Neutral Citation Number: [2022] EWHC 3263 (KB)

QB-2019-001601

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2022

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

IRIS BENFORD
(A CHILD REPRESENTED BY HER MOTHER
SARAH ARNOLD AS LITIGATION FRIEND)

Claimant

- and -

EAST AND NORTH HERTFORDSHIRE NHS TRUST

Defendant

E.A. GUMBELL KC (instructed by Field Fisher Solicitors) for the **Claimants**
SARAH VAUGHAN JONES KC (instructed by Clyde & co Manchester) for the **Defendant**

Hearing date: 16 December 2022

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APPROVED JUDGMENT

Mr Justice Ritchie:

The Parties

1. The Claimant suffered brain damage around the time of her birth.

2. The Defendant runs the hospital at which the Claimant was born.

Bundles

3. For the application there were two lever ach arch files and one skeleton argument from each counsel. A letter was handed up during the hearing.

Summary

4. In this clinical negligence case liability is admitted by the Defendant for the quite severe brain damage suffered by the Claimant during her birth on the 6th of December 2016.

5. Quantum remains to be determined for the Claimant's injuries and the trial is listed to commence on 2nd May 2023 for 5 days. By a notice of application dated the 22nd of October 2022 the Defendant applied to vacate the trial, stay the claim for four years, for the Court to order a CMC for directions and applies for an extension of the time for service of the Defendant's experts' reports and counter schedule.

The issues

6. The issue in this case is whether the trial listed for May 2023 should be adjourned on the assertion that the assessment of future loss and expense arising from the Claimant's injuries is either impossible or so speculative that it would be unjust to the Defendant.

Pleadings and chronology of the action.

7. Only 6th of December 2016 the Claimant was born with no foetal heart rate and in very poor condition. The Claimant's APGAR score was zero at one minute and the Claimant was not respiring. Her heart rate became measurable at 9 minutes after birth. Her blood cord gas pH reading was 6.7. She spent three days in the special care baby unit and 11 days in the intensive care unit. The neonatal discharge summary form diagnosed perinatal asphyxia and noted seizures. The Claimant had suffered suffered hypoxic ishaemic encephalopathy grade three, thrombocytopenia and sepsis. She had been treated with elective hypothermia of her brain after the insult. She is doubly incontinent.

8. The Claimant issued the action in May 2019 and the Particulars of Claim were dated April 2019. The defence was served in July 2019. Breach was admitted in the defence. Judgment was entered on the 6th of August 2019.

9. Over two years later Master Stevens made directions by consent between the parties. Disclosure was to take place in September 2021, witness statements were to be

exchanged in February 2022, experts' reports from various fields (12 fields each) were to be served by the Claimant in February 2022 and by the Defendant in July 2022. The experts were to meet and provide joint reports on areas of agreement and disagreement by November 2022. The Claimant was to provide an updated schedule by February 2022 (which was long before the joint experts' reports were to be served) and the Defendant's counter schedule was to be provided by July 2022 (long before the joint experts' reports). The trial was listed for January to May 2023 with a time estimate of seven days. The Claimant was permitted to serve an updated schedule and updating witness evidence 2 months before trial. No provision was made for an updated counter-schedule.

10. At the end of the same month, September 2021, the trial was listed to start on the 2nd of May 2023.

11. Matters preceded well and then on the 7th of April 2022 by consent Master Stevens granted the Claimant an extension of time for her witness statements and expert evidence until April 2022 and therefore put back the counter schedule to September 2022 and the experts' joint meetings till the 16th of January 2023.

12. On the 17th of June 2022 Master Stevens granted the Claimant further time to serve her gastro-enterology and paediatric surgery expert evidence until July 2022. As a result the directions for the Defendant's counter schedule and all of the Defendant's experts' report was extended to the 25th of November 2022 and the date for the joint experts' reports on matters agreed and not agreed was extended to the 24th of February 2023.

13. In the event the parties agreed a one month further extension for service of the Claimant's experts' reports and I am told that they were served in July 2022.

