to be reimbursed for the wasted costs incurred. Such an order is just. I therefore make an order for costs against Dr. Mercier in the sum of £50,543.85 as set out in the Defendant's cost budget.

Recorder A Hudson

9th September 2021.