Neutral Citation Number: [2024] EWHC 2958 (KB)

Case No: KB-2021-004001

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2024

Before :

MASTER SULLIVAN

- -

Between :

SOPHIE TAIT	**Claimant**
- and -	
TORBAY AND SOUTH DEVON NHS FOUNDATION TRUST	**Defendant**

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- -

Katie Gollop KC and **Caroline Hennessy** (instructed by **WBW Solicitors**) for the **Claimant**
Laura Johnson KC (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 28 October 2024

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Approved Judgment

This judgment was handed down remotely at 14.00 on 20 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER SULLIVAN

Master Sullivan :

1. The Claimant brings a claim for the misdiagnosis of asthma and the prescription of steroid treatment for it over a period of 10-11 years from April 2008. The Claimant's breathing problems were in fact caused by a psychological condition called dysfunctional breathing. She is now seriously limited in her mobility and day to day activities and claims damages as a result of the negligence.

2. The claim was notified to the Defendant in 2018 and a letter of claim with draft particulars of claim was sent in December 2019. On 24 July 2020 the Defendant responded with full admissions on breach of duty and some admissions in respect of causation and injury. The claim was issued in October 2021 and after further discussions between the parties an order for judgment was agreed in August 2022 and sealed on 7 November 2022.

3. In February 2023, the Claimant was assessed by Professor Edwards, Consultant Neurologist, and diagnosed as suffering from a Functional Neurological Disorder (FND). The Claimant amended the particulars of claim to reflect that diagnosis. The Defendant filed a defence on 9 August 2024 which denies that the FND, and therefore symptoms arising out of it, were caused by their admitted negligence and avers that the FND developed some years before it was diagnosed. They also aver that the Claimant would not have responded to the treatment which they admit should have been given for the dysfunctional breathing. The Claimant made an application to strike out parts of the defence on 19 September 2024, on the basis those parts were inconsistent with the agreed judgment order. The Defendant's position is that the defence is consistent with the Judgment order.

4. This judgment deals with the issue of whether the defence as pleaded is inconsistent with that order. The parties were agreed that I should not go on to deal with consideration of strike out of the defence if I was of the view they were inconsistent as the Defendant has made an application, if their arguments about consistency are not correct, to withdraw the admissions and vary the judgment order. That application raises different questions of law and practice and was issued close to the hearing (for reasons which I need not go into) and which the Claimant did not have time to properly respond to.

The law

5. I received submissions on the purpose of admissions and the ability to vary court orders, but I will not set out those legal principles here. It seems to me that the essential question I have to decide at his stage is what the correct construction of the judgment order is and whether parts of the defence are inconsistent with that construction. Essentially the question, as agreed by Ms Gollop KC and Ms Johnson KC is, what issues have been settled by the judgment? It is of course relevant to that consideration that admissions are intended to ensure that issues between parties are taken as a final resolution of those issues and that must form a background to the construction the order, but it is not directly on point.

6. A judgment "for damages to be assessed" assumes, as liability has been determined by that judgment, that the claimant has suffered *some* damage, or the cause of action would not be complete. But the question of exactly what loss and damage was caused by the

defendant's negligence forms part of the exercise of assessing damages. That means that any point which goes to quantification of damages can be raised by the defendant, provided that it is not inconsistent with the judgment order. (*Symes v St George's Healthcare NHS Trust* [2014] EWHC 2505 (QB)). I note the judgment order in this case is not simply judgment for damages to be assessed, the order goes on to specify certain matters which have been caused or would have been avoided by the admitted negligence. The principle that any point which goes to quantification can be raised by the defendant provided it is not inconsistent with the judgment order must nonetheless still be correct.

7. When facts in issue, that is those facts which it is necessary to prove in order to establish a claim, have been determined, then they have been determined in a binary way. A judge cannot reach one factual conclusion for one part of a case and another for another. (*Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] 1 WLR 3549).

8. In construing an order the sole question for the court is what the order means, not whether it should or should not have been granted. The words of the order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context (*Banca Generali SPA v CFE (Suisse) SA* [2023] EWHC 323 (Ch)).