14. This led to the Defendant's experts to considering the Claimant's experts' reports in August 2022 and, as is usual, the Defendant having a conference or conferences with counsel. As a result of those, in a letter dated 9th September 2022, the Defendant wrote to the Claimant, lawyer to lawyer, requesting that the trial be adjourned because the Defendant's key experts did not consider it possible to provide a proper prognosis. The main issues were: whether the Claimant had properly been diagnosed with epilepsy; the true cause and extent of the Claimant's damaged cognitive functioning and communication; her capacity to litigate and manage money; her learning capacity; the nature and extent of the Claimant's ability to feed and swallow independently; the Claimant's gross motor function; the Claimant's continence and the Claimant's hearing.

15. Two months later the Claimant's solicitor informed the Defendant's solicitor that the Claimant opposed the application. It was explained that the Claimant's lawyers understood the uncertainties which were causing concerns to the Defendant but the

various investigations requested could or should be undertaken before trial and latitude would be given on service of counter schedules and other matters so that the trial date was still reasonably achievable.

16. On the 25th of November 2022 the Defendant did not serve its counter schedule or any of its experts' reports.

17. The Defendant's application is supported by a witness statement from Matthew Tippin dated November 2022 which summarises the various letters gathered by the Defendant from various experts. The Claimant's opposition to the application is supported by a witness statement from the Claimant's mother dated 9th December 2022 and one from the Claimant's solicitor, Mr McNeil, on an unknown date in December 2022.

18. In submissions the Defendant asserted that the expert medical evidence on key issues would be too uncertain in May 2023 for the Court to be able to make a fair judgment. In support of that assertion the Defendant relied on the letters provided by the Defendant's medical experts which I shall summarise below. In addition the Defendant asserted that the Claimant's experts themselves had raised various requests for further assessment of the Claimant or for tests and had expressed their diagnoses or prognoses in conditional or provisional ways which disclosed that the Claimant was not really ready for trial. The Defendant asserted that the uncertainties over the Claimant's epilepsy, cognitive function, social communication, feeding and life expectation would lead to substantial uncertainties for the trial judge in assessing the key heads of loss. The issues to which these uncertainties would go included whether in future the Claimant would need two or one day carers; whether the Claimant would need waking night care; whether the Claimant would be able to work in remunerative employment; whether the Claimant would have capacity; the Claimant's life expectation and the Claimant's future expenses for SA LT, physiotherapy and equipment. Overall the Defendant distinguished this case from a "straight forward" cerebral palsy case. The Defendant asserted that in a straight forward cerebral palsy case the injuries would be more easily categorised and prognosticated upon. The injuries, if particularly severe, would lead to obvious gross motor disability, lack of capacity, the need for care, the lack of earnings and the need for equipment, so it would not be inappropriate for a trial judge to assess quantum with the Claimant aged only 6. However, in this case the Defendant asserted that the long term outcomes in various key areas are more complicated than in a cerebral palsy case and at this stage far more speculative because the Claimant is still developing physically and cognitively. The Defendant asserted that there is a real risk that an assessment of damages in May 2023 may be wrong. The Defendant offered that it would pay the costs of any adjournment. In the alternative if adjournment was refused the Defendant sought an extension of time of 42 days for service of the experts' reports and the counter schedule.

