ORD 20/0008

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CIVIL DIVISION
ORDINARY PROCEDURE

Between:-

R
(A minor by her Mother and Litigation Friend …)

Claimant

and

DEPARTMENT OF HEALTH & SOCIAL CARE

Defendant

Judgment delivered
by His Honour Deemster Needham
at Douglas on 30th January 2026

Introduction

1. In the context of a clinical negligence "wrongful life" claim, this judgment deals with the Defendant's application dated 2nd September 2025 ("the Defendant's Application") to set aside a consent order made as long ago as 7th October 2021 in which the issues of liability and causation were determined against the Defendant as a result of its full admissions in that regard, with quantum being left to be decided. The Defendant now wishes to avoid the consequences of such consent order by seeking to vary its extent in terms of clarifying the nature of its admission on liability and withdrawing completely its admission on causation. The Claimant resists the application.

2. I heard the Defendant's Application on 6th January 2026 and had the benefit of receiving the eloquent oral submissions of the parties' advocates, Ms Porter for the Defendant and Ms Creedon for the Claimant, in addition to reading their informative skeleton arguments.

3. In advance of the hearing, via my clerk, I raised with the parties a possible added complication with the state of the case in that I drew to the parties' attention common law jurisprudence regarding the bar in a "wrongful life" case to a child being the claimant. In the case in hand such difficulty had been created by the substitution of the child for her mother as claimant by consent order dated 5th August 2021. Shortly in advance of the hearing on 6th January 2026, Ms Creedon accepted that, in light of such authority, the substitution of the child as claimant had been an error and at the hearing made application on foot for revocation of the consent order of 5th August 2021 thereby cancelling the erroneous substitution. Ms Porter accepted the need for rectification of the Claimant's identity but suggested that such further problem added weight to the wholesale need to put the case on a sound legal footing by the court approving the Defendant's Application in conjunction with a reversion back to the proper claimant for a claim of this type.

4. I reserved judgment in the case and hand such down now.

The Claim

5. I have used the colloquial term "*wrongful life*" to describe the claim. Such term is not particularly apt in that generally it does not reflect the love, care, devotion, commitment and attachment that a parent in this sort of case usually provides to the child in question. Nothing I have seen in this case suggests such is not true for the subject of these proceedings.

6. The claim pertains to damages for losses allegedly sustained as a result of the negligence of the Defendant's staff in the antenatal care unit at Nobles Hospital regarding screening of the condition of the then unborn child, … ("R"). R was born on … 2016 with VACTRL Association. The crux of the claim appears to be that, had R's pre-birth condition been properly investigated during the pregnancy, the pregnancy would have been terminated such that the increased costs associated with the care of a child with very severe disabilities would have been avoided. The claim was issued in the Civil Division under the summary procedure on 14th August 2019 with the suggestion of damages being limited to £50,000. However, by February 2020 the claim was transferred to ordinary procedure with a suggestion that the damages claimed could be up to £10,000,000.

7. The particulars of claim were filed on 24th February 2020. Such referred to various scans occurring during the pregnancy, namely: … 2016 ("the 20-week scan"), … 2016 ("the 22-week scan"), … 2016 ("the 28-week scan"), and …2016 ("the 32-week scan"). The claim is that the Defendant's staff negligently omitted to identify indicators of foetal abnormalities which should have led to further expert investigation of the condition of the foetus. A particular background feature indicative of potential problems was the two-vessel umbilical cord identified at the 20-week scan. The 28- and 32-week scans were said to have highlighted increased amniotic fluid volumes. The lack of further investigation of such indicators was alleged to be negligent. It is alleged that further investigation would have required a referral to a specialist in foetal medicine which it was submitted would have, on the balance of probabilities, led to the confirmation of the ventricular septa defect in R's heart and the mother being offered an invasive test which in turn would have identified the microdeletion of Chromosome 14 in the foetus. It was alleged that the 20-week scan image indicated a heart defect and its lack of detection and onward referral was alleged to be a breach of duty. It was submitted that the absence of a "*stomach bubble*" at the 28-week scan should also have been documented and triggered a referral to a specialist in foetal medicine, particularly in light of the lack of a three-vessel umbilical cord and the increased volume of amniotic fluid (polyhydramnios). It was pleaded that, had the Claimant been referred to a specialist consultant in foetal medicine because of the potential heart defect indicated in the 20-week scan, further investigations would have revealed the likely extent of the disabilities to the unborn child.

8. The particulars of claim *inter alia* state at paragraph 20:

> "*Had the Claimant* [then being R's mother] *have known of these issues, and the serious disabilities and issues…* [R] *has been born with, she would have given serious consideration to terminating the pregnancy*."

9. The claim was for:

> "*Special and General damages in relation to the above and* [R's] *ongoing care and medical needs…* [plus interest]."