9. When considering what should be taken into account as context when construing the order, in *Sans Souci LTD v VRL Services Ltd (Jamaica*) [2012] UKPC 6, Lord Sumption considered the reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. At the other end of the spectrum, in *Banca Generali* at [21], it was held that caution should be exercised in using the parties submissions as context, with parallels to admitting evidence of negotiations in construing a contract.

<u>The judgment order dated 10 October 2022 and sealed on 7 November 2022</u>

10. As relevant the Judgment order reads:

"IT IS ORDERED that

1) Judgment for the Claimant for damages to be assessed be entered on the basis that it has been admitted that, as a result of the Defendant's admitted breach of duty. the following would have taken place or avoided (as appropriate):

i. from around 2008 the Claimant would have received the correct diagnosis of dysfunctional breathing against the background of mild asthma:

ii. the Claimant would have been referred to a psychiatrist/psychologist from 3 December 2012.

iii. the Claimant would have been referred to ventilatory service or specialist hospital, such as the Brompton Hospital before July 2017;

iv. the Claimant's referral to physiotherapy would have been followed up from 5 June 2014;

v. the Claimant would have had fewer incidences of treatment with high dose steroids, as she only had mild asthma;

vi. the Claimant would have been diagnosed with dysfunctional breathing after 2008 and would have received appropriate treatment minimising the side effects of steroid treatment;

vii. the Claimant would have avoided high dose corticosteroids she received for many years and would have avoided the associated detrimental adverse effects of such treatment, which impacted on her breathing and quality of life for a period of 11 years. causing intractable fatigue, osteopenia, proximal myopathy with neuropathic pains requiring high and repeated doses of pain killers, tachycardia. hair loss;

viii. the Claimant would have avoided prolonged courses of ineffective prednisolone, which were often prescribed at high doses for long periods_ Although she would have required, on occasion, some prednisolone, for genuine exacerbations of asthma, this would have been at much smaller and restricted doses and for shortened periods of time of about 5-17 days;

ix. the Claimant would have avoided steroid induced gestational diabetes during her pregnancy. and would not now be at an increased risk of suffering with diabetes mellitus in future (the Defendant admits that she is at increased risk as a result of its admitted negligence and admits that the risk is more than minimal but is unable to quantify the increase in risk at this time. and requires the Claimant to prove it).

x. the Claimant would have avoided inactivity due to breathlessness, which contributed to her developing obesity and proximal myopathy (muscle wasting), leading to a reduction of overall function and mobility;

xi. the Claimant would not have suffered from ongoing, debilitating and widespread joint ache and joint pain;

xii. the Claimant would not have been wheelchair bound.

xiii. save as aforesaid, no admissions are made by the Defendant as to the nature extent or effects of the Claimant's alleged personal injury loss and damage and she is put to strict proof thereof"

11. I have tried to reproduce the terms of the order as sealed (save that in the sealed order, the text of paragraph (ix) is repeated twice). There are number of punctuation marks which I am assuming are errors of drafting in the order. I do not therefore draw any conclusions form the punctuation as to whether a paragraph is subordinate to an other or whether a new topic is being raised after a full stop.

Background to the judgment order

12. I was asked by the Defendant to look at the draft particulars of claim and letter of response which were clearly the starting basis for the judgment order. However there are some differences, the judgment allows withdrawal of certain admissions in the letter

of response for example regarding osteoporosis and an admission about fatty liver. The particulars of claim was also served in the meantime. There have therefore clearly been negotiations since and so I should exercise caution in using the letter of response to aid construction where there is a difference of detail. I was also asked to take into consideration the report of Dr Darzy, Consultant Endocrinologist, which was served with the draft particulars. I do not think that would be appropriate for me to do so. There is no evidence as to how that was considered by the Defendant, and the Claimant was examined by the Defendant's own endocrinology expert in November 2021 and respiratory expert in January 2022, both prior to the agreement of the judgment order. It seems to me therefore that I can take as context the draft particulars of claim as the way in which the case was put, the letter of response and the particulars of claim.

13. I note the draft particulars of claim plead that when the claimant was referred in 2008 for treatment, she had suffered shortness of breath on minimal exertion, waking at night with wheeze and chest tightness, and breathlessness on climbing stairs. This in context must have been as a result primarily of the dysfunctional breathing.