19. The Defendant relied on Mr Justice Eady's decision in *Cook v Cook* [2011] EWHC 1638. That case concerned a child who had suffered bilateral occipital and temporal lobe damage and total blindness caused by raised intra-cranial pressure caused by the Defendant's negligence. Evidence was put before the Court by the Claimant's solicitor who asserted that the Court could not achieve justice when the evidence as to the long term prognosis was so unclear. The evidence from the Claimant's experts: doctor McCarter and doctor Miles, a neuropsychologist and a consultant paediatrician, was to the effect that a further review at the age of 16 was necessary and the final prognosis could not be given until then. The Claimant was at increased risk of epilepsy but it was too early to predict from a psychological perspective how well she was going to manage at school and too early to predict her psychosocial development. The Claimant sought to split the quantum trial dealing with pain suffering and loss of amenity and past loss at the fixed trial date and then with future losses at a later trial when the Claimant reached 16. Eady J took into account the ruling of Lord Hudson in *Mulholland v Mitchell* [1971] AC 666, that there needed to be finality in litigation and that the Court needed to make the best estimate it can as to the future life of the injured person including the prospects of improvement. In addition Eady J reviewed *Murphy v Stone-Wallwork* [1969] 1 W LR 1023, which the issue was whether the trial should be postponed until such time as solid evidence became available with a view to avoiding the need for speculation and to achieve a more realistic assessment. In addition Eady J reconsidered his previous decision in *Adan v Securicor* [2004] EWHC 394 in which the adjournment was refused. The application in that case was based on the uncertainty related to a possibility of the Claimant's mental health improving such that he might be released from Rampton Hospital and thence need care in the community. At para. 23 of *Adnan* Eady J had envisaged a hypothetical case where the nature of the damage and the likelihood that it would be incurred was clear but quantification could not meaningfully be carried out. Eady J stated that it might well serve the interests of all concerned to postpone quantification until the necessary evidence became available. However, that was not the case in *Adan*. At para. 18 in *Cook* Eady J concluded that the case before him was very exceptional and complicated and that the long term outcomes for the Claimant were uncertain and speculative. Therefore in order to do justice in accordance with the overriding objective he agreed to adjourn the assessment of future loss and expense quantum to the Claimant's 16th birthday.

20. The Claimant opposes the application on various bases. The first is that the right time to raise submissions on the appropriate trial date due to the Claimant's young age was back in September 2021. In fact at that date directions for the trial of quantum and the evidence in support were made by consent between the parties and ordered my Master Stevens. In addition the Claimant submitted that in clinical negligence and personal injury claims quantification of future loss always rests on the prognoses given by various medical experts. Prognoses regularly include opinion evidence on a likelihood of improvement or worsening at some stage in future so this is normal. All such

opinion evidence involves an element of experience, expertise and speculation and uncertainty. The Claimant submitted that this case is no different.

21. Ms Gumbell KC submitted that the Claimant was ready for trial and because the Claimant carried the burden of proof any disadvantage involved in any uncertainty about any prognosis fell on the Claimant's shoulders not the Defendant's because the Defendant did not carry the burden of proof. In addition the Claimant relied on *Fitzroy Robinson limited v Meantmore Towers* [2009] EWHC 3070 (TCC). In that case Mr Justice Coulson was dealing with an application by the Defendant to adjourn a trial starting in less than three weeks time. The judge considered the relevant principles to be applied in an application to adjourn where the adjournment was said to be necessitated by the parties' failure to comply with earlier directions. He noted a certain lack of authority on that issue. The case did not involve quantification of personal injury. When considering the general principles Coulson J adumbrated 5 which were relevant including: the parties conduct and the reasons for the delays; the extent to which the consequences of the delays can be overcome before the trial; the extent to which a fair trial may have been jeopardised by the delays; specific matters affecting the trial such as illness of critical witnesses and the like and the consequences of an adjournment for the Claimant the Defendant and the Court. He then went on to consider each factor in his judgment and concluded that a fair trial was not impossible and gave directions.

The power to adjourn

22. This Court's power to adjourn the trial is contained in CPR rule 3.1 (2) (b). The Court also has power to stay the proceedings within the same rule at (f).

23. The notes to that rule include a reference to a case in which solicitors came off record just before the trial of a serious clinical negligence claim: *Bowden v Hamilton Hospital* [2002] EWCA civ 245. The Court of Appeal overturned the judge's refusal to adjourn the trial on the Claimant's application (acting as litigant in person) because his solicitor had come off record a month before trial. No such issue arises in the case before me. Applications often arise based on ill health grounds and I consider that the principles in such case are equally applicable in this case.

The relevant factors

24. Taking into account the authorities in this application to adjourn the trial of quantum in this large clinical negligence claim where liability is admitted, I consider that the relevant factors which I should take into account are as follows.

