

Claim number: QB-2016-000602

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
MASTER YOXALL

B E T W E E N

MS LIANE DORRINGTON

Claimant

-and-

BASILDON AND THURROCK UNIVERSITY HOSPITALS NHS  
FOUNDATION TRUST

Defendant

---

**JUDGMENT**

---

*My judgment will not be electronically recorded. Accordingly, this may be treated as authentic.*

1. On the 19<sup>th</sup> February 2020 and 16<sup>th</sup> March 2020, I heard the Defendant's application for an order that the proceedings be stayed until the Claimant undergoes urodynamics testing by the Defendant's expert Professor Cardozo or her technicians. On the 20<sup>th</sup> March 2020 I made an order granting that stay and I promised that a written judgment would follow. This is it.

2. Ms Laura Johnson, of counsel, appeared on behalf of the Defendant and Mr. Harry Trusted, of counsel, appeared on behalf of the Claimant. I am grateful for their written and oral submissions. I hope that I will be forgiven for not rehearsing their arguments in full. The skeleton arguments should be read with this judgment.

3. I have been referred to a number of authorities including:

*Starr v NCB [1977] 1 W.L.R. 63, CA;*  
*Laycock v Lagoe [1997] P.I.Q.R P518, CA;*

*Regina (Y) v Croydon LBC [2016] EWCA Civ 398.*

4. As far as the authorities are concerned, I am obviously bound by the principles stated in those cases, but I remind myself that each case turns on its own facts.

5. I also remind myself that it is for the Defendant to justify the imposition of the stay.

*The underlying claim and background*

6. The underlying claim is one of clinical negligence. The Claimant alleges that as a result of a delay in decompressing a disc prolapse she has suffered “severe cauda equina dysfunction with persistent evidence of left S2, S3 and S4 sensory reduction”. The Claimant alleges that she suffers lower back pain, urinary incontinence, faecal incontinence, numbness in the left leg, perianal numbness and lack of sexual function.

7. The Claimant has served a schedule of loss for general damages and over £400,000 in special damages.

8. It is agreed that urinary incontinence would contribute substantially to any award for pain, suffering and loss of amenity and also in respect of special damages.

9. What happened was that the Claimant was seen at the Defendant’s hospital on the 20<sup>th</sup> September 2013 complaining of a sudden onset of back pain with bilateral symptoms in the legs and a full bladder which she could not empty. The Claimant’s case is that the doctor who examined her was unsympathetic and failed to properly explain the need for a rectal examination. The Claimant refused consent to that examination and was discharged from hospital. The Claimant returned to the hospital on the 24<sup>th</sup> September 2013 and was fully investigated. A cauda equina syndrome was diagnosed and the Claimant underwent decompression surgery on the 25<sup>th</sup> September 2013.

10. The Defendant accepts that the Claimant should not have been discharged from hospital on the 20<sup>th</sup> September and to that extent breach of duty is admitted. The Defendant accepts that decompression should have been carried out on 21<sup>st</sup> September 2013.

11. A central issue is whether the Claimant now has bladder incontinence as a result of this admitted breach of duty. As Ms Johnson puts it, the question of urinary incontinence and its cause goes not only to the head of loss associated with that aspect of the claim but to the existence of nerve damage at all. The Defendant does not accept that the Claimant suffered sacral nerve dysfunction that would cause the sensory and neurological deficits of which the Claimant now complains.

12. In short, factual and medical causation are very much in issue. The Defendant makes the point on factual causation that not only are there no entries in the medical records reporting urinary dysfunction between September 2013 and 15<sup>th</sup> September 2015,

but there are records within that period where the Claimant was asked about her bladder and bowel function and she confirmed that these were normal.

13. The Defendant makes the point – which I accept – that it has no way of knowing what the Claimant’s urinary function is without reliable testing that enables its experts to express a view that the Defendant has confidence in.