14. The draft particulars of claim set out a series of allegations of breach of duty including failing to suspect and consider the differential diagnosis of dysfunctional breathing.

15. In respect of causation, it was pleaded that but for the negligence, the Claimant would have been diagnosed with dysfunctional ventilation (which I understand to be the same as dysfunctional breathing) at a point from 2008 onwards. It is said the asthma itself played very little part in the severe symptoms the Claimant suffered. It is specifically pleaded that the Claimant suffered from a functional disorder, rather than an organic condition.

16. It is pleaded in paragraph 52 that the Claimant remained on high dose corticosteroids for many years unnecessarily. Therefore the Claimant suffered with the associated detrimental adverse effects of such treatment. "*The steroids had an impact on her breathing and quality of life, aside from the uncontrolled dysfunctional ventilation condition itself*."

17. It is pleaded that had the proper diagnosis been made, the Claimant would have been symptomatically less affected than she has been. It is said the excessive prescription of steroids contributed to the Claimant's obesity as well as her inactivity and breathlessness. The steroids and enforced inactivity contributed to muscle wasting. Apart from specific matters related to the use of long term steroids, the condition is described as a combination of inactivity and continual prednisolone. The particulars of injury start with many years of severe and disabling breathlessness and excessive steroid prescriptions. It is said this has resulted in the Claimant suffering from anxiety and depression.

18. The letter of response follows the text of that draft particulars. The admissions are mostly not in the same words as the allegations. It was specifically accepted that had the proper diagnosis been reached sooner, the Claimant would have suffered less and would have been in a better position to continue her overall treatment (paragraph (v) under causation). The allegation that is accepted word for word includes that "*the Claimant would have avoided prolonged courses of ineffective prednisolone… which mean that the conditions of osteopenia and steroid induced diabetes would have been avoided. The excessive prescriptions of Prednisolone contributed to the Claimant's*

obesity as well as her inactivity due to breathlessness. The steroids and enforced inactivity over the last 12 months contributed to the muscle wasting…"

19. I note that the admissions about osteopenia and steroid included diabetes were withdrawn by agreement in the judgment order.

20. It is specially accepted in the letter of response that "*the negligence led to the Claimant being wheelchair bound with limited mobility, with evidence of arthropathy due to inactivity and muscle weakening*". That admission was not in the words of the allegation in the draft particulars.

The particulars and amended particulars of claim

21. It seems to me appropriate to look not only at the particulars of claim from November 2021 but also the amendments to the particulars of claim made post judgment in the context of what the defence is now pleading. If the amended particulars of claim was pleading a new, or additional case then that might be relevant to looking at whether the defence was inconsistent with the judgment.

22. The amended particulars of claim at paragraph 48A include factual statements about the Claimant's correspondence with the Trust and the matters leading up to the assessment by Professor Edwards including that in February 2023 he "made a diagnosis of Functional Neurological Disorder ("FND")…"

23. The particulars of claim at paragraph 50 state:

> "The cause of the Claimant's breathing problems was a psychological condition called dysfunctional breathing. Corticosteroids are not a reasonable or recognised treatment for dysfunctional breathing. That condition should have been diagnosed in around 2008 when the Claimant was 17 years of age. Following establishment of the correct diagnosis, she would have been weaned off steroids, should that have been necessary, and provided with psychological therapy, respiratory therapy and education about how to manage dysfunctional breathing, as required. She would have been able to lead a normal life and to cope well with any dysfunctional breathing symptoms."

24. The amended particulars of claim add, after the fourth sentence, "*following her therapy and education, she would not have developed FND, alternatively and FND symptoms that did develop would have been recognised, correctly diagnosed and treated early on, and would not have been severe or given rise to disability*".