    24.1 The overriding objective of achieving justice between the parties.
    24.2 Whether the Defendant (or Claimant) will suffer prejudice by the trial going ahead.
    24.3 Whether the Claimant (or Defendant) will suffer prejudice by the trial being adjourned.

24.4 The balance of the prejudice which may be suffered.
24.5 The need for finality in litigation.
24.6 The need for justice to be done without unreasonable delay.
24.7 The conduct of the parties and in particular whether the Defendant (or the Claimant) has complied with the Court's directions.
24.8 The choices made by the parties on the date for trial and any consent orders made.
24.9 Reasonable and fair allocation of the Court's resources.
24.10 The wishes of the parents who carry the burden of caring for the Claimant and running the litigation and being present at each assessment by experts (of which there are 24).
24.11 The alternatives to adjournment including (1) whether a stay or an adjournment for a shorter period would be fair and (2) whether different directions between now and the listed trial date would be sufficient.

The witness evidence in the clinical negligence claim

25. I have read the witness evidence in the bundles provided to me. There are three witness statements from the Claimant's mother which relate to liability and quantum. There is a witness statement from Miss Keech dated March 2022, she is a physiotherapist treating the Claimant and there is witness statement from Michelle Bailey dated March 2022, she is a teacher at Greenside school Stevenage where the Claimant attends.

The Claimant's life

26. In very brief overview, the Claimant has four siblings. Oliver, her brother ,is at university studying nursing. Lily is on a gap year. Ruby is at school and Daisy is at school. In her early years the Claimant went to the Early Years Development Centre and thereafter she went to Greenside school in Stevenage which is a special needs school, initially part time and later full time. It is apparent that she enjoys swimming and swims in a public pool and with a physiotherapist in a private pool. She also enjoys painting. Initially her communication was mainly sign language but more recently it is sign language and considerable verbal communication. Her hearing is very poor and she has bilateral hearing aids. She is fed by a gastrotomy tube through a PEG. She has some oral feeding with tasters. Her behaviour over the years has been described as difficult and has involved tantrums, kicking, biting and screaming but the triggers have not always been clear. As to her mobility, she can walk indoors on flat safe surfaces but uses wheelchairs outside and is unsteady and is described as falling often. Other reports show that she can walk to the shops with her carers. She watches Disney films and has a tablet computer. She is described as having a good sense of humour and is improving socially. Stairs are dangerous for her. She lives with her sibs and her mother n rented accommodation. They have bought another property and are planning to adapt it.

The expert evidence

27. I have read the experts' report in the bundles and the letters from the Defendant's experts. I shall extract some relevant matters from each below.

Claimant's experts

28. Doctor Hart, a paediatric neurologist, reported in May 2022. He described the Claimant's neurological profile as "spikey" with emerging issues relating to executive functioning, concentration, distractibility and emotional regulation. He said she had social communications skills but needed further education. He diagnosed that she had motor problems due to her brain injury which did not fulfil cerebral palsy criteria. He considered she would need a wheelchair pretty much full time from the age of 13 although would not be entirely dependent. He predicted increased dependency at age 55. As for the "paroxysmal episodes" the diagnosis of epilepsy was in doubt because no EEG evidence had shown such. He advised she need needed prolonged EEG video telemetry over two to five days and then if she did not have epilepsy her medication should be stopped. In relation to the prognosis he considered her symptoms may change as she grows older but she will continue to have poor balance, limited exercise tolerance and the need for wheelchair use for long distances. She will need physiotherapy for life. He considered she probably will not have capacity at age 18. He considered it unlikely she will be able to work in remunerative employment. He considered it unlikely she will live independently. He considered she will have lifelong communication difficulties and lifelong feeding difficulties using gastronomy tubes but he deferred to the SALT experts on that. In relation to behaviour he advised that she would have lifelong impulsive behaviour with stubbornness and very little danger awareness and would run into trouble if unsupervised. He advised she needed 24 hour care with two carers in the day to provide cover and as she grows older and her tantrums when she is bigger. In relation to life expectation he predicted based on cerebral palsy data from California *(Brooks et al)* that she would not lose the ability to walk by the age of 15 (which is positive) and did not know whether to deduct five years for epilepsy so he took a midline of 72 years of age for that.