14. I must mention an important matter. The Claimant was raped in March 2011. As a result of this she developed depression and was diagnosed with an emotionally unstable personality disorder. The Claimant contends that this has led to “an extreme reluctance to accept intimate examination”, as illustrated by her initial refusal to undergo a rectal examination in September 2013.

#### *Urodynamic testing*

15. On the 23<sup>rd</sup> January 2019, I gave case management directions taking the case to trial. The trial is listed for hearing in October 2020. Inter alia, I gave permission to each party to rely on expert evidence in neurosurgery and urology. Subsequently, the parties’ solicitors discussed the question of urodynamic testing. Both sides were aware of the Claimant’s history and sensitivities and it was agreed that the Claimant’s solicitor would seek a single expert to carry out the testing – the results of which could then be considered by other experts. I was taken to correspondence between the solicitors. Suffice to say that the Defendant’s solicitors asked to be kept informed. Those acting for the Claimant made the point that they had difficulty in finding a female expert.

16. The Claimant did undergo testing by Ms. Charlotte Chaliha, a urogynaecologist. Her urodynamic report was duly served on the Defendant’s solicitors. The report appears to show a urological problem and incontinence. The problem is that those acting for the Defendant were not aware of Dr Chaliha’s selection as an expert. The position of Mr. Lambert, of Bevan Brittan for the Defendant, is that he expected to be kept informed of the testing and who was to carry it out. Had he been told of the selection of Ms Chaliha he would have objected to her appointment as an expert. Ms Savjani, of Irwin Mitchell for the Claimant, contends that the identity of the expert was not required by the Defendant’s solicitors. Ideally, Ms Savjani should have discussed the appointment of Ms Chaliha’s with Mr. Lambert given that the expert was to be a joint expert. Having said that, I accept that Ms Savjani was under pressure to find an expert.

17. Those acting for the Defendant had previous personal knowledge of Ms Chaliha from when she was engaged on behalf of a claimant in a case. In that case Ms Chaliha came under severe judicial criticism; see *Watts v Secretary of State for Health [2016] EWHC 2835 (QB) at [53], [54] and [64]*. The result was that the claimant’s case was dismissed.

18. The Claimant submits that Ms Chaliha is not a Part 35 expert in the case. She is merely carrying out testing. I do not think this is an answer to the problem. I am aware that Ms Chaliha is in no position to defend herself on this application, but the Defendant’s

concerns are justifiable given the judicial criticism I have referred to. It may well be that Ms Chaliha is in fact capable of carrying out the testing, but the Defendant is entitled, on a substantial case such as this, to proceed with an expert in which it has confidence.

19. Professor Linda Cardozo, the Defendant's expert urologist provided a letter dated 19<sup>th</sup> December 2019 commenting on Ms Chaliha's report. She states:

“ ... Whilst I am in no way criticising Miss Chaliha's urodynamic investigations which she undertook herself, not all urodynamic testing is the same and the results may depend upon the equipment used, the test performed, the person undertaking the test and the way in which it was carried out.

... the equipment has produced a trace on a very small scale which is therefore somewhat difficult to interpret ... it would appear that at one point there is a gap in both the intravesical pressure trace as well as the detrusor pressure line recording. It is quite likely that one of the pressure measuring catheters had fallen out at that point. Therefore I am unsure regarding the cause of [the Claimant's] urinary leakage.

On the basis of the current urodynamic test results, I cannot make a conclusive statement regarding the actual underlying pathology in relation to [the Claimant's] pelvic floor dysfunction. As I am unable to reach any firm conclusions from the urodynamic studies provided, it could impact adversely upon my ability to provide an accurate report on causation, condition and prognosis. As the results of urodynamic studies are of paramount importance in this medical negligence claim, I think it is important to have as accurate and up to date results available as possible.”

Professor Cardozo went on to make the point that an all female team of healthcare professionals could be provided to carry out the tests.

