



Neutral Citation Number: [2020] EWHC 683 (QB)

Case No: QB-2019-001199

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2020

Before :

MASTER COOK

Between :

Paula Mackintosh	<u>Claimant</u>
- and -	
Sheffield Teaching Hospitals NHS Foundation trust	<u>Defendant</u>

Hugh Preston QC (instructed by **Taylor & Emmet LLP**) for the **Claimant**
Robert Cumming (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing date: 18 February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER COOK

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1. This judgment arises from an adjourned costs and case management hearing (CCMC) which took place on 18 February 2020. At the conclusion of the hearing I indicated to the parties that I would hand down a written judgment given the fact there are potentially a large number of claims raising similar issues which may, at a future date, require some form of co-ordinated case management.
2. The Claimant's claim is for damages arising from alleged clinical negligence in failing to advise as to the material risks associated with the implantation of a transobturator mesh tape device on 17 March 2011.
3. The claim was originally commenced in the Sheffield County Court but was transferred to the Queen's Bench Division by District Judge Batchelor on 30 November 2018. The reason for the transfer was that product liability litigation arising from the implantation of vaginal mesh was already proceeding in the High Court and managed by me. It was anticipated there would be a large number of similar negligence claims which would also benefit from co-ordinated case management by one of the dedicated clinical negligence Masters in London. After some discussion with District Judge Batchelor I agreed that it would be sensible for the claim to be transferred to the Queen's Bench Division.
4. At the CCMC the Claimant relied upon the witness statement of Linda Millband which set out the context in which this case and others arose. Ms Millband is a partner in the firm Thompsons. She states that she currently acts for over 200 claimants all of whom have received treatment for stress urinary incontinence or vaginal prolapse. Each of the claimants has been treated by the insertion of a TVT (transvaginal tape), TOT (trans-obturator tape), or TVM (trans-vaginal mesh). In each of the claims the claimant alleges a breach of duty that, (a) the operative treatment was recommended without giving the claimant adequate advice on the risks associated with implantation of the mesh and (b) no or inadequate advice was given as to the alternative treatment options available.
5. Ms Millband stated that she had been working closely with two other claimant firms, Hugh James and Taylor & Emmett who were also acting for groups of claimants of various sizes with similar claims. She said that at an early stage it had been recognised that unlike the product liability claims, where a defect in the implanted device was alleged, there was no true "common issue" in these claims which might make a Group Litigation Order appropriate, as each claim was a cause of action arising from unique facts. However, she also said that the breaches of duty which had been identified were "strikingly similar, if not identical" in all cases such that it seemed to her and the other claimant firms that resolution of the breach of duty issues in a sensibly selected group of claims would be highly likely to lead to resolution of the of the issue and enable the cases to be dealt with in a more cost effective manner and maximise the prospects of some form of ADR which would significantly reduce the burden on the resources of the court caused by the large number of cases being litigated.
6. Miss Millband also stated that she had contacted DAC Beachcroft who are instructed on behalf of the Defendant with a view to discussing the issue of co-ordinated case management of these claims. It is clear to me from the correspondence exhibited to her witness statement that such discussions are still very much in their formative

stages. Miss Millband's desire was to use this case as a "procedural mechanism" to place the issue of co-ordinated case management before the court.

7. Mr Preston QC informed me that 42 cases had currently been identified as suitable for coordinated case management. Of these 42 cases proceedings had been issued in 5 cases. He informed me that one of the practical difficulties that has held back claimants from serving claims, is that without knowing the potential direction of travel so far as coordinated case management is concerned, claimants have not been clear as to whether the court will require, for example, service of full pleadings, or an abbreviated form such as schedules of information. By way of example he put forward the following proposal.

"In each of the claims listed in the Schedule of Claims, the Claimant shall by [] file and serve upon the Defendants to the claim, relevant clinical records together with a schedule of information containing the following information:

(i) The claim number, the Claimant's name and date of birth, the name and address of her legal representative and the name of the Defendant(s) to the claim.

(ii) A summary of the alternative treatment options that it is alleged should have been offered to the Claimant but were not, prior to any decision to undergo the mesh implantation procedure in question.