29. Professor Taylor reported in July 2022 in relation to paediatric gastroenterology. In his opinion the Claimant has hypotonic cerebral palsy. He noted she has gastronomy and is fed with a PEG. His prognosis was she would be PEG fed for life.

30. Albert Reed is a psychologist who reported in May 22. In his opinion the Claimant might have but probably did not have an autism spectrum disorder. Her presentation was not dissimilar to hearing impaired children but was also consistent with executive dysfunction. He considered the Claimant is at significant risk of developing dysfunction in social communication but her hearing impairment compounded the issues. He advised further assessment. He advised that being at school with autistic children was not good for the Claimant. On testing he noted that her verbal reasoning was low average, her spatial awareness and processing speed reflected brain injury. He could not advise on capacity and advised reviewing that later after comprehensive

rehabilitation. He advised that remunerative work was unlikely and that she would require a support regime for life.

31. Doctor Rajput advised on audiology in May 2022. He noted a diagnosis of HEI (Hypoxic Ischaemic Encephalopathy) at birth. His assessment of hearing loss was that on the right it was mild to severe and on the left it was mild to moderate. He advised on the need for further testing to exclude auditory neuropathy spectrum disorder and this would be carried out by ABR under general anaesthetic. During the hearing I was provided with a letter dated 15 December 2022 which shows that this testing has been carried out and no genetic mutation was found. Therefore his conclusion stands, which was not expressly written in the report but implied, that the Claimant's hearing loss was caused by the Claimants brain injury.

32. Mr Conlon, a paediatric consultant surgeon, reported in April 2022 that the Claimant has hypotonic cerebral palsy but this is better described as centrally mediated motor disorder with hypotonia, that she is grade II on the GMFCS scale. She can walk unsupervised on a level surface but not on stairs. She had frequent falls. In relation to the prognosis there is no prospect of significant improvement as she gets bigger. She will gain weight as she grows so she will need a powered wheelchair at the age of 13 and will rely much more on her wheelchair from the age of 55. He advised the need for single level accommodation and physiotherapy for life but probably not surgery on her hips or on her spine.

33. Stopping there I consider that the orthopaedic and auditory prognoses seem to be relatively certain, the neurological prognosis in relation to epilepsy or episodes will depend upon prolonged video telemetry which, according to Mr McNeil, will be carried out in the new year. Once that testing is done a clearer a picture will have been painted on the diagnosis for her absences. They will either be diagnosed as epileptic or non epileptic and more related to behaviour. The prognosis in relation to gastronomy feeding has been provided with reasonable clarity. The prognosis in relation to capacity is not decided by the Claimant's psychologist but is by another relevant expert.

34. Miss Filson, an expert physiotherapist, reported in May 2022. She considered the Claimant will require physiotherapy for life. She split the future physiotherapy into various age brackets. She also supported disabled riding. She provided costings.

35. Gillian Rumble is an expert SALT who reported in May 2022. She described the Claimant as "delightful" with delayed speech and language skills and severe hearing impairment. She understood that the oral feeding difficulties may be behavioural rather than motor and awaited the swallow through video-fluoroscopy results. Mr McNeil informed the Court these will be completed in January. She accepted that it was very difficult at this stage to make whole life SALT recommendations and made

her recommendations with caution and the caveat that she would review them on receipt of further information. She then costed them out clearly.

36. I have not summarised all of the experts' reports but it speaks for itself that the various standard heads of loss in a serious brain damaged case include in particular care and case management and the fees of a deputy where the Claimant lacks capacity and these are dependent on the Claimant's cognitive functioning and psychological state.

Defendant's experts

37. The Defendant's application rests upon various letters provided by the Defendant's experts. It would have been easier to understand the force and context of these letters had the opinions been expressed in full reports with CPR part 35 statements attached setting out the range of opinions appropriate in each field. The Court ordered that the Defendant's reports should have been served by the 25th of November this year. Without that context the letters appear to be answers to requests from the Defendant's solicitors for letters instead of reports. If the Defendant does not have draft reports in its possession then matters have gone awry. If the Defendant does have reports in its possession then the Defendant has chosen not to serve them and to disclose letters instead.