20. Against this, Mr. Shah, the Claimant's urological expert is of the view that the tests results show a urological problem and that further testing is not necessary. It is not for me, on this application, to decide the issue between Professor Cardozo and Mr. Shah. It is enough to say that the view of Professor Cardozo appears to be a reasonable one.

21. The Defendant makes the point that it would never have chosen Ms Chaliha as a joint expert and that had she been a joint expert they would have been entitled to seek a separate alternative; see *Daniels v Walker* [2000] 1 W.L.R. 1382, CA. I accept this proposition.

22. Those acting for the Defendant requested that the Claimant undergo urodynamic testing by Professor Cardozo or her team. In my view, that was a reasonable request which the Defendant was entitled to make.

23. To her credit, the Claimant *agreed* to undergo such further testing. It is to be noted that the Claimant has agreed to examinations (some intimate) by the Defendant's experts as well as her own although (as I understand it) the examination by Mr. McFarlane, the Defendant's neurosurgeon, did not proceed as he wished.

24. Having agreed to further testing by Professor Cardozo or her team, the appointment was cancelled as the Claimant had a urinary tract infection [“UTI”]. Thereafter, although she had recovered from the UTI, the Claimant refused to undergo the further test with Professor Cardozo on the basis that the further examination would cause further UTI.

25. There is no evidence that the first urodynamic testing carried out on 22<sup>nd</sup> May 2019 caused the Claimant’s UTI. In an email to Mr. Lambert dated 17<sup>th</sup> February 2020, Professor Cardozo comments on the Claimant’s attributing her severe UTI to the urodynamic testing. She states:

“ ...I have looked through the GP records and I think there must be some misunderstanding here. Whilst there is no real evidence of confirmed urinary tract infections, if a urodynamic investigation causes a urinary tract infection (which it does in between 2%-4% of studies) then the infection occurs immediately after the test. There is no way that urodynamics causes long term recurrent urinary tract infections. It is the underlying pathology that causes the infections in the long term, not the individual test.”

### *Conclusion*

26. As indicated above, I consider the Defendant’s request that the Claimant do undergo further urodynamic testing to be reasonable. I bear in mind that the examination or testing is to be carried out by an all female team in a suitable setting.

27. In the circumstances, I do not think it would be just to saddle the Defendant with the findings of an expert whom it did not chose and in whom it has no confidence.

28. On balance, I do not consider that the Claimant has put forward a substantial reason for not having the further urodynamic test with Professor Cardozo. I bear in mind the Claimant’s history and sensitivities, but (to her credit) she has undergone various examinations by other experts. She has submitted to an examination or testing by Ms Chaliha. No doubt these examinations were unpleasant or distressing for the Claimant but there is no evidence of any psychological damage being caused. Last, and by no means least, the Claimant did agree to undergo a further test with Professor Cardozo.

29. As far as the risk of UTI is concerned, that risk is slight. There is no evidence that the first urodynamic test caused UTI. No doubt UTI would be most unwelcome but it is a relatively minor condition.<sup>1</sup> In my view, the Claimant’s fear of a UTI is not a substantial or reasonable reason to refuse the further test.

30. I accept that the Claimant expected that she would only have to undergo one test. It is regrettable that another test is necessary. I note that the Defendant has made allowances for the Claimant’s sensitivities by changing from their original choice of urological expert, Mr. Harris, to a female – Professor Cardozo. I also bear in mind that

---

<sup>1</sup> In *Laycock* the slight risk was a psychotic episode with a claimant who had mental health issues.

the Defendant originally agreed to a single expert to carry out the testing - again taking into account the Claimant's sensitivities. There is nothing in the Defendant's conduct which precludes the further examination.

31. In the circumstances, to do justice between the parties, I will order a stay. I bear in mind that such an order is coercive in nature albeit indirectly. Obviously, my hope is that the Claimant will reconsider matters and choose to undergo testing by Professor Cardozo and her team as she originally agreed.

BASIL YOXALL

Dated the 23<sup>rd</sup> April 2020