Subsequent filings

10. The Defendant's acknowledgement of service, dated 12th March 2020, indicated an intention to defend all of the claim. An extremely short defence, dated 26th March 2020, was filed which pleaded that a two-vessel umbilical cord occurred in 1 in 500 pregnancies and "*often causes no additional difficulties in a pregnancy*". As to the polyhydramnios identified at the 32-week scan, such was pleaded to be mild and did not require any further intervention or treatment. The other alleged negligence was denied.

11. By a consent order of 13th August 2020 leave was granted to the Claimant to instruct two named experts being a consultant in feto-maternal medicine and a consultant obstetrician and the Defendant was likewise given leave to instruct two such similar experts one in each field. The order provided that the Defendant's experts were to file reports by 9th September 2020. However, such deadline was extended by consent on several occasions.

12. By application dated 27th July 2021 the Claimant applied under rule 3.8 of the Rules of the High Court of Justice 2009 ("the 2009 Rules"), to substitute as the claimant, R as a minor by her mother and litigation friend. It is accepted that such substitution was made at the suggestion of the Defendant's then advocate and the application was made by the Claimant's previous advocate. I interject to confirm again that both sides now accept that such substitution was ill-founded in law (see the decision of the majority in the English & Welsh Court of Appeal case of *Mckay and Another v. Essex Area Health Authority and Another* [1982] Q.B. 116 where the court was unable to evaluate non-existence for the purpose of awarding damages for the denial of it). As stated, both sides are content for the court to amend this error by reinstating R's mother as claimant. It is the extent of what else is set aside or amended that is in issue.

Initial Expert Reports

13. In the material before me I have had sight of the reports of the four experts relied upon pursuant to the order of 13th August 2020. The Claimant's experts were Stephen M Wild, Consultant Obstetrician and Gynaecologist (report dated 9th August 2019) and Jeremy C Brocklesby, Consultant in Feto-Maternal Medicine (report dated 10th December 2019). The Defendant's experts were Emma Ferriman, Specialist in Obstetrics and Foetal and Maternal Medicine (report dated 26th November 2020) and Andrew Pickersgill, Consultant Obstetrician and Gynaecologist (report dated 22nd December 2020).

14. Concentrating on the Defendant's expert witnesses in particular, I note that Dr Ferriman's conclusion has been summarised in paragraph 1.03 of her report *inter alia* as follows:

> "… *The failure to diagnose the VSD* [ventricular septal defect] *and cardiac defect on the 20-week anomaly scan does not amount to a breach of duty as the detection rate is less than 50% for VSD and 37% for pulmonary stenosis. There was a failure for the sonographers at the 28 and 32 week growth scans to recognise an absent stomach and polyhydramnios. Had these abnormalities been recognised a referral would have been made to a foetal medicine specialist who would on the balance of probabilities… have diagnosed the oesophageal atresia (OA) / TQF and cardiac defect and karyotyping would have been offered which would have* [shown] *the microdeletion in chromosome 14….*"

15. Dr Pickersgill's opinion was broadly consistent with that of Dr Ferriman, although he suggested the expected detection rate by sonographers of trachea-oesophageal fistula and oesophageal atresia was below 50% such that it did not amount to a breach of duty, although obtaining an expert sonographer's opinion was suggested. Dr Pickersgill went on to state:

"*Following her 28-week scan, consideration should have been given to further investigate the mild polyhydramnios with a viral screen and a detailed foetal medicine scan, given the fact that there was also a two vessel umbilical cord." …* [and]

"Had a foetal medicine scan been performed after 28-weeks, it is possible that the cardiac defect and the oesophageal atresia may have been noted and karyotyping then arranged culminating in a diagnosis of micro-–deletion of chromosome 14, a rare genetic disorder. The diagnosis is likely to be made following 29-weeks of completed pregnancy."

Admission of liability and causation

16. By email on 28th May 2021 the experienced advocate being the then Legal Officer (Clinical Negligence) at the Attorney General's Chambers wrote to the Claimant's then advocate as follows:

    "*Further to the above I now have confirmation from the Department of Health and Social Care that liability in respect of breach of duty and causation is admitted by my client.*

    I would propose that we touch base next week and draft an order dealing with the admission of liability and causation, dealing with the administrative matter of the Claimant party names (which needs to be amended to include…[R]*) and adjourn the matter on the issue of Quantum so we can discuss and plan the way forward…*"

17. As indicated, by consent the substitution of the child as claimant occurred in August 2021. The Claimant's then advocate submitted a signed draft consent order which had been signed by the Defendant's then advocate on 6th October 2021 and which was approved by the court and issued on 7th October 2021 ("the October 21 Order") whereby it was stated *inter alia*:

    "*…**IT IS ORDERED THAT** - by consent- **THAT:***

    1. Judgment be and hereby is entered in favour of the Claimant as against the Defendant in respect of liability and causation with only quantum remaining in issue…"

18. It was envisaged in the October 21 Order that the parties would subsequently file agreed directions for the remaining part of the case to advance in due course.