38. Doctor Kumar is a paediatric neurologist whose letter is dated October 2022. He states that he is not able to provide reliable, accurate assessment of the Claimant's condition and prognosis. I do not understand why he could not report on condition. Nor do I understand why he could not give a prognosis with a range in it. He has carried out two examinations of the Claimant over a period of more than 1 year and he has seen all of the relevant medical and other notes and witness evidence. In the letter he agreed with doctor Hart that the Claimant needed specialist video EEG over many nights to be able to diagnose her absences either as epileptic or not epileptic. He noted significant improvements in her feeding and advised that 6 year olds were too young for him to project forwards. If this is purely age related it should have been raised in September 2021. He advised that the Claimant had not "plateaued" yet. He considered that the Claimant does not have profound developmental delay but has a lesser level of developmental delay with continuing improvement. He advised that he needed to see three more years of progress before providing his prognosis. I should mention here that many experts would like more time to be able to be more certain about the prognosis for children.

39. Peter Sullivan reported by letter dated 26 September 2022. He is a paediatrician. He recommended video flouroscopy swallowing studies be carried out and other investigations for diet. He recommended a delay of at least two years before providing his prognosis.

40. Dr Peter Rankin wrote a letter dated October 2022. He is a neuropsychologist. He had assessed the Claimant and he gave a guarded long term prognosis because of her complex behavioural issues and seizure like episodes. He wondered, in view of the family's history of autism spectrum disorders, whether she had such. One of the Claimant's siblings has apparently been diagnosed. He considered the Claimant needed a multi-disciplinary assessment and then a further report when she is aged 10, although he considered that a more accurate report would be produced at the age of 15. In effect he was saying that no proper prognosis can be given to the Court for any child under 15. I do not accept that approach. It may be difficult but it is not impossible.

41. Doctor Hariri provided a letter on audiology in October 2022 and wondered whether the Claimant's hearing loss was progressive in which case it would not be caused by hypoxia and he advised a genetic test to determine this. That test has been carried out and that question has been answered. It is not genetic. The hearing loss was caused by the brain damage.

42. Professor Clarke is a consultant orthopaedic surgeon who advised that it is not possible to give a reliable prognosis until the age of 13 which he asserted was the age of skeletal maturity. Therefore his evidence is in direct contradiction to the evidence given by Mr Conlon who could and did give a prognosis. In addition, if this is the case, it should have been raised before September 2021 when the directions for trial were agreed.

43. Catherine Newcomb provided a letter on care. She assessed the Claimant in April this year. She sought clarity on the following topics: epilepsy, behaviour, night feeding, gastronomy, falls, balance, walking on stairs and she asserted it is too early for her to provide an assessment. In fact the Claimant's orthopaedic expert had already advised that the Claimant is unsafe on stairs, on her balance and walking. The epilepsy tests are soon to be completed and the swallowing tests too and the hearing tests have been done.

44. Katie Worley provided a letter in October 2022 in relation to physiotherapy. She asserted she was unable to provide an accurate opinion because the Claimant is very young and has not reached a plateau. She advised assessment at ages 8 to 9. If this is the case it should have been raised in September 2021.

45. Susan Hamrouge is an expert SALT. Her letter dated October 2022 stated she had assessed the Claimant in February and the Claimant's language and speech are severely delayed. She also has profound hearing loss. Miss Worley stated she understood there was an agreement between the neurologists that the Claimant does not have epilepsy and that her issues are behavioural. I am not aware of that agreement from the evidence before me. She recommended referral to Great Ormond

Street hospital and then future referral to the Evelina charity to address behavioural issues and a recommended reassessment at age 12.

46. I comment here that many of the expert letters rely purely on age to ask for a later trial. But age alone was not the basis of the Defendant's application in the way it was argued. It was the special circumstances of this injury pattern which was the basis of the application and the hope for improvement and the uncertainties in particular over epilepsy, hearing and feeding.