25. In the particulars of claim, the particulars of injury said that she experienced many years of severe and debilitating breathlessness and excessive steroid prescriptions. She has suffered steroid withdrawal symptoms, she is now unable to undertake everyday tasks without getting breathless. Prolonged high dose steroids caused or contributed to loss of bone density, diabetes, obesity and muscle wasting. Through a combination of

steroid induced physical inactivity, generalised joint pain and obesity, the Claimant has been a wheelchair user since 2017. It is said her current level of fatigue, pain and physical disability is now chronic and entrenched. In the amended particulars of claim the words "*and impacted by FND*" are added.

26. There are other amendments which do not need to be set out as they do not add to the above for the purposes of this judgment.

The defence

27. There was no defence served prior to judgment being entered, so the defence is new. The controversial parts are in the main in paragraphs 10, 11 and 12.

28. In paragraph 10 it is pleaded that the Defendant stands by the agreed terms of the judgment "*insofar as the Claimant's injuries caused by the delay in diagnosis and treatment of her dysfunctional breathing and the unnecessary treatment with high doses of steroids are concerned*."

29. The defence admits the "*first four sentences of paragraph 50 of the particulars of claim, save that no admissions are made as to the Claimant's likely engagement with and/or the outcome of such therapy as ought to have been offered in that respect…*". The first four sentenced of paragraphs 50 are set out at paragraph 23 above.

30. Paragraph 11 of the defence goes on to positively aver:

> "(ii) The Claimant's dysfunctional breathing was part of an underlying functional neurological disorder (hereafter FND) and was based only in part on an organic respiratory condition. As randomised trials show, treatment of dysfunctional breathing, on the balance of probabilities would not have bene highly effective in the Claimant's case, even if she would have engaged with what would likely have been prolonged and demanding therapy….
>
> (iii) As the Defendant's evidence demonstrates, major triggers of the Claimant's specific presentation were complex psychosocial issues and so breathing interventions for her dysfunctional breathing would not likely have been protective from further psychological issues. Just as the totality of her FND (further addressed below), the claimant's functional condition was part of a complex biopsychosocial disease, and the claimant had strong predisposing, perpetuation and precipitating factors with substantial psychological trauma in childhood an later life."

31. It is pleaded in (iv) that "*it is unlikely that the Claimant would have achieved full remission even if she had started to and continued to engage with appropriate therapy whilst still a teenager*."

32. Paragraph 12 of the defence pleads to the amended parts of paragraph 50 of the particulars of claim concerning the Claimant's case on FND (so the additional paragraph which states "*following that therapy and education she would not have*

developed FND"). It is pleaded (i) that it is denied that she would not have developed FND in the absence of the admitted breach and (ii) that the worsening of the Claimant's FND in 2021/22 and more marked worsening in 2023 following diagnosis is associated with the legal proceedings and so would have been avoided. It is denied that the correct diagnosis and interventions would have substantially altered the levels of disability seen in around 2018/2019. It is therefore denied that earlier recognition and treatment would have enabled the Claimant to avoid the severity and level of symptoms with which she presented as a consequence of FND in or around 2019.

33. I note that the last sentence of paragraph 50 of the unamended particulars of claim, set out above at paragraph 23, is not directly referenced, but a positive case is clearly pleaded against it, amounting to a denial. That sentence is "*She would have been able to lead a normal life and to cope well with any dysfunctional breathing symptoms*."

34. Paragraph 12(iii) of the defence pleads to the statement "*all of her problems (save for migraine) are part of a functional neurological disorder or FND: none of them are organic physical illnesses*" from the preliminary schedule of loss dated 15 December 2023. The Defence states that it follows all of the Claimant's symptoms now arise from FND. It is their case that the Claimant, with treatment, will recover to the level of symptoms she had in 2019, which were as a result of FND alone. When that level of recovery is reached any causative effect of the admitted negligence will be extinguished. It is also denied the migraines are causally related to the negligence.

35. The Claimant's position is that the Defence in these paragraphs is inconsistent with the admission in that it seeks to open up the correct diagnosis in 2008, the helpfulness of the treatment it is admitted should have been given from 2008, and that the levels of disability the Claimant suffered from and now suffers from, which were admitted to be caused by the negligence, are not caused by the admitted breaches.

36. I confessed during the hearing to some confusion as to what the defence case is. It is admitted the correct diagnosis in 2008 was dysfunctional breathing but also averred that the Claimant had a functional neurological disorder, of which the dysfunctional breathing was a part, apparently from that time. There is a denial that the FND was caused by the negligence. Given that it is admitted that the correct diagnosis in 2008 should have been dysfunctional breathing but it appears also to be said that she always had FND, it was not clear exactly what the Defendant is pleading in terms of injury caused by the negligence.

37. Ms Johnson, who did not draft the defence, clarified that the Defendant's case was that dysfunctional breathing was the correct diagnosis in 2008. It is accepted that there were serious and significant symptoms caused by both the failure to get to grips with dysfunctional breathing and the prescription of steroids, but *at some point in time*, the dysfunctional breathing progressed to FND. The Defendant says that 2019 is the point at which the FND took over from dysfunctional breathing as the cause of the Claimant's symptoms.

38. It does seem to me that is different to what the defence pleads in paragraphs 11 and 12, which appear to say that the treatment for dysfunctional breathing would not have been effective (although it is not clear if it is suggesting it would only have been partly effective).

39. The Claimant accepts the Defendant can contend that the February 2023 diagnosis of FND is incorrect or that such FND as she now has was not caused or materially contributed to by the negligence, or that her prognosis is good. The Claimant's position is that the starting point must however be the facts recorded in the judgment order.

40. The Defendant's position is that the defence is consistent with judgment order. The Claimant does not have a judgment in respect of her FND, save for such part of it can be properly described as dysfunctional breathing. The FND did not form part of her original claim. The difference between the parties is essentially what the nature of the admissions made were.

Construction of the judgment order

41. The judgment order was agreed in 2022. That is after the particulars of claim were served. It is clearly not simply a replication of the admissions made in the letter of response. Reading the various particulars of claim and letter of response, I take into account as context that the Claimant's case has always had two parts to it, the failure to diagnose the dysfunctional breathing with the consequences it was not effectively treated and the breathlessness continued, and the incorrect prescription of steroids which caused specified consequences, but also working alongside the breathlessness combined to a reduction of overall function and mobility. The defendant accepts that there are those two parts to the claim. However, the Defendant's position is that the relevant parts of the judgment order refer to injuries suffered only as a result of the excessive prescription of steroids.

42. The judgment order is more than a simple judgment for damages to be assessed with the Defendant being able to make any arguments as to quantum they wish. There are 13 specific matters which are set out which the judgment says "*would have taken place or [been] avoided*" as a result of the admitted breach of duty. The Defendant cannot in my judgment, and I do not think this is controversial, argue matters which have been determined by the judgment. They would have to seek to amend or appeal the judgment to do so.

43. Paragraph (i) of the judgment order states that the Claimant would have received the correct diagnosis of dysfunctional breathing from 2008. That is a judgment that from 2008 the correct diagnosis was dysfunctional breathing. That was in fact the diagnosis made in around October 2017. There is no endpoint specified in the paragraph but in context, in my judgment, that is until the actual diagnosis in 2017. There is no suggestion that the 2017 diagnosis was incorrect.

44. Paragraphs (ii) to (iv) set out what it is agreed the Claimant's treatment path would have been from 2008, namely referral a to psychiatrist from 3 December 2012, referral to a ventilatory service before July 2017 (when it in fact happened) and referral to physio in June 2014.

45. Paragraph (v) is that the Claimant would have had fewer incidences of treatment with high dose steroids, as she only had mild asthma and (vi) that she would have been diagnosed with dysfunctional breathing and would have received appropriate treatment minimising the side effects of steroid treatment.

46. Both paragraphs are in the terms of the letter of response. They respond to longer paragraphs in the draft particulars of claim but do not simply accept what is set out in those paragraphs. The relevant paragraphs of the draft particulars refer to the asthma itself playing very little part in the severe symptoms she suffered and therefore the symptoms did not respond to the standard asthma rescue medications. It goes on to refer to the treatment she had including prolonged and frequent stays in hospital. It must mean the treatment for the dysfunctional breathing would have been effective to avoid such severe symptoms. I do not accept the Defendant's argument that this is simply saying that she would have been given fewer higher doses of steroids as there would have been a recognition that her symptoms came from dysfunctional breathing. In my judgement those clauses determine that the Claimant would have received appropriate treatment for her dysfunctional breathing, which would have led to fewer symptomatic periods which were in fact in the past treated with high dose steroids. That is also consistent with my construction of paragraph (x) of the judgment order below.

47. It is not in dispute that paragraphs (vii) to (ix) specify steroid related injuries. I will not deal with their detail save to note that (vii) stated that the Claimant would have avoided the adverse effect of steroid treatment impacting on her breathing and quality of life for 11 years. I note that she was weaned off the steroids in 2019, which is 11 years after 2008 when the negligence started. This is a determination that she was suffering adverse impacts of steroid treatment for 11 years.

48. The judgment at (x) that the Claimant would have avoided inactivity due to breathlessness, which contributed to her developing obesity and proximal myopathy (muscle wasting) leading to a reduction of overall function and mobility is in my judgment an admission that those symptoms would have been avoided but for the breach of duty. It does not limit those symptoms suffered as a result of any particular cause. This is not a clause which has been taken directly from an admission in the letter of response. It is not expressly linked to the use of steroids. To construe it in such a way, as the Defendant submits I should, is not consistent with the natural meaning of the words or the context that the underlying disorder was caused breathlessness, which is specifically referred to in the clause.

49. In any event, even if the judgment order was on the understanding that symptoms were side effects of the steroids (which I do not find that it was), that would not in my judgment matter for the purpose of its meaning. The fact is the order provides that the those symptoms were as a result of the breach of duty. The fact that the order should or should not have been made is irrelevant to its construction.

50. The judgment at (xi) is that the Claimant would not have suffered from ongoing, debilitating and widespread joint ache and joint pain. Again this is not a clause lifted directly from the admissions in the letter of response. In my judgment it is again an agreement that the symptoms specified would have been avoided but for the breach of duty. It is not limited to the direct effects of steroids. The word ongoing must be interpreted such that it is ongoing at the time of the judgment order. It does not mean (nor do I think it was argued that) beyond the date of the judgment it cannot be argued that those symptoms are not caused by the admitted negligence – it is not prospective.

51. The same analysis applies in my judgment to paragraph (xii) with one difference. There is an admission in the letter of response that "*it is accepted that the negligence led to the Claimant being wheelchair bound with limited mobility…*". That is in response to

the pleaded allegation "*at the same time the Claimant was inactive over many years ultimately helped confine her to a wheelchair by 2017. This was not helped by the onset of generalised joint pains as well as the development of obesity as a result of the combination of inactivity and continual prednisolone, often at high doses for weeks since April 2010*." The previous paragraph in the draft particulars of claim had specifically referred to the Claimant suffering long term adverse effects of corticosteroids. But it is clear that this paragraph in the letter of response, (viii), is not simply referring to steroids, but also inactivity.

52. Ms Johnson argues that any such interpretation would put the experts in an impossible position as their views are – on the defence side – that these symptoms at least from 2019 are due to FND not the dysfunctional breathing and/or steroids or the combination of both. I do not accept that experts cannot form opinions on the basis of agreed facts, even if they disagree with those facts. It happens all the time in clinical negligence cases – for example they may be are asked by a judge, in giving evidence – if I find x as a fact, what would your opinion be. Their evidence is of their opinion, the findings by a court are of facts.

Conclusion

53. In my judgment the Defence is inconsistent with the judgment insofar as it states that treatment for the dysfunctional breathing from 2008 would not have been successful and that she would have had the problems set out in paragraphs (x) to xii) before the date of the judgment in any event. The case as put by Ms Johnson is also inconsistent insofar as it is saying that the symptoms set out in the judgment at (x) to (xii) were not caused by the negligence before the date of the judgment.

54. The fact the Claimant has not specified in her amended pleading the date at which the FND started does not matter insofar as those symptoms specified in the order are concerned. Their cause has been determined. In my judgment, the Defendant is entitled to make any argument it wishes in respect of the FND, save to plead that those symptoms specified as having been caused by the negligence in the judgment order have not been so caused or that the correct diagnosis in 2008 to 2017 was not dysfunctional breathing.