Subsequent interlocutory matters

19. In August 2022 the Claimant made application seeking an interim payment and by the consent order, dated 18th November 2022, directions were given in that regard and a half-day hearing was set for 13th February 2023 to deal with the issue of interim damages. However, such hearing was not necessary as that issue was compromised by a consent order issued on 21st December 2022 whereby the Defendant agreed a care package which consisted of interim monthly payments to a third-party care provider regarding two nights per week overnight respite care for R and school travel costs. The contract term for the provision of the interim care package was to be a minimum of 12 months with the third-party provider and such contract was to continue thereafter terminable on one month's written notice. The Defendant was to file each year a statement of account regarding the care package in terms of overall expenditure in respect of such interim payments of damages.

20. Variation of the care package occurred on 12th September 2024 substituting a different third-party care provider and increasing the payments allowed. A further minor variation occurred on 10th January 2025.

Changes of advocates on both sides and a new Defence expert's report

21. The Claimant's advocate remained unchanged until shortly before the notice of change of advocate was received by the court at the end of March 2025. The advocate for the Defendant within the Attorney General's Chambers left that employment sometime after the making of the October 21 Order. Thereafter the case had been in the hands of a number of qualified staff within Chambers prior to the case officer becoming Ms Porter last year.

22. It appears that within Chambers there had been a reflection on matters and the Defendant, presumably upon advice of new legal advisors unilaterally chose to instruct an additional expert, without recourse to the court. The Defendant instructed Dr Gerald C Mason, a consultant in foetal-maternal medicine, to specifically answer the question whether, on balance of probabilities, had the abnormalities been detected in utero, R's mother would been offered a termination. In his report dated May 2025, Dr Mason answered such question in the negative.

23. In light of such new evidence the Defendant wished for leave to submit an amended defence along the lines of a draft prepared by Mr David Keates of Chambers dated 2nd September 2025. In that amended defence it was admitted that the Defendant's staff were negligent in omitting to refer R's mother to a specialist in foetal medicine following the scans at 28 and/or 32 weeks. It was admitted that further investigations would have been undertaken including an offer of an invasive test which would have led to the detection of the micro-deletion of chromosome 14. It was admitted that the parents of R would have been screened to see if this was a hereditary anomaly which could have identified if there was the same deletion in other family members so as to potentially reassure the parents that the likely micro-deletion would have little or no significance for R. It was admitted that a diagnosis of a suspected trachea-oesophageal fistula/ oesophageal atresia would have been made and the parents would have been counselled that this was a correctable defect but one which would require surgery very shortly after birth. It was denied that the criteria for lawful termination under the relevant statute regarding abortion then in force in the Isle of Man would have been met such that termination would not have been offered. The amended defence referred to the originally drafted particulars of claim as being defective in not positively asserting that a termination would have occurred, and it was denied that the mother would have opted for termination as most mothers in such circumstances do not proceed with a termination. Therefore, causation, in its entirety, was denied. It was to be pleaded that even if a diagnosis of VACTERL Association had been made the advice to R's mother would have been that the majority of children would not have learning disability and would have been expected to attend mainstream education making it unlikely for R's mother to have proceeded with termination, aside from any legal restriction thereof and R's mother was more likely to have proceeded with the pregnancy even if the proper investigations had been done and appropriate advice given.

The Defendant's Application

24. It is fair to say that the focus of the Defendant's Application and skeleton argument was primarily upon seeking leave to withdraw/vary the admissions under rule 6.19(5) of the 2009 Rules rather than focusing upon the setting aside or varying of the October 21 Order. There were two principal strands to the application regarding this being an erroneous admission, namely: (1) the particulars of claim in alleging causation were incomplete as such did not positively plead that termination would have been opted for even had the condition of the foetus been properly investigated and the likely resultant disabilities advised upon, such that the admission itself was inchoate; and (2) in light of Dr Mason's evidence, that on the factors known about the condition of the foetus at the time when such investigations should have been carried out, a termination would not have been possible at that stage of the pregnancy for legal reasons because the likely extent of the disability was not sufficient to legally justify abortion at that late stage, thereby wholly undermining causation.

25. For those reasons the Defendant sought the court's permission for it to clarify the extent of the admission on liability and withdraw its admission regarding causation and that the October 21 Order be set aside or varied accordingly.

Law

26. Ms Porter helpfully referred to the judgment of Acting Deemster Caine in *Old Mutual International Isle of Man Limited v Caddick* 2017 MLR 360 which considered the court's power to revoke or vary a final judgment on admission. Acting Deemster Caine in that case at [6] quoted with approval the view of Mr Justice Akenhead sitting in the English and Welsh High Court in the case of *Northern Rock (Asset Management) plc v Chancellors Associates Ltd* [2011] EWHC 3229 at [17] whereby logic dictated that the order of consideration of matters was that the issue of setting aside the judgment needed to be looked at first before the court decided whether to give a defendant permission to withdraw an admission. Such is the approach that I intend to adopt regarding the Defendant's Application.

27. Also in *Old Mutual International Isle of Man Limited* Acting Deemster Caine informatively considered the authorities from England and Wales regarding a court's ability to set aside a final judgment, not being a default judgment, based on CPR 3.1(7), which were virtually identical to the Manx provisions of rule 7.2(7) of the 2009 Rules. I have followed such commentary closely and accept the validity of the analysis made by the learned Acting Deemster who summarised the threads to be drawn from such cases as follows:

> "*57.I take from these authorities the following –*
>
> *(i) an application under Rule 7.2(7) to set aside a judgment upon admission which is determinative of the case cannot be founded upon the grounds of erroneous information or subsequent event (per Hughes LJ in Roult) (above);*
>
> *(ii) even if I am wrong in this regard, and an application under Rule 7.2(7) to set aside a final judgment upon admission can be founded upon erroneous information before the court, a conscious choice not to deploy relevant material (whether evidence or argument) will present an almost insuperable barrier to the application (per Briggs J in Kojima);*
>
> *(iii) the principles upon which final judgments may be set aside are limited in number, of long standing, and are well founded upon a clearly articulated public policy. For a new procedural rule to displace or extend those principles, a truly exceptional case would be required (per Norris J in QBE);*

(iv) it may be possible to set aside a final judgment obtained by fraud (although I make no determination upon this point, because it is not necessary for me to do so) (per Matthews J in Prompt Motors);

(v) it makes no difference that the final order which disposes of an action is made without an adjudication by a judge of the merits. A final order is a final order, whether it results from an admission, a default by the defendant, consent of the defendant, proof before a judge at a trial where the defendant does not appear, or an adjudication on the merits after a fully contested trial (per Norris J in QBE);

(vi) the interest of justice, and of litigants generally, require that a final order remains as such unless proper grounds for appeal exist (per Hughes LJ in Roult)…"

28. Since the provision of this useful summary of the law given by the learned Acting Deemster there have been a number of further relevant authorities in England and Wales regarding the court's powers in this regard. The most authoritative of which appeared to me to be the Court of Appeal decisions in *Terry v BCS Corporate Acceptances Ltd and others* [2018] EWCA Civ 2422 and *Vodafone Group plc v IPcom GmbH and Co KG* [2023] EWCA Civ 113.

29. In *Terry* Hamblen LJ stated:

> "*75. In summary, the circumstances in which CPR 3.1(7) can be relied upon to vary or revoke an interim order are limited. Normally, it will require a material change of circumstances since the order was made, or the facts on which the original decision was made being misstated. General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given the importance of finality. An example is provided by cases involving possession orders made when the defendant did not attend the hearing where CPR 39.3 may be relied upon by analogy – see Hackney London Borough Council v Findlay [2011] EWCA Civ 8, [2011] HLR 15. Another example is the use of powers akin to CPR 3.1(7) to vary or revoke financial orders made in family proceedings in relation to which there is a duty of full and frank disclosure and the court retains jurisdiction – see, for example, Sharland v Sharland [2015] UKSC 60, [2016] AC 871and Gohil v Gohil (No 2) [2015] UKSC 61, [2016] AC 849.*"

30. In *Vodaphone Group plc* Lewison LJ stated:

> *"54. The overwhelming thrust of the authorities is that the court's power under CPR rule 3.1 (7) to vary or revoke orders either cannot or should not be used to discharge a sealed final order. The only limited exception thus far even contemplated in civil proceedings is the case of a continuing order (such as a final injunction).*"

31. I accept that the admission as to liability and causation contained in the October 21 Order was a final order and therefore the discretion to set such aside under rule 7.2(7) is extremely limited.

32. Unsurprisingly given its subject matter, an English authority which was not referred to by the learned Acting Deemster in *Old Mutual International Isle of Man Limited* was the case of *Simmons v City Hospitals Sunderland NHS* (2016) [2016] EWHC 2953 (QB). That case does not alter the validity of the Acting Deemster's helpful summary. However, it is quite informative in terms of being an example where an admission-based final order was set aside. Indeed, such case has certain significant parallels with the matter in hand involving: a clinical negligence/breach of duty case; an admission of liability of breach of duty, albeit only partial; an order reflecting such admission and then subsequent medical evidence

obtained by the defendant undermining the factual basis of its admission. In that case Leggatt J, as he then was, identified that if there had been no order reflecting the partial admission of liability the issue of granting permission to withdraw the admission would have been relatively straightforward. However, the learned judge considered that the order reflecting the partial admission of liability was a significant obstacle. Leggatt J stated:

> "*15. A substantial difficulty which the defendant needs to overcome, however, arises from the fact that a judgment has indeed been entered. It is common ground that, although that judgment relates to only part of the claim, it is a final judgment in the sense that, subject only to any appeal, it finally decides issues of liability in the action. The application to vary the court's order is made under CPR 3.1(7) which gives the court power to make an order to vary or revoke an earlier order. It is established by authority, however, that that power ought not to be exercised in a way which would undermine or detract from the important principle that final orders are indeed intended to be final and that the only way to set aside a final order is ordinarily by way of an appeal.*
>
> *16. That CPR 3.1(7) should not be used to circumvent that important principle is made clear by the decision of the Court of Appeal in Roult v North West Strategic Health Authority [2010] 1 WLR 487. In Kojima v HSBC Bank plc [2011] EWHC 611 (Ch) Briggs J (as he then was) held that the principle was applicable where, in that case as in this, judgment had been entered on the basis of admissions with regard to part of the claimant's case*."

33. Nonetheless on the facts of that case the learned judge did exercise discretion to vary the order to expunge the judgment on liability reflecting the partial admission. From paragraphs [22] to [23] of the judgment it can be seen that the overriding factor supporting such decision was that the admission of liability had been only partial and the withdrawal related to issues which were "*inextricably intertwined*" with issues on liability which remained in dispute. The judge saw it as unsatisfactory for the liability-directed experts at the remaining trial being required to express opinions as the case went forward potentially on a false factual basis. Furthermore, the application came at an early stage of the litigation and there was no prejudice to the claimant by the withdrawal of the admissions because the action had not been progressed on the basis of them.

34. Both parties' advocates have referred to *Simmons* and I shall say more about that below.

35. As to the separate jurisdiction to amend or withdraw an admission after the start of proceedings, rule 6.19(5) provides that permission of the court is required. A similar provision is contained in CPR 14.1(5). The Part 14 practice direction within the CPR listed the factors that the court should have regard to when considering the issue of withdrawal of an admission which included:

> "(a*) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;*
>
> *(b) the conduct of the parties, including any conduct which led the party making the admission to do so;*
>
> *(c) the prejudice that may be caused to any person if the admission is withdrawn;*
>
> *(d) the prejudice that may be caused to any person if the application is refused;*

(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and

(g) the interests of the administration of justice"…

36. Ms Porter helpfully cited the Court of Appeal's judgment in *Woodland v Stopford* [2011] EWCA Civ 26 expressed by Ward LJ at paragraph 26 regarding the lack of their being a hierarchy in application of such considerations and the fact-sensitive nature of the exercise in "*striking a balance with a view to achieving the overriding objective*".

37. Plainly there is some crossover in the factual consideration regarding both the issue of setting aside an order under rule 7.2(7) and withdrawal of the admission under rule 6.19(5) but the former needs to be determined before the latter.

Submissions

38. I do not intend to repeat here all that each party has said to me whether in writing or orally, or to refer to all the cases cited to me. Such submissions are a matter of record and I have had full regard to all of them when reaching my decision. I can summarise the respective points advanced as follows.

For the Defendant

39. Ms Porter accepted that it was appropriate to change the identity of the Claimant back to R's mother but submitted that such could not be dealt with in isolation and ought to occur in conjunction with the variation of the judgment on causation, as simply reinstating the mother as claimant did not address the legal effect or foundation of the existing admission and judgment. It was submitted that, even if the correct claimant was reinstated, the Claimant's pleadings remained legally deficient in that the particulars of claim stated only that the mother would have given serious consideration to a termination rather than the positive assertion thereof which was required to found a complete cause of action in a wrongful life claim. It was submitted that causation could not be established without such positive pleading.

40. It was submitted that the Claimant had been on notice of the deficiency in her pleading since early September 2025 but had not sought to remedy the pleading or adduce further evidence. Absent a positive pleading, the claim remained unsustainable as a matter of law and it was submitted that the admission went no further than accepting that the mother would have merely given serious consideration to a termination.

41. As to the court's jurisdiction to set aside the October 21 Order, Ms Porter referred to *Old Mutual International Isle of Man Limited* and submitted that the court's power to vary or revoke an order under rule 7.2(7) was not clear-cut where the order was final. The 2009 Rules provided no explicit guidance as to how rule 7.2(7) was to be applied save for its application being consistent with the overriding objective. In respect of the CPR equivalent, the judgment in *Vodafone Group plc* referred to there being no authority which absolutely precluded the invocation of that rule in relation to varying or revoking final orders.

42. It was submitted that the court did have jurisdiction to set aside the order and such jurisdiction was to be exercised in a fact-sensitive way and driven by justice and proportionality. Ms Porter submitted that in simple terms, if there ever was such a case where exceptional circumstances arose, such was this case in light of: (a) the deficient

particulars of claim; (b) the need to substitute the claimant; (c) the as yet undisputed expert evidence that causation could not be established on the facts; (e) that mistakes had been made on both sides; (f) the relatively large size of the claim at £10 million meant that allowing the claim to proceed on the erroneous basis where causation could not be made out would be unfair and disproportionate in that the prejudice caused to the Defendant would be profound.

43. Ms Porter confirmed that the payment of interim damages in the form of the existing care package would continue until causation had been tested and such monies paid would not be sought to be recouped if the Defendant was ultimately successful in resisting the existence of causation. The current care package would continue until trial such that the Claimant would suffer no prejudice from the withdrawal of the admission.

44. Ms Porter submitted that this was a case where discretion should be exercised in favour of setting aside the October 21 Order. Ms Porter referred to the admission of the breach being maintained insofar as it was accepted that the mother should have been referred to a specialist following the scans at 28 and 32 weeks. The Defendant merely wished to clarify the nature of the admission of breach and withdraw the admission on causation. Although originally the application was made to vary the October 21 Order, procedurally and pragmatically it made sense to set aside the relevant order and allow rectification such that the case could proceed on a firm legal footing. It was submitted that the court was not being asked to excuse an error, instead it was being asked to prevent the litigation proceeding on a false factual and legal premise and to give the Claimant the opportunity to properly plead her case.

45. It was submitted that if set-aside did not occur then assessment of quantum would become extremely difficult in a case where the pleadings only stated that the mother would have given serious consideration to a termination. Such made establishing loss problematic. The Claimant was not being deprived of victory in a case which had been properly articulated, instead the Claimant was required to prove the case that she had always had the burden of proving.

46. It was submitted that the facts of this case could be materially distinguished from those in *Old Mutual International Isle of Man Limited* as the Defendant accepted responsibility for the breaches set out in the proposed amended defence. The application was confined to withdrawing judgment regarding causation and the purpose was to ensure that the claim was put back on all fours, through corrected pleadings, to prevent substantive injustice.

47. It was submitted that the admission on causation was immutable where it rested upon a pleading having such a deficient foundation. It was submitted that a pragmatic solution was for R's mother to be allowed to be substituted as the Claimant, the October 21 Order be set aside, save for judgment on liability specific to the breaches set out in the amended defence remaining and leave being granted to the Claimant to correct her pleadings should she wish to do so. It was suggested that such represented the minimum necessary intervention to restore the claim to a legally coherent footing and avoid satellite litigation including any appeals.

For the Claimant

48. It was submitted that it would be contrary to the proper administration of justice to allow the Defendant to withdraw an admission on liability and causation with a final order having been in place on such matters for some four years. Judgment was agreed by consent following receipt of expert foetal medicine opinion on both sides. The Defendant's expert in that discipline was Dr Ferriman, but the Defendant was seeking to rely upon a

second such expert with a differing opinion. It was submitted that the Defendant, with the medical and other resources it had available to it, would have provided informed instruction regarding the admission after considered advice from a skilled and experienced advocate within Chambers. That the agreed form of words of the October 21 Order determined all liability and causation issues was abundantly clear. If the admission was meant to be limited, whether that was in terms of liability for breach of duty or causation, it would have said so and it did not. Instead, the meaning of the October 21 Order was plain in that regard. This therefore was a final order. There were no liability issues to be resolved in this case which distinguished it from the facts in *Simmons*. Furthermore, the delay in applying to withdraw was significantly longer than that in *Simmons* and in the present case the parties had acted on the judgment in that interim damages had been paid in the form of a care package and the Claimant, reassured that she had won on liability and causation, had devoted significant effort to obtaining expert opinion on quantum.

49. It was submitted that if one applied the principles from *Vodafone Group plc* there was no real remit to suggest exercising a discretion here. It was submitted that there were none of the special circumstances referred to in the well-known case of *Ladd v Marshall* [1954 1 WLR 1489 to set aside the judgment. The ground covered by the report from Dr Mason could, with reasonable diligence, have been covered by a specific query to the then existing foetal medicine expert that the Defendant had originally instructed. Instead, there had been no explanation from the Claimant as to why such issue was not pursued at that time and different expert evidence being obtained some 4 years later. It was suggested that the late instruction of a further such expert, holding a differing opinion, was an example of "*expert shopping*".

50. Ms Creedon submitted that there were potentially patent flaws in the evidence of Dr Mason in that he had not considered the severity of the heart defect as detailed by Dr Ferriman where Dr Mason suggested R's heart defects were mild, which was patently incorrect in light of the major open-heart surgery that R had to undergo.

51. A simple set aside of the consent order of 5th August 2021, which had changed the Claimant's name to R, would suffice to revert identity of the Claimant to R's mother and allow the judgment on liability and causation to remain as it stands in the October 21 Order.

52. Aside from the very limited jurisdiction to set aside a final order, the application to withdraw the admission was opposed by the Claimant. The Claimant's advocate pointed to the significantly long delays in this matter, four years to make the application and four months to disclose the report of Dr Mason. It was submitted that it was prejudicial to the Claimant to have to reinstate the proceedings "*from scratch*". It was submitted that in light of this being a "*blanket judgment*" on liability and causation if it was set aside after such a long period such would put the case back virtually to square one. If the issue of causation was reopened the Defendant's legal aid funding would need to be readdressed. Legal aid expenditure had already been incurred regarding quantum. Added to that was the emotional turmoil of the client where she had thought her case had been won regarding breach of duty and causation and the reopening of all such issues would be extremely emotionally damaging and would significantly delay the potential for settlement. Practical difficulties may also exist in reinstructing the experts that they already had.

53. The public policy in ensuring finality to litigation was important. Ms Creedon submitted that the court setting aside a final order after 4 years could set a dangerous precedent in all civil litigation. It would be a change of the legal landscape in terms of certainty

regarding advocates advising their clients on a final order where liability and causation had been admitted and the parties had acted thereon on the basis that such part of the litigation was final. Such would have negative ramifications especially regarding setting a costs budget and potentially prohibiting access to justice. It was submitted that there was significant prejudice to the Claimant.

54. I did question Ms Creedon as to why 4 years had elapsed since the October 21 Order without the remaining issue of quantum being tried. Ms Creedon indicated that the question of quantum was complicated, time had been taken regarding the interim payments represented in the care package, experts in a number of disciplines regarding quantum had required to be instructed and the Claimant was due to receive its final report from their care expert imminently, such that quantum should be able to be settled or be adjudicated upon at trial sooner rather than later.

55. As to any equivocality or omission in the particulars of claim regarding opting for a termination, it was confirmed at the hearing by Ms Creedon that the Claimant's case was that R's mother would have chosen that option if she had been correctly advised about R's condition. The Claimant was willing to clarify that assertion by a correction of the pleadings if such was required, but any issue that the Defendant had with the particulars of claim should have been raised well in advance of the admission and the Defendant had a number of opportunities to request what it was requesting now prior to the agreement of the wording of the October 21 Order.

Discussion

56. When in the run up to hearing the Defendant's Application, via my clerk, I raised the difficulty regarding the identity of the present claimant in a case of this type and suggested, without fettering any discretion, that the parties may perhaps adopt pragmatism to compromise by agreement including setting aside the judgment on liability/causation and correcting the identity of the Claimant, Ms Creedon resisted that approach. In my considered opinion, having now reflected upon all the relevant authorities, she was right to do so, on the basis that the use of the discretion under rule 7.2(7) of the 2009 Rules, where a final order has been made upon liability, is plainly one that must require the application of extreme caution before it is exercised by the court. The pursuit of a public policy regarding the merits of finality in litigation is such that setting aside final orders, carries a real danger of opening the door to a plethora of unwarranted applications seeking to resurrect litigation that, in colloquial terms, has been "*done and dusted*" long ago. Such would be wholly detrimental to the virtues of an expeditious, fair and cost-effective justice system. Aside from where there has been fraud or other such trickery, cases where the circumstances in which the courts (particularly at first instance) should be able to set aside final orders in the interests of justice will be few and far between.

57. This is not a case such as that found on the facts in *Northern Rock (Asset Management) plc* where there has been an obvious error and no admission was actually meant, such that the order reflecting the admission was irregular. Instead, here the legally represented Defendant having received expert medical opinion, chose to issue a blanket admission regarding both liability and quantum. I noted Ms Porter's submission that the admission was only as good as the particulars of claim, such that if the cause of action pleaded was defective, then so too was the admission. In my view such ignores the nature of the admission made. I find that the blanket admission on causation must indicate that the Defendant had interpreted the particulars of claim as properly pleading the complete cause of action for a wrongful life claim and the Defendant should not be able now to quibble with the wording of the particulars of claim after all this time where it had, without

limitation, admitted causation more than 4 years ago. Viewing the admission in that light also means there should be no problem with assessing quantum. I reject the suggestion that there is any remaining need for the Claimant to amend the particulars of claim.

58. I agree with Ms Creedon that the example of the court exercising such jurisdiction to set aside an order reflecting admissions on liability in England & Wales, namely *Simmons*, can easily be distinguished from the facts of the present case. In *Simmons* there had been limited rather than complete admissions on liability. There, where liability remained in issue despite the admissions, I can understand the invidious position, highlighted by Leggatt J, that would have been created at trial in terms of the court hearing expert evidence that was hamstrung by an erroneous admission arising within the same expert discipline from which the earlier questionable medical opinion originated which had led to the limited admissions. In the present case the admission on liability and causation was wholly unqualified/unfettered such that there was no danger of the court having to make further factual findings within the discipline of the relevant experts on such issues. Quantum would involve evidence from wholly different expert disciplines to that of foetal medicine and gynaecology.

59. As cited by Ms Porter, I have noted the words of Charles Baggott KC at paragraph 29 of *West v Bedfordshire Hospitals NHS Foundation Trust and another* [2024] EWHC 1774 (KB) where the learned judge warned of the need to guard against a knee-jerk reaction to the passage of time and instead focus on all the factors and circumstances of the case rather than simply the delay. In that regard it is not simply the elapsing of 4 years that is of concern. I find that the Claimant will have worked on the valid assumption that she had won on liability and causation over the intervening 4 years. Aside from the undoubted emotional impact on the Claimant that a set aside would have, it cannot be ignored that her case has moved on to concentrate on the fields of expertise needed to establish quantum in circumstances where the costs thereof could prove wholly wasted. Although, I note the Defendant's purported stance on interim damages and such funds not being recouped, I questioned overall the "*vires*" of making such a concession in continuing to make interim payments in circumstances where the wholesale issue of causation was to remain in active dispute. Of course, I have not heard representations on the "*vires*" question such that my view thereon is non-determinative and perhaps the Defendant could justify the expenditure as being part of its normal functions to provide assistance for the care needs of R in any event. However, more fundamental is the point that the case has advanced well beyond the early nature of *Simmons* in that here interim damages have been paid.

60. I do accept the validity of Ms Creedon's argument that with due diligence the issue of what was the correct medical advice to have been given to R's mother in 2016 about termination, and the actual availability of such a procedure, on the likely known facts regarding the condition of the foetus at 28 and 32 weeks, would have been something that a reasonable person in the position of the Defendant could have pursued with the court authorised experts in 2020/21. There appears to have been no unknown factor that meant the ground now covered by Dr Mason could not have been covered four years ago.

61. I noted Ms Creedon's reference to "*expert shopping*" bearing in mind the existing instruction of experts in foetal medicine which had been approved by court order. Although, I do not find that there has been any deliberate choosing of experts because a party thinks or knows that the expert's view will be favourable, there has been no real explanation as to why the Defendant did not approach either of the two experts it had already instructed for such additional opinion, or seek prior court approval for instructing Dr Mason despite the court earlier ruling upon the extent of the expert evidence necessary. If the answer is that the court appointed experts no longer practice then such adds to the

prejudice arising from setting the case back to its pre-admission stage. If the answer is that Dr Mason is somehow better placed to opine on such issues then such should have been explained. The fact that the court had determined the extent of the experts to be used also distinguishes this case from *Simmons*.

62. I have noted the potential size of the claim but such in my view does not lead to a conclusion that because so much is at stake the case should effectively restart with refiling of amended pleadings. The substitution of the child as the Claimant to my mind represented a self-contained erroneous step that is remediable and such does not alter the effect of the October 21 Order in terms of holding the Defendant to its admissions. It appears to me that there will be no prejudice to anyone to revoke such substitution on the basis it effectively was made by mutual mistake such that the Claimant can be viewed as R's mother at the time of the October 21 Order. As to the size of the claim generally, and I certainly do not fetter any discretion in that regard, one important issue that may of course be of relevance regarding quantum in a wrongful life claim, particularly in the context of reverting to R's mother as being the correct claimant, will be the extent of her losses. Such damages will be limited to issues of loss suffered or likely to be suffered by the parent in having to care for a very disabled child, as opposed to, perhaps, the potentially wider scope of general and special damages in a claim by the child themselves where such disabilities were actually caused by a defendant's negligence. I raise such issue now as the extent of losses may perhaps require an adjustment of expectation particularly where the figure of £10 million is referred to. I note that although limited in number, the wrongful life claims in Kemp are nowhere near such a figure but, of course, each case is extremely fact sensitive. As I say, I keep an open mind in this regard.

63. On all the facts of the case I am not minded to exercise discretion to set aside the judgment on liability and causation contained in the October 21 Order. As that is my decision, I do not need to go on to separately consider the application to withdraw the relevant admissions. Looking generally at the matters to be considered as listed at paragraph 35 above I can say that if the matter simply rested on the withdrawal of admission application such decision perhaps would be more finely balanced. However, in the circumstances where the admission has led to a final order which I am not persuaded to set aside, I dismiss the withdrawal of admission application also.

64. I grant the Claimant's application made on foot to revoke the Order of 5th August 2021 such that the Claimant remains the original claimant.

Decision

65. For the reasons given above I dismiss the Defendant's Application. Furthermore, I revoke the Order of 5th August 2021 such that [R's mother] shall remain as Claimant in these proceedings. I shall deal with any further consequential matters at the time of handing down this judgment.

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