Applying the law to the facts

47. Taking each of the relevant factors in turn.

48. The overriding objective of achieving justice between the parties in my judgment is achieved by a trial taking place in May 2023. The burden of proof is on the Claimant in relation to general damages, past loss and expense and future loss and expense. If on the balance of probabilities, as a result of the expert evidence, the Claimant cannot prove any particular future head of loss or part thereof, due to uncertainty, that head of loss or part thereof will not be awarded. If it can be proven with some uncertainty over the future details that can be dealt with by discounting or step changes in the award. Therefore the uncertainties in the evidence called by the Claimant are probably a disadvantage to the Claimant or at least mainly to the Claimant. In relation to expert evidence called by the Defendant the Court has seen none of it. If, as is asserted in letters, some of which have no part 35 statements attached to them, the Defendant's experts truly cannot provide a prognosis in the way that the Claimant's experts have in the key relevant fields, then they will need to express the appropriate range of views and those views may be accepted by the trial judge. But I do not see how that is a substantial disadvantage to the Defendant. Making awards for damages for future loss is an exercise based upon a comparison between an estimate of what the "but for" position would have been and what the "future actual" position will be. Both of those are crystal balls through which the judge has to look with the guidance of experts. Certainty is admiral but is often not achievable. Uncertainty is ever present in such assessments. The Courts are used to assessing probabilities.

49. As to the prejudice that is asserted by the Defendant if the trial goes ahead. The way that the Defendant put this in submissions was that it will be either the same or similar uncertainty or prejudice for both the Claimant and the Defendant. Whatever evidence is eventually served by the Defendant the uncertainties on key matters that remain after the relevant expert prognoses in relation to epilepsy, behaviour, development and swallowing (the assessment on hearing is already complete) are unlikely to lead to any greater prejudice on behalf of the Defendant than on behalf of the Claimant. What is really being said is the estimate of the likely future loss will be more speculative if carried out in May 2023 than it would be if carried out four years later. However all future loss is speculative and the Defendant's own experts write that assessment at the age of 10 is no guarantee of certainty. Indeed some of them suggest

assessment at the ages of 13 or 15. Comparison with the case of *Cook v Cook* is instructive but not determinative in my judgment. In that case the applicant argued that assessment at the age of 10 was going to be too speculative.

50. Whether the Claimant will suffer prejudice: It is clear to me from the witness statement from the litigation friend that the litigation process is creating stress and anxiety for the family. She considers she is living in a "goldfish bowl" being assessed by experts month after month. Factually she is correct. There are 12 experts on each side, therefore 24 experts who have assessed the Claimant in the last year. If the trial is adjourned at least 24 further assessments are likely and perhaps more if events change and any expert wishes to have another assessment. These appear to me to be relevant factors. The more so in the light of the agreement between the parties to hold the trial in 2023, such agreement having been made in September 2021. Since that time the Claimant's mother has been working towards the case being over by mid next year. Much work has been done. Witness statements have prepared. Expert assessments and reports have been completed and served.

51. The need for finality in litigation. The litigation friend seeks finality so that she can get back to caring for the Claimant and her other children and get on with her family life. She also seeks certainty of result rather than living with uncertainty. I have set out above reference to the principle of finality which is well acknowledged in previous case law. The need for finality in litigation weighs toward the trial date not being adjourned once it has been set by the Court.

52. The need for justice to be done without unreasonable delay. It is apparent from the submissions made by senior counsel in this case that, as a result of the duty of candour and more modern practises in the NHS in the last 10 years or so, cases involving severe brain injury are brought to the attention of parents earlier. Not least as a result of serious incident reports carried out internally by NHS Trusts. This has led to cases being issued earlier and settled earlier and trials on quantum of seriously brain injured children are being heard at a younger age. This does create a practical difficulty which is properly highlighted by the expert evidence put before this court. However, in my judgment I should take into account the need for justice to be done without unreasonable delay on behalf of insurance companies, the NHS Legal Authority, the tax payer and on behalf of Claimants.

53. When looking at the conduct of the parties and in particular whether the Defendant has complied with the Court's directions I take into account that the parties, by consent, agreed in September 2021 that the trial would take place in early 2023 and they also agreed a set of directions for exchange of documents, lay witness evidence and 12 expert reports on either side. That was the time to negotiate the proper date for trial dependent on the age of the Claimant and the medical evidence, such as it was, of her condition. The experienced personal injury lawyers instructed in this case will have handled such claims before. A year after that consent order the Defendant has

raised this application to vacate the trial, in effect seeking to break their own agreement. The application was put on the basis that it could not be made until after the Claimant's experts' reports were served and read. However the directions made in September 2021 were for the Defendant's evidence to be served in July 2022. For the evidence to be served on time the experts would have had to carry out assessments of the Claimant between the date of the directions order and June 2022 at the latest. I work on the basis that those assessments should have been carried out either in late 2021 or early to mid 2022 with draft reports produced by June 2022 which were only awaiting site of the Claimant's reports for completion. The fact that the Claimant's reports were delayed until July 2022 would only delay the finalisation of the Defendant's expert's reports. I do not see why that would delay the experts in providing their draft report. In any event Dr Kumar saw the Claimant long before the directions were made by consent. I do not accept the explanation given as the cause of the delay in making the application. It seems to me that the application to adjourn the trial, if it was based solely on the Defendant's experts' reports, could have been made months earlier and in any event should have been raised in September 2021. Whilst this is not a deciding factor it is a relevant factor. As for the Claimant's conduct, she is not in breach of any of the directions and whilst her expert evidence has been provided a little later than first ordered, it was so provided with consent orders made by the Court.

54. As to the choices made by the parties on the date of trial, I have set out above that the parties agreed to the trial in 2023 one year and two months ago. When parties make serious choices like this in very high value brain injury litigation it seems to me that the general rule should be that they should stick to their choices.

55. As to the reasonable and fair allocation of the Court's resources, putting the trial back will increase the use of the Court's resources in this action, including at least one case management conference and perhaps other applications in relation to interim payments. Whilst this is not the heaviest factor in a very high value claim it is a factor.

56. Finally I take into account the wishes of the parents who carry the burden of caring for the Claimant and running the litigation and being present at each assessment by experts. It seems to me that this is not only a relevant factor but a factor of some weight. Parents of seriously brain injured children who bring claims for which liability is admitted have, to some extent, control over the progress of the claim. Some wish for the claims to be delayed until the result is more likely to be more certain. Some wait to issue when the child is 18 or nearly 21. Others, like these parents, wish for the claim to be over early. It seems to me that that personal choice over when to issue and when to go to trial is of importance. When a trial date has been agreed between the parties, as it was in this case, should be respected and adhered to.

57. In addition I take into account that severe brain injury cases for children have been assessed for 6 year olds many times before, for instance in *Whiten v St George's* [2011] EWHC 2066, Swift J did so.

Conclusions

58. I consider that after balancing all of the factors set out above the trial date should stand and so I dismiss the Defendant's application. I do not consider that the balance of prejudice favours the Defendant. Nor do I consider that the trial will result in unfairness for the asserted reasons.

59. As to alternatives to adjournment, I consider that a tight new set of directions should be agreed to facilitate the evidence and the trial in May 2023 and to encourage ADR. I will extend the time for service of the Defendant's expert reports and the counter schedule to 14 January 2023.

60. As for the directions thereafter I invite the parties to agree them and submit them to my clerk in writing by 4pm on Tuesday 19th December. In default two sets of suggested directions should be put before me via my clerk by 4pm on Tuesday 20th December 2022 if the parties so choose or I will hear submissions on the directions on Wednesday 21st December in the morning at 10.30 am listed for 1 hour.

61. The Defendant shall draw up the order relating solely to the application and submit it to the court by 10 am on Tuesday 20th December 2022 in Word format.

62. The costs of the application shall be paid by the Defendant on the standard basis to be summarily assessed (by me) on written submission on the costs schedules to be submitted by 4pm on 20 December 2022, if not agreed.

END