(iii) A summary of the particular risks associated with the operation in question that the Claimant alleges were either not advised about or in respect of which inadequate advice was given.

(iv) The date of the operation in question, the name of the surgeon, the name of the hospital and the mesh product type and make.

(v) A brief summary of any additional allegations of clinical negligence made in the claim but not falling within the scope of paragraph 3 of this order.

(vi) A brief summary of the injuries sustained by the Claimant for which damages are claimed.

(vii) A brief summary of the heads of special damages in respect of which damages are claimed"

8. Mr Preston QC urged me, in the circumstances, to make an order requiring the Claimants to serve schedules of information in the five currently issued claims and then to list them for a joint case management conference. He stressed that he was not making an application at this stage for any particular form of co-ordinated case management but wished to put in place a mechanism by which the court could

achieve a proportionate and cost effective provision of information to enable decisions to be made on another day.

9. Mr Cumming pointed out, from the Defendant's perspective, one of the features of litigation involving TVT, TOT and TVM was that large numbers of claims were threatened but very few materialised. He stressed that NHS Resolution, on behalf of the Defendant, were not opposed to sensible case management proposals provided it was clear that there were indeed a large number of issued claims which would proceed.
10. From my experience to date Mr Cumming's observation is accurate. There has been a huge amount of publicity surrounding the use of synthetic mesh to treat vaginal incontinence and vaginal prolapse and the adverse complications suffered by many women who have undergone the treatment. Currently, in the High Court there are two product liability cases progressing to trial. Both are test cases brought against Johnson & Johnson, the *JJML Stress Urinary Incontinence Products litigation* QB-2017-001720 and the *JJML Pelvic Organ Products litigation* QB-2015-008362. It was initially anticipated that these claims might proceed under Group Litigation Orders. However only a hand full of claims were issued and the large number of claims which had been threatened, failed to materialise. The decision was therefore made to take two individual claims to trial.
11. A similar pattern emerges in this case. The listing of the CCMC was delayed at the parties' request on the basis there would be a large number of similar claims issued and served. As set out at paragraph 7 above only five claims have been issued to date.
12. On 12 February 2020 I made directions in the case of *Talbot v Torbay and South Devon NHS Foundation Trust* QB-2019-000604. This claim involved alleged negligent advice given to the claimant in connection with an unsuccessful anterior repair procedure in September 2011 followed by alleged negligent advice in connection with an uphold procedure in March 2012 involving the insertion of an Uphold LITE Vaginal Support System manufactured by Boston Scientific. The Claimant in this claim was represented by Lime solicitors. Given that the alleged breaches of duty occurred over eight years ago I could see no reason to delay the claim's progress or to co-ordinate its management with the current claim. I therefore made directions for the Talbot claim to proceed to trial in a trial window between October and December 2021.
13. It is clear to me that the claimants' solicitors have much work to do in terms of preparation and notification of the individual claims. It may well be that some form of bespoke pre-action protocol can be agreed with the solicitors acting for NHS Resolution. This would certainly be in accordance with the duty of the parties to help the court in furthering the overriding objective under CPR r.1.3. For my part the most obvious feature of these cases is that the advice given to each claimant was imparted in unique circumstances and I readily accept that there may be a limited pool of experts and that the party's solicitors' resources may be pressed. However, it seems to me that these features do not of themselves justify delaying the claims which are now ready to proceed. In the circumstances I am of the view that progress should be made on the claims which have been issued and served. Further delay is not in the interests of justice.

14. On the basis of what I am told I think it is realistic to accept there is the potential for many more claims of this kind to be issued in the medium to long term. If such claims are issued it would assist the Court if the heading on the claim form and statements of case contains the wording, "TVT/TOT/TVM mesh implant (consent) Litigation". This will enable the files to be linked and assigned to me on the Court's electronic case management system.

15. I will therefore make directions in this claim for; disclosure, witness statements, exchange of expert evidence and schedules of loss. I will order a further CCMC to take place on 15 February 2022 when I will consider making final directions for trial. I would urge the parties to agree similar directions in the remaining issued claims. Hopefully by 15 February 2022 the court will have a much clearer picture of the number of similar claims and issues